

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ross William Thomas (Applicant)
AND SkyCity Management Limited (Respondent)
REPRESENTATIVES Tony Drake for Applicant
Shan Wilson for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 13 October 2005
CLOSING SUBMISSIONS 27 October 2005
DATE OF DETERMINATION 18 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Ross Thomas has been employed by SkyCity Management Ltd (“Skycity”) in various positions for more than 10 years. Since 2004 he has been employed in the position of Surveillance Manager. Mr Thomas’s terms and conditions of employment are set out in a written individual employment agreement.

[2] The terms of employment included a requirement that Mr Thomas familiarise himself with, and adhere to, the standard staff policies.

[3] On 16 March 2005 Mr Thomas was called to a meeting and advised he was to attend a disciplinary meeting regarding allegations that he had offered re-employment to a former employee without approval and he had charged drinks to his corporate credit card in breach of the company policy. Following a disciplinary meeting on 23 March 2005, and based on information provided by Mr Thomas, Skycity determined the allegations had no basis and did not proceed with any disciplinary action.

[4] Mr Thomas says being subject to a disciplinary process; being threatened with the loss of his job; and the failure by Skycity to undertake any proper investigation prior to raising the

allegations against him were unjustifiable actions giving rise to a disadvantage. Mr Thomas also claims Skycity's actions were a breach of good faith and he seeks the payment of compensation, penalties and costs in resolution of his problem.

[5] In response, Skycity denies any breaches and says Mr Thomas was not disadvantaged in his employment.

The issues for determination:

- was one or more of Mr Thomas's conditions of employment affected to his disadvantage by an unjustifiable action by Skycity?
- did Skycity breach the good faith obligations of the Employment Relations Act?

Was one or more of Mr Thomas's conditions of employment affected to his disadvantage by an unjustifiable action by Skycity?

[6] Mr Thomas is required to show on the balance of probabilities that one or more of his conditions of employment are affected to his disadvantage by an unjustifiable action by Skycity (s.103(1)(b) Employment Relations Act 2000).

[7] The Employment Court has found that disadvantage grievances arise out of the employment activity, the on the job situation. The words "are affected" are related to physical conditions of employment, the environment in which the work is carried out, the amenities and facilities available, the payment to the employee and matters of that kind (*Wellington Area Health Board v Wellington Hotel IUOW* [1992] 2 ERNZ 466).

[8] In determining whether Mr Thomas's employment was affected to his disadvantage, it is necessary to focus on the employment, considering the changes that occurred and assessing their impact on the employee (*Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994).

[9] This matter is also subject to the test of justification (s.103A, Employment Relations Act 2000). This requires a determination as to whether, in all the circumstances the actions of Skycity and how Skycity acted was what a fair and reasonable employer would have done. The emphasis provided by s.103A is on the employer.

[10] In February and early March 2005 Skycity managers received information and documents which raised concerns about whether or not Mr Thomas had acted within company policy. Skycity

was concerned that Mr Thomas had made a verbal offer of employment without the necessary approval and had charged drinks to his company credit card without proper authority.

[11] Given Mr Thomas's position, senior managers of Skycity decided to proceed with caution and set up a formal investigation including a disciplinary meeting.

[12] On 16 March 2005 Mr Thomas was asked to attend the office of his immediate manager, Mr Grant Webster. On arriving at the office Mr Thomas was advised by Mr Paul McCloskey, HR Manager Attraction and Support Services, that he and Mr Webster had become aware of some serious issues which may amount to serious breaches of Skycity's policies and procedures. In accordance with Skycity policy Mr Thomas was provided with a letter which set out clearly the issues being raised, the possible consequences and the date, time and venue for a meeting. The letter also set out Mr Thomas' right to seek advice and be represented. In addition, Mr Thomas was provided with copies of the documents relating to the allegