

was unjustifiably dismissed or that she was subjected to unjustified disadvantage in her employment.

Brief account of the events leading to the dismissal

[2] The respondent operates a café in Cashmere, Christchurch. Ms Sheppard-Johnson worked at the café, having commenced employment on 23 February 2014, at the age of 18. Ms Sheppard-Johnson was initially employed as a barista/café assistant but gained more responsibility in the café, including getting a key so that she could open and close the café.

[3] Ms Sheppard-Johnson suffers from eczema, and says that she has done so since she was a baby and that it can affect her anywhere on her body, but it frequently affects her face. She says that the eczema has been debilitating, and that it gets her down, as it can be painful and bleeds. She says that, in the past, she has been embarrassed by it and does not want to go out of the house, especially when it is on her face. In her oral evidence Ms Sheppard-Johnson said that she cannot mask the eczema with make-up, as that does not work. In his oral evidence, Ms Sheppard-Johnson's partner, Michael Ede, said that she did use make up to hide the eczema. Whilst a minor point in itself, this is an example of the many inconsistencies in the evidence presented on behalf of Ms Sheppard-Johnson.

[4] Ms Sheppard-Johnson says that one of the directors of the café, Lynton Robinson, was well aware that her eczema would flare up from time to time, and would frequently complain about any absence she took, and sometimes threatened her with a written warning, although she was never given one. She said the threat of being given a warning would cause her anxiety. She also said that the threats caused her to dread coming to work, and that they made her feel helpless because she was not in control of her eczema and could not predict when she would need time off.

[5] Mr Johnson's evidence was essentially in agreement that he did address Ms Sheppard-Johnson's level of sickness absence with her on regular occasions, albeit not in a formal setting, and did once intend to give her a written warning, but decided against giving it to her, as he feared her reaction in front of the customers. Mr Robinson did not agree, however, that Ms Sheppard-Johnson's level of eczema was ever as obviously bad as she now made out.

[6] Ms Sheppard-Johnson says that, on 11 July 2015, she had a particularly bad flare up of eczema on her face, and that it was painful and bleeding, and that she did not think it was appropriate for her to be near food and drink. She therefore called the café and spoke to the café manager, Kerri Woolhouse. Ms Sheppard-Johnson says that Ms Woolhouse was rude to her and told her that eczema was not a good enough reason to call in sick. Ms Sheppard-Johnson said that she was in a lot of pain, and could not attend work and got very upset.

[7] Ms Sheppard-Johnson says that Ms Woolhouse told her that she had to find cover for her shift if she was not going to attend. Ms Sheppard-Johnson therefore texted Mr Robinson and asked for the number of a co-worker. When she was given this number, she called him, but he said that he was not able to cover for her. Ms Sheppard-Johnson said that she got very upset and called Ms Woolhouse back and told her, whilst crying on the phone, that the colleague could not cover for her but she could not come into work because of the eczema. She says Ms Woolhouse said that was ok.

[8] Ms Sheppard-Johnson says that Ms Woolhouse knew that Ms Sheppard-Johnson was upset and also knew that she would not be coming to her shift that day. Ms Sheppard-Johnson says that, when she returned to work the following day, no one said anything to her about her absence. Ms Woolhouse, who gave evidence to the Authority, said that she could not recall if Ms Sheppard-Johnson had told her she was not coming in or whether she had said that was ok. She conceded that it was possible.

The events of 19 and 20 July 2015

[9] I preface this section by saying that I find there were some significant inconsistencies in Ms Sheppard-Johnson's evidence in regard to the events of 19 and 20 July 2015.

[10] Ms Sheppard-Johnson says in her written evidence that, on Sunday 19 July 2015, while she was at work, she was feeling very tired and *did not feel 100% well*. She said that she had been working back-to-back shifts up to that point. She said she had had a headache, and a general feeling of being unwell and exhausted. She had hoped that a good night's sleep would fix it.

[11] Ms Sheppard-Johnson said in her written evidence that, at the end of the shift, she was preparing the café for closing with two other staff and they were chatting and

bantering. Her partner, Mr Ede, had arrived to take her home and, at some point during the chat, Ms Sheppard-Johnson said something along the lines of *man, I think I will call in sick tomorrow*. She said that she laughed afterwards and the others laughed too. Ms Sheppard-Johnson said that it was clearly meant as a joke and the other staff members were aware of that. When she got home, she was not feeling very well and went to bed. No mention is made in her written evidence of asking her co-workers to cover for her the following day.

[12] During the Authority's investigation meeting, Ms Sheppard-Johnson agreed that she had asked two of her colleagues, Arno, and Aaron Brown, whether they would cover her shift the following day, and both had refused. It was then that she had said that she thought she would call in sick the following day. She maintained in her oral evidence that she had meant it as a joke, and that her co-workers had also done so, and that Mr Brown had joked back *in that case I'll keep my phone off*. Mr Brown gave evidence at the Authority's investigation and he said that he had taken the comment as a joke at the time but did not recall making a comment about keeping his phone off.

[13] In her written evidence, Ms Sheppard-Johnson said that the following morning, Monday, 20 July 2015, she felt even worse and realised that she was too unwell to go to work. She describes going to the bathroom, but realising that she was too unwell to go to work, and not being able to leave the bathroom. She makes no mention of vomiting and diarrhoea in her written statement, save to say she *felt like vomiting*, but it is arguably implied by the statement that she was *unable to move far from the bathroom*. However, given that her written statement is her chance to set out all relevant evidence, her apparent coyness about this is surprising.

[14] In her oral evidence to the Authority, Ms Sheppard-Johnson stated that she had been vomiting (specifically, bringing up bile) and had diarrhoea. However, this is at odds with the consultation notes that the Authority directed be produced prior to the investigation meeting. Those notes state:

Subjective

A bit tired yesterday and then not so good in the night. Woke hot and cold in the night. Now has sore throat and cough. Slight headache.

36.8. Throat si [sic] red and a few nodes.

Ears NAD. Chest clear.

Smoking discussed. Did stop for 4 days a few months ago and is now using e cigarettes a bit with nicotine and non nicotine.

Objective

Out Box: Off Work certificate

Dx: Current smoker (137R.00)

Dx: Brief smoking cess adv given (@ZPSB.10)

[15] Ms Sheppard-Johnson's GP also issued a medical certificate which stated that she had examined her on 20 July 2015 and that, in her opinion, she *is/has been medically unfit from 20 July 2015 and should be fit to resume work on 23 July 2015.*

[16] Ms Sheppard-Johnson was unable to explain why her GP had made no mention of her vomiting and having diarrhoea, which seems more serious than a sore throat and a cough, especially as Ms Sheppard-Johnson worked in a café preparing food and beverages. Ms Sheppard-Johnson had not called her GP to give evidence to the Authority.

[17] Ms Sheppard-Johnson's account of having vomiting and diarrhoea on 20 July 2015 was also at odds with what was stated in her advocate's personal grievance letter, which made no mention of vomiting and diarrhoea, and with the statement of problem, which indicated she had had influenza on that day.

[18] Another apparently inaccurate statement in Ms Sheppard-Johnson's written brief of evidence was the statement that she had been working back to back shifts, finishing at 9.30 to 10pm and then starting again the following morning at 6.30am. The strong implication created in her statement was that she had been working these shifts close to her feeling unwell on 20 July 2015, and so had been exhausted. However, an examination of her rosters and timesheets showed that she had not worked such shifts during any time in July 2015, and had had two rostered days off on 17 and 18 July.

[19] In any event, on the morning of 20 July 2015 Ms Sheppard-Johnson asked Mr Ede to call in sick on her behalf and, after he had done so, Mr Ede told her that he had spoken with Mr Robinson who had asked for a medical certificate and for Ms Sheppard-Johnson to call him when she could. She said that she then tried calling Mr Robinson at the café but that he was not there, so she advised the staff that she was sick. She said that she tried calling Mr Robinson, presumably on his mobile, but that it went to voicemail and Mr Robinson did not return her call. Mr Robinson's

evidence is that he had no record of Ms Sheppard-Johnson trying to call him on that day.

[20] Ms Sheppard-Johnson says in her written evidence that Mr Ede agreed to stay at home with her because she felt so unwell, and he drove her to the doctor's at 10.45 that morning in order to get the certificate. Ms Sheppard-Johnson states in her written evidence that the doctor told her that she had the flu, was contagious and should take at least three days off.

[21] Ms Sheppard-Johnson then received a text message from Mr Robinson asking her for her postal address, to which she later replied.

21 July 2015

[22] Ms Sheppard-Johnson says in her written evidence that, *despite the medical certificate and feeling absolutely terrible, Mr Robinson told [her] she had to work the following day, Tuesday 21 July 2015*. She says in her statement that she did not feel able to say no to Mr Robinson and believed that, if she refused to come to work the following day, he would dismiss her. She says in her statement that Mr Robinson always scared her, and had always made her feel *stupid, young and dumb*. However, in her oral evidence she said that she had not been told to come into work on 21 July, but did so because she felt pressured to do so, because of the way Michael had been spoken to the day before when he had called in sick on her behalf.

[23] This difference in evidence is quite startling. I can only conclude that Ms Sheppard-Johnson was seeking to paint Mr Robinson's action more negatively in her statement than they were.

[24] Ms Sheppard-Johnson started her shift at 6.30am and worked until 2pm on 21 July. At the end of her shift, Mr Robinson asked her if she had anything happening on the following Thursday (23 July 2015) and gave her an envelope, telling her to go home and read it and that she did not need to come in the following day to work her shift.

[25] Ms Sheppard-Johnson says that there was no discussion with her about whether she could work the following day, and that she did not feel she was able to object. She says that Mr Robinson agreed that he would also pay her for not working

that day. Mr Robinson's evidence is that she stormed out prior to him having the chance to discuss suspending her.

[26] The envelope that Mr Robinson had given Ms Sheppard-Johnson contained a letter which advised her of an employment investigation that was to take place at the offices of Young Hunter, the legal advisers at that time for the respondent. This letter contained the following passages:

Failure to turn up for work

2. *On Saturday morning 11th July, you rang me looking for another staff members contact number. I asked why and you advised that you wanted to ask him to work for you as you had eczema and didn't want to work, you stated that if he couldn't cover you [sic] shift you would go to work. You made the same commitment to Kerri Woolhouse our manager. Kerri advised you that having eczema was not a reason to call in sick and yet you did not arrange a swap of shift, did not show up for work and have not provided a medical certificate as required under clause 11.c in your employment contract.*

Failure to follow procedure in the event of being sick

3. *At 7.34am on Monday the 20th, someone rang my number to advise that you were sick and wouldn't be coming to work. This is a clear breach of the company policy and the process required of you in the event you are sick. This process has been discussed with you on several occasions and you have acknowledged that you are fully aware of what is required.*
4. *I have spoken to two other staff members who advise that on Sunday the 19th, you asked Aaron to swap shifts for Monday the 20th with you and when he said he wouldn't, you told him you were going to go sick. You also told Arno that you were going to go sick because you had had enough of doing closes.*
5. *These instances specifically raise issues of trust and confidence. I have had several conversations with you regarding the excessive amount of sick leave you have been taking which now totals close to 5 weeks, since your employment started at Zeroes.*
6. *I need to be able to trust what you tell me, also because your role also involves handling cash, ordering of stock and dealing with suppliers.*
7. *This is a serious matter and could potentially give rise to termination of your employment. However, I want to speak to you about this further and get your explanation and your comments.*

8. *I wish to discuss these matters with you on 23rd October [sic]. As these matters are serious, they could potentially give rise to termination of your employment, you are encouraged to have a support person of your choice present so we can discuss these matters further. I will be at the meeting, along with our company lawyer, Simon Graham of Young Hunter.*
9. *Pursuant to clause 20(g) of your employment agreement, I have decided to suspend you on full pay pending the outcome of a disciplinary enquiry.*
10. *Please note that under no circumstances are you to contact any Zeroes staff members or come to the premises until the meeting on the 23rd.*

[27] Ms Sheppard-Johnson attended the meeting with Mr Ede. She says in her written statement that she was very nervous, nearly had an anxiety attack, and became shaking and feeling sick and was on the verge of crying. She said that Mr Robinson and Mr Graham did most of the talking and that, whenever she talked, she felt *bullied and like they were talking over [her] and this left her frustrated and upset*. She said that, at one point, she began to cry and the meeting was stopped to enable her to calm down.

[28] However, the meeting was recorded and the Authority heard it in its entirety. Whilst Ms Sheppard-Johnson did lose her composure at one point, this was because she had worked herself up into a state of upset because she had felt she was being targeted for having made a comment about taking a sick day when other staff made comments Mr Robinson probably would not like. There was no evidence from the recording of her having been bullied, or of having been talked over. Indeed, Mr Graham, the respondent's adviser, was very polite at all times. At one point, Mr Robinson made comments about Ms Sheppard-Johnson's level of sick leave absence in a forceful way, but it was entirely appropriate within the context of the meeting.

[29] Ms Sheppard-Johnson also said she was feeling very unwell from the flu, and was not well enough to attend a formal meeting, especially one that might lead to dismissal. Although Ms Sheppard-Johnson states in her written brief of evidence that she should have been at home because she had been certificated to remain off work until the following day, this was clearly not the case as the Authority saw a copy of the medical certificate which stated that she should be fit to resume work on 23 July 2015, the day of the disciplinary meeting.

[30] Ms Sheppard-Johnson says that she did agree at the meeting that she had said that she was going to *throw a sickie* while she was doing the close of the café on 19 July 2015. She explained that it was a light hearted joke between friends.

[31] The following day, Ms Sheppard-Johnson says that she found a letter in her post box which stated that she had been summarily dismissed for serious misconduct. This letter from Mr Robinson to Ms Sheppard-Johnson, dated 24 July 2015, stated as follows:

Dear Natalie,

RE: EMPLOYMENT INVESTIGATION

1. *Further to the meeting held on the 23rd July 9.00am at Young Hunter and our letter to you dated 20 July 2015.*
2. *In that meeting, you accepted that the statements made at paragraph 4 were correct. You confirmed that you had discussed swapping [sic] your shift with Aaron and when he declined to swap you indicated to him that you would simply take the day off and claim it as a sick day.*
3. *You also agreed that the events noted at paragraph 3 are correct although you say that Kerri said you may need to get a medical certificate, rather than tell you, that you must get one. I note that regardless of whether Kerri made this a specific requirement of you, it is a requirement in your signed employment contract.*
4. *I have given a lot of thought to this matter and I have carefully considered all the facts.*
5. *Your acknowledgment demonstrates that you have intentional [sic] lied and misused your entitlement to sick leave. It is my view that your actions seriously undermine our relationship of trust and confidence and constitute serious misconduct.*
6. *Regrettable [sic], I have no option but to hereby advise that your employment is summarily terminated with immediate effect.*
7. *I require you to return the door key and your staff t-shirts immediately.*
8. *Your final pay will include all owed holidays and Lieu days plus Wednesday 22nd shift. This will be paid on Tuesday 28th subject to receipt of the keys and t-shirts.*
9. *If you have any questions about this letter please call to me to discuss.*

[32] Ms Sheppard-Johnson says that she arranged to meet Mr Robinson so that he could give her a copy of her original employment agreement. She says that

Mr Robinson told her that he was sorry, and praised her for the work she had done at Zeroes. He refused to pay her two weeks' notice, however.

[33] Mr Robinson's evidence to the Authority was that he noticed during Ms Sheppard-Johnson's 90 day trial period that she was calling in sick more than other employees, and that he spoke to her about her sick leave at that point. She had already taken 3.75 days off sick by then he says. Mr Robinson says that Ms Sheppard-Johnson had not told the respondent of any ongoing health issues at her interview, although she denied this, saying that she had mentioned her eczema.

[34] Mr Robinson says that he has calculated the number of sick days Ms Sheppard-Johnson took over 17 months of employment, between February 2014 and July 2015, and that they amounted to 22.25 days, 16 of which were next to rostered days off. Mr Robinson says that, on average, Ms Sheppard-Johnson was only working four days every second week.

[35] Mr Robinson says that Ms Sheppard-Johnson provided medical certificates for 5.5 of those days and that none of them were for *ongoing and unbearable bouts of eczema*. The reasons that were given by Ms Sheppard-Johnson were migraine/headache, waiting for a forensic team to arrive when her flat had been broken into, her grandmother being ill in Blenheim and her coming to work hung over and vomiting at work. Mr Robinson says that, at no time did Ms Sheppard-Johnson refer to an ongoing and painful condition, and that he never saw Ms Sheppard-Johnson's eczema manifest itself in the way she describes in her evidence.

[36] Mr Robinson states that the business is only viable if the respondent balances its staffing levels to its busy periods and that, if one of the staff is sick, it is not able to run the shift with one less person. Therefore, the respondent has to call in one of the team who is on a rostered day off and ask for them to come to work. Mr Robinson said that Ms Sheppard-Johnson's excessive demands for sick leave meant that other staff were fed up with having to cover her shifts and were refusing to cover shifts for her. Mr Robinson said that he had to cover shifts for her and there were several occasions when his wife had to come to work to cover her shifts.

[37] Mr Robinson said that the staff were of the opinion that Ms Sheppard-Johnson was going off sick whenever she felt like it and that they had regularly raised their concern with him and with Ms Woolhouse.

[38] Mr Robinson stated that the other problem with Ms Sheppard-Johnson's approach was that she did not follow the respondent's policy/procedure for sick leave. This required that a staff member must ring the café and speak to the supervisor or Mr Robinson as soon as possible. Apparently the sick leave policy hangs on the staff notice board.

[39] Mr Robinson also gave evidence about the prohibition on texting to advise of sick leave. However, the relevance of this was not clear, as Ms Sheppard-Johnson did not text on either of the occasions that caused concern (namely, 11 and 20 July 2015).

[40] Mr Robinson said that he spoke with Ms Sheppard-Johnson about her sick leave and her failure to follow procedures when phoning in on several occasions, including prior to the end of her 90 day trial period in May 2014, August 2014, October 2014 and March 2015. However, on none of these occasions did Mr Robinson keep notes of those conversations, or confirm the conversations with Ms Sheppard-Johnson in writing.

[41] Mr Robinson said in his evidence that he did not accept that Ms Sheppard-Johnson was just joking about taking 20 July 2015 off as sick leave, and that she suddenly become sick the next day. This was because she had clearly wanted the next day off work, she could not arrange a replacement and told two staff members that she would be taking the day off sick. He said he did take the medical certificate into consideration but concluded that she had obtained this in order to support her day off that she wanted. He said that she was obviously well enough to come to work the next day.

[42] Mr Aaron Brown gave evidence to the Authority and confirmed that, on Sunday 19 July 2015, Ms Sheppard-Johnson asked him to work her shift on the following Monday as she was sick of doing closes and that, when he refused, she said *oh well, I am going to go sick anyway.*

The issues

[43] The Authority must determine the following issues:

- (a) Was Ms Sheppard-Johnson unjustifiably dismissed;

- (b) Was Ms Sheppard-Johnson subject to an unjustifiable disadvantage in her employment by being suspended without consultation?

[44] Before addressing these issues, I set out below the key legal principles by which the Authority must be guided.

The key legal principles

[45] The Authority must take into account the obligations of good faith required of the employer pursuant to s.4 of the Employment Relations Act 2000 (the Act), as well as the test of justification set out in s.103A of the Act. These sections provide as follows:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1) –

(a) is wider in scope than the implied mutual obligations of trust and confident; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) within limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

...

Section 103A Test of justification

(1) For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is 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 the dismissal or action occurred.

- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
- (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[46] The Authority must also take into account the relevant sections of the employment agreement between the parties. These provide as follows:

11. Sick Leave

- a) *After six months continuous service the Employee shall be entitled to 5 (five) days paid sick leave in each year which may be taken by the Employee in the event of sickness or injury of the Employee or the Employee's spouse or if a person who depends on the Employee for care is sick or injured.*
- b) *An Employee may carry over up to 5 days sick leave to a maximum of 20 days current entitlement in any year.*
- c) *The Employee shall provide to the Employer proof of sickness or injury for sick leave in the form of a certificate from a registered medical practitioner if the Employee is absent for 3 or more consecutive calendar days, whether or not the days would otherwise have been working days for the Employee.*
- d) *If an Employee has not provided proof of sickness or injury as required under s 11c) above, the Employer shall not pay the Employee until the Employee provides that proof to the satisfaction of the Employer.*

20. Termination of Employment

- a)
 - i) *The Employee may terminate the employment by giving the Employer two weeks' notice in writing or forfeiting pay in*

lieu thereof. Such notice shall not be counted as annual leave.

...

- b) *If the Employee is guilty of gross or serious misconduct the Employer may summarily dismiss him/her at any time without notice or wages in lieu of notice. Serious misconduct includes but is not limited to:*
- i) *Theft of property or information belonging to the Employer or one of its Employees.*
 - ii) *Reporting to work under the influence of alcohol and/or drugs, bringing onto [sic] or consuming alcohol and/or drugs to or at work.*
 - iii) *Wilful damage to the property of the employer.*
 - iv) *Any serious or repeated breach of clause 4 of this agreement. [Performance Review]*
 - v) *Breaching clause 14, 15 or 16 of this agreement. [Confidentiality, Other Employment and Conflicts of Interest and Health and Safety in Employment]*
 - vi) *Refusing in breach of clause 17b) and 18 to undergo medical examinations required by the Employer if the Employer has reasonable grounds to believe that the Employee is intoxicated and/or under the influence of any drug or any substance.*
 - vii) *Failure to use safety equipment provided by the company or to observe health and safety rules or procedures or by engaging in any activity which may endanger the safety of that Employee or other Employees or clients of the company or any breach of the provisions of this agreement relating to the Health and Safety in Employment Act 1992.*
- ...
- g) *The Employee agrees that the Employee may be suspended with or without pay pending the outcomes of any disciplinary inquiry for issues of serious misconduct.*

Was Ms Sheppard-Johnson unjustifiably dismissed?

[47] There are three issues to explore in addressing this question:

- a. Was Ms Sheppard-Johnson dismissed for expressing an intention alone? If so, was that justified?
- b. Was Ms Sheppard-Johnson dismissed because the respondent did not believe she had been genuinely ill on 20 July 2015? If so, was that justified?
- c. Did Ms Sheppard-Johnson admit to wrong doing?

The starting point

[48] I accept, first, that an employee who deliberately lies to his or employer, saying that they are too ill to attend work, when they are not ill, or are well enough to attend work without any substantive risk, is liable to be dismissed for serious misconduct, as such conduct would be likely to damage trust and confidence, and would be a breach of the employee's duty of good faith.

[49] The situation presented to the respondent in the present case, however, is not so clear cut because of the following factors:

- a. Ms Sheppard-Johnson said to the respondent that she had been joking when she had said she would take the next day off sick, as had her co-worker Mr Brown;
- b. Ms Sheppard-Johnson presented a medical certificate which covered her absence on 20 July 2015, and which signed her off for two further days.

Was Ms Sheppard-Johnson dismissed for simply expressing an intention?

[50] Mr Robinson's oral evidence was that he dismissed Ms Sheppard-Johnson because she had had the intention of lying to her employer about going off on sick leave the following day. Mr Robinson said that, whether Ms Sheppard-Johnson had been genuinely sick or not, did not matter.

[51] Mr Robinson was first told that Ms Sheppard-Johnson had said she would take the next day off a sick by an employee called Hamish, who presumably told him this after Hamish had discovered that Ms Sheppard-Johnson was off sick that Monday. Mr Robinson said that Mr Brown had then told him he had thought she had been joking when she had said it (and his evidence to the Authority was that he had thought Ms Sheppard-Johnson had been joking, as she had laughed) but that when Mr Brown had heard from Mr Robinson that she was actually off sick that day, he had said, *really? Well, clearly, she wasn't [joking]*.

[52] Mr Robinson said that he did not believe Ms Sheppard-Johnson had been joking because she had first asked both Arno and Aaron to cover for her that Monday. Clearly, though, it is perfectly possible for one employee to ask a colleague to cover

their shifts for them, but to then say, as a joke, when that colleague declines, *well, I'll throw a sickie then* whilst having no real intention to do so. A mere statement of apparent intention by an employee does not mean that the employee truly intends to carry out the act.

[53] On the face of it, if Mr Robinson had really meant what he had said in evidence that it did not matter whether Ms Sheppard-Johnson was ultimately sick or not, Ms Sheppard-Johnson's dismissal was purely because she had expressed an intention to do an act that could, if carried out, amount to serious misconduct, and that it did not matter if she then acted to carry out that intention. I do not accept that simply expressing an intention to call in sick the next day is sufficient to amount to serious misconduct. I say this for the following reasons:

- a. The list of examples of serious misconduct in the individual employment agreement all refer to actual acts or omissions. Whilst the list is not intended to be closed, one can infer the types of acts and omissions that would be treated as serious misconduct from the examples given. However, there is no example which refers to merely expressing an intention to commit an act of misconduct or an omission.
- b. Ms Sheppard-Johnson expressing an intention to take a day off sick, without doing so, is very unlikely to have caused any substantial harm to the respondent. If she had been in a position of authority, the situation could have been different. However, in her case, she was effectively one of the team, and not in a managerial role, and her co-workers had believed she had been joking in any event.

[54] In addition, I refer to the dicta of the Labour Court in *New Zealand (with exceptions) Shipwrights etc Union v Honda NZ Ltd*¹, which was approved by the Court of Appeal², that *where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave*. A serious charge was levelled against Ms Sheppard-Johnson, as the disciplinary letter implied that the respondent could no longer trust her to handle cash, order stock or deal with suppliers, apparently because of her statement of intent.

¹ [1989] 3 NZILR 82 (LC),

² *Honda New Zealand Ltd v New Zealand Boilermakers' etc Union* [1991] 1 NZLR 392, (1990) ERNZ Sel Cas 855 (CA).

[55] However, in my view, in order to justify dismissing Ms Sheppard-Johnson based upon a statement of intent alone, a fair and reasonable employer could not have reached the decision that dismissal was justified without having explored more thoroughly the only defence Ms Sheppard-Johnson could have used against such a charge; namely, that she had been joking. This would have required, as a minimum, Mr Robinson obtaining written statements from the co-workers Hamish, Arno and Mr Brown in relation to exactly what Ms Sheppard-Johnson had said, and the context in which she had said it. She should then have had these statements in advance of the disciplinary meeting so that she could have asked questions in respect of them, and made comments on them. Indeed, Ms Sheppard-Johnson said in the disciplinary meeting that no statements had been obtained, but this was ignored by Mr Robinson and his adviser.

[56] In conclusion, I do not accept that the respondent's actions and how it acted in dismissing Ms Sheppard-Johnson for having merely expressed an intention to take the next day off were what a fair and reasonable employer could have done in all the circumstances.

[57] In any event, despite Mr Robinson's oral evidence to the Authority, I believe there must have been more in his mind when he decided to dismiss Ms Sheppard-Johnson than the simple fact of her having said that she would call in sick the next day.

Was Ms Sheppard-Johnson dismissed because the respondent did not believe she had been genuinely ill on 20 July 2015?

[58] Mr Robinson said in his oral evidence to the Authority that Ms Sheppard-Johnson's eczema and her sickness history did not form part of the decision to dismiss, and that he did not question the genuineness of the medical certificate. However, this does not stack up with other evidence, as follows:

- a. Mr Robinson made much in his written evidence of Ms Sheppard-Johnson's history of sickness absence. I do not believe, therefore, that it was not relevant to his rationale.
- b. Mr Robinson and Ms Woolhouse both commented in their written evidence that they believed Ms Sheppard-Johnson's eczema not to have been as bad as she now made it out to be.

- c. Mr Robinson said in both his written and his oral evidence that Ms Sheppard-Johnson had not been sick on Sunday 19 July 2015, nor on Tuesday 21 July. He would not have needed to have made this observation if the genuineness of Ms Sheppard-Johnson's sickness on 20 July had not been in question.
- d. Mr Robinson also pointed out in his oral evidence that the consultation notes that were later disclosed (and which he did not see prior to dismissal) did not support Ms Sheppard-Johnson's account of her illness (which is true). Again, this observation strongly implies that he did doubt the genuineness of the sickness certificate.
- e. Mr Robinson also said in his oral evidence under cross examination that he believed that Ms Sheppard-Johnson had gone to the doctor *to justify her day off*.
- f. In the disciplinary meeting, the following exchange took place (taken from the transcript):

Natalie

99. *Are you questioning my illness? Is that what you're trying to say when I'm sick do you question it every time?*

Lynton

100. *Because of the regularity of you going sick we do question your illness because your sick leave has been so extreme and we have been through this issue on numerous occasions with you.*

- g. In the dismissal letter, Mr Robinson refers to Ms Sheppard-Johnson having intentionally lied. A statement of intent is not a lie – it may be a statement of an intention to lie, but that is different. The conclusion of Mr Robinson that Ms Sheppard-Johnson had lied must have been based on his conclusion that Ms Sheppard-Johnson had not been genuinely sick on 20 July.
- h. The dismissal letter also states that Ms Sheppard-Johnson had misused her entitlement to sick leave. Again, this does not say that she had expressed an intention to misuse her sick leave, but that she had actually done so. Again, Mr Robinson can only have reached this conclusion by deciding that she had not actually been sick on 20 July.

[59] Therefore, despite him saying in his oral evidence that he had not questioned the genuineness of the medical certificate, Mr Robinson clearly did, and that must have formed part of his thought process. Therefore, as that doubt about the genuineness of the certificate (or more accurately, the genuineness of the sickness, despite the certificate) played a part in his decision, an enquiry should have been made of the doctor to help him establish the genuineness of the sickness.

[60] Mr Robinson said that he had no idea at that time that he could question a medical certificate. I believe this is true. However, Mr Robinson's ignorance of a fair and reasonable process cannot act as an excuse. In any event, Mr Robinson had legal advice by this point.

[61] What had obviously occurred is that Mr Robinson had decided to ignore the medical certificate, concluding, without any independent evidence, that Ms Sheppard-Johnson had simply misled her doctor, or that the doctor had written a false certificate. This approach, however, is not the action of a fair and reasonable employer.

[62] Section 68 of the Holidays Act 2003 provides that proof of sickness or injury may include a certificate from a medical practitioner that the employee is not fit to attend work because of sickness or injury. The certificate Ms Sheppard-Johnson provided stated exactly that. This statutory provision raises a presumption that a medical certificate is sufficient proof of sickness or injury. That is not to say that the presumption cannot be rebutted. However, to do so effectively, further evidence is required, either from the doctor issuing the certificate, or from a second expert opinion. Merely choosing to reject a medical certificate without more is not enough though.

[63] Furthermore, the Medical Council of NZ has issued a Statement on Medical Certification dated September 2013, which contemplates questions from the receiving agency (such as an employer) and even rejection of the doctor's findings and recommendations. However, as stated, there must be sound reasons to reject the certificate.

[64] Finally, I note also that clause 11(c) of the employment agreement makes reference to *proof of sickness or injury for sick leave in the form of a certificate from*

a registered medical practitioner. This effectively states that the certificate is acceptable proof for the respondent.

[65] I conclude that, in all the circumstances, including circumstances where Ms Sheppard-Johnson had furnished a medical certificate declaring her to have been unfit to have worked on 20 July 2015, no fair and reasonable employer could have concluded that Ms Sheppard-Johnson had not been genuinely ill whilst having failed to have made further enquiries of her doctor to support that conclusion.

[66] This failing was directly relevant to Mr Robinson's conclusion that Ms Sheppard-Johnson had intentionally lied and misused her entitlement to sick leave. The failing is not minor and it did result in Ms Sheppard-Johnson being treated unfairly.

[67] This leads me to conclude that the dismissal was procedurally unjustified.

[68] However, was the dismissal substantively justified, nonetheless? If Ms Sheppard-Johnson had presented herself at the disciplinary investigation meeting as having been absent on 20 July 2015 because of vomiting and diarrhoea, and Mr Robinson had made enquiries of the doctor, it is likely that he would have been in a position to have concluded that she had lied to him, as it is likely that the doctor would have said that Ms Sheppard-Johnson presented to her as having a sore throat. However, Ms Sheppard-Johnson did not make any such statement, and did not really specify what had been wrong with her. Nor did the employer ask.

[69] Therefore, even if Mr Robinson had made enquiries of the doctor, it is not likely that he would have been told anything that could have legitimately led him to conclude that Ms Sheppard-Johnson had not been entitled to take 20 July 2015 off as sick leave. Indeed, without making that enquiry, he was in no position to conclude anything other than that Ms Sheppard-Johnson had been legitimately sick on 20 July, in light of the medical certificate. I must therefore conclude that Ms Sheppard-Johnson's dismissal was substantively unjustified.

Did Ms Sheppard-Johnson admit to wrong doing?

[70] Mr Robinson is sure that she did. However, when I examine the transcript of the disciplinary meeting, I believe that she does not admit that she had intentionally

lied, or that she misused her sick leave entitlement. For example, in the following exchange, Ms Sheppard-Johnson clearly states that she did get sick on 20 July.

Simon

7. *Ok so the allegation here is effectively as I understand it, this is the way I read it that on the previous day which is the Sunday you asked Aaron to swap your shift for the following day the Monday with you. When he said he wouldn't you told him you would take the day off sick anyway.*

Natalie

8. *Yeah.*

Simon

9. *That's effectively what the allegation is. Do you dispute that or*

Natalie

10. *No that's*

Simon

11. *You agree with that.*

Natalie

12. *Yeah that's true but it's the fact that I did get sick as well so I went and got a medical certificate after one day of having off and then went back after being told I should have three days off and went back.*

[71] Then the following exchange took place:

Simon

13. *So you are saying you were actually sick on the Monday.*

Natalie

14. *If you can't hear me sniffing right now and I got a medical certificate on the Monday.*

Simon

15. *On the Sunday though, when you were talking to Aaron.*

Natalie

16. *Yeah it was just*

Simon

17. *You were fine were you?*

Natalie

18. *Yeah I guess so.*

Lynton

19. *I worked with you on Sunday, you were fine.*

Natalie

20. *But do you hear I am not fine now. I wouldn't go to a doctor's certificate and lie my doctor is too she has been my doctor since I was born she knows if I am lying or not so I don't think I could round lying to my family doctor.*

[72] Later, Ms Sheppard-Johnson makes clear that what she had said had been a joke:

Simon

23. *You effectively saying that if I can't get someone to cover me effectively I am just going to take a sick day whether I am sick or not. Do you accept that?*

Natalie

24. *Yeah totally but it's more the fact that its just funny how it happened Michael was there and he heard it all too so it was a joke at the time. Like someone else jokes about it that they don't want to work tomorrow. Everyone would be like ok haha I'm turning my phone off tomorrow. Like they said like Aaron turned around and joked haha can't turn my phone off.*

[73] The admission that Mr Robinson relies upon is, I believe the following exchange:

Simon

25. *Right, right ok. So you are effectively acknowledging that you said this with the clear intention of using a sick day improperly and then you're saying as it turned out or transpired on the Monday that you actually became sick.*

Natalie

26. *Yeah.*

Simon

27. *And you obtained did you obtain a medical certificate and you provided that to your employer. Ok. Do you have any questions Lynton.*

Lynton

28. *No so you are basically acknowledging that what we have put in writing is correct.*

Natalie

29. *Yeah definitely. Yeah I did say that yes.*

[74] Even when Mr Robinson stated directly to Ms Sheppard-Johnson that she had admitted the misconduct, she did not agree she was not ill on 20 July:

Lynton

129. *I think we are going around in circles Simon. At the end of the day Natalie you admitted*

Natalie

130. *But I was fine that I was able to work the Sunday yes but I was not able to work the Monday hence why I got a certificate just because I never told anyone that I am not yeah I might have been able to work but it doesn't mean that I might not have had a headache or just felt a little drowsy or tired or anything like that.*

[75] In light of the other statements that Ms Sheppard-Johnson had made about joking, and really being sick on 20 July, I do not believe that she was agreeing that she had had *the clear intention of using a sick day improperly*. I believe that she was actually agreeing that she had said she would take sick leave day the following day.

[76] To the extent that Mr Robinson relies on this purported admission, he did so without checking what it was that Ms Sheppard-Johnson was admitting to. In fact, I believe that Mr Robinson seized upon what appeared to be an admission to justify his pre-formed view that Ms Sheppard-Johnson had intentionally lied and misused a sick leave entitlement.

[77] I therefore do not accept that Ms Sheppard-Johnson admitted to the misconduct of which she had been accused.

Was Ms Sheppard-Johnson subject to an unjustifiable disadvantage in her employment by being suspended without consultation?

[78] It is clear to me that Mr Robinson did not consult with Ms Sheppard-Johnson prior to suspending her, and that he had decided to suspend her prior to giving her the letter dated 20 July 2015. Her *storming out* was not relevant, therefore, as he had had no intention of consulting with her about the suspension.

[79] Did this cause Ms Sheppard-Johnson a disadvantage? She said in her oral evidence that she felt bad knowing that her boss was doing her shift because it would have meant something serious was happening. She also hinted that she was concerned about what her colleagues were thinking. On balance, I accept that failing to discuss her suspension prior to implementing it was a disadvantage in Ms Sheppard-Johnson's employment. No fair and reasonable employer could have failed to have done so in all the circumstances, and so the failure to consult was unjustified.

[80] As for the suspension itself, the employer had a contractual right to suspend when serious misconduct is being investigated. That was the case here. On balance, I believe that the suspension was justified as Mr Robinson suspected Ms Sheppard-Johnson of a dishonest act, which impinged upon the trust and confidence he had in her. In any event, as Ms Dalziel points out in her submissions, Ms Sheppard-Johnston was signed off sick for the two days of her suspension and should not have been working in any event.

Remedies

[81] Section 123 of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

[82] Ms Sheppard-Johnson found work two weeks after being dismissed on a higher salary. She suffered a loss of wages in the gross sum of \$1,260.00. She is entitled to be awarded this sum under s123(1)(b) of the Act.

[83] Ms Sheppard-Johnson said she was not paid for 23 and 24 July 2015. This is not contested. She should have been paid for both days, as her dismissal was not communicated to her until half way through 24 July 2015. She is therefore entitled to be paid an additional two days' pay.

[84] As far as compensation under s.123(1)(c)(i) of the Act is concerned, I deal first with the effects of the dismissal. Ms Sheppard-Johnson gave evidence that she felt

quite desperate and upset after the dismissal, that her anxiety levels *shot through the roof* and that she had trouble sleeping. She also said she cried a lot after the dismissal.

[85] I am faced with a problem with respect to Ms Sheppard-Johnson's evidence. I found it to be generally unreliable, and lacking in credibility in several respects, which I have described above. During the Authority's investigation meeting Ms Sheppard-Johnson tried to justify some of the statements she had made in her written brief of evidence (such as her vomiting and having diarrhoea, and having worked back to back shifts shortly prior to 19 July 2015) but her answers were unconvincing.

[86] I have come to the conclusion that Ms Sheppard-Johnson sought to mislead the Authority both in her written brief of evidence and in her oral evidence. This is very serious. Just as the giving of false evidence to a court is a matter of considerable concern³, doing so to the Authority is equally unacceptable. Ms Sheppard-Johnson gave evidence having affirmed that she would tell the truth.

[87] I will say, also, that I am not convinced by the truthfulness of all of Mr Ede's answers. He also said that Ms Sheppard-Johnson had suffered from vomiting and diarrhoea on 20 July 2015. Whilst one must be very careful of assessing credibility on the basis of demeanour, as it is notoriously unreliable, I did note that Ms Sheppard-Johnson and Mr Ede exchanged glances whilst he was giving his evidence about Ms Sheppard-Johnson having vomiting and diarrhoea. This made me suspicious of the veracity of his evidence.

[88] In light of my serious concerns about the credibility of Ms Sheppard-Johnson and Mr Ede, I cannot trust their evidence about Ms Sheppard-Johnson's humiliation, loss of dignity and injury to feelings following dismissal. The awarding of remedies under s 123 is discretionary. As I cannot judge what Ms Sheppard-Johnson's true level of humiliation, loss of dignity and injury to feelings are, I decline to award her any compensation under this heading for the dismissal.

[89] As for the effects on Ms Sheppard-Johnson of being suspended without consultation, her evidence was about the effects of the suspension itself, not the lack of consultation. For that reason, I am not satisfied that there were any adverse effects. I therefore decline to award any compensation under s 123(1)(c)(i) of the Act.

³ See, for example, *Richard & Jennifer Adams v Shannen Brown* [2015] NZEmpC 77, at [77h]

[90] I would add that my decision in respect of remedies has not been influenced in anyway by the letter from Mr Robinson that Ms Dalziel lodged in the Authority on 11 July 2016, as that amounted to additional evidence after the investigation meeting had closed, and is inadmissible.

Contribution

[91] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[92] Whilst I have found that Ms Sheppard-Johnson attempted to mislead the Authority, I do not believe that she contributed in any blameworthy way towards her dismissal. This is because I am unable to conclude that she was not genuinely sick on 20 July 2015. I am also unable to conclude that she failed to follow appropriate procedures on 11 or 20 July 2015 in respect to reporting her sickness. In any event, Mr Robinson said that any failing to follow the correct sickness reporting procedure did not lead to her dismissal.

[93] I therefore decline to reduce Ms Sheppard-Johnson's remedies by way of contribution.

Orders

[94] I order the respondent to pay to Ms Sheppard-Johnson the following gross sums:

- a. \$1,260.00 by way of lost wages; and
- b. \$260.00 by way of two days' pay for 23 and 24 July 2015.

Recommendation

[95] During the respondent's evidence, I formed the view that the respondent's approach to employees being absent on sick leave was a significant factor in the personal grievance, as Mr Robinson became frustrated with Ms Sheppard-Johnson's

level of sickness over her employment, and jumped on a particular instance to justify dismissing her. Accordingly, I make the following recommendations:

- a. Where the respondent has concerns about the level of sickness absence of an employee, it should keep a track of that sickness absence, bring it to the attention of the employee in a formal disciplinary setting, advise the employee of its concerns, and set clear targets for improvement, making clear the possible consequences of a failure to improve or sustain an improvement.
- b. Where the respondent has suspicions about the genuineness of an incident of sickness absence, it should require the employee to obtain a medical certificate in accordance with s68 of the Holidays Act 2003.
- c. Where the respondent has suspicions about the genuineness of an incident of sickness absence despite the provision of a medical certificate, it should clearly advise the employee of those suspicions, and seek to obtain the consent of the employee to ask pertinent questions of the practitioner who issued the medical certificate, so as to seek to reasonably rebut the presumption of its accuracy.

[96] Finally, whilst not a recommendation under s123(ca) of the Act, I would make two observations. First, the respondent needs to be careful of simply deciding not to employ someone, as he said he would do, who declares an injury or illness which may impact on their ability to do the work, as that person may well be disabled in law, and subject to protection against unlawful discrimination. At least, further enquiry should be made to understand whether any accommodations or adjustments could reasonably be made.

[97] Second, I understood that the respondent sometimes challenges employees who ring up to say they are sick, requiring them to come to work unless they can find someone else to cover for them. This practice raises concerns about the health, safety and welfare of the employee, as well as other staff and the public, who may be exposed to contagion.

Costs

[98] I reserve costs. The parties are to seek to agree costs between them. However, if they are unable to do so within 14 days of the date of this determination, any party seeking a contribution to their costs should serve and lodge a memorandum setting out what contribution they seek, and the basis for it, within a further 14 days. The other party will then have a further 14 days within which to serve and lodge a reply.

David Appleton
Member of the Employment Relations Authority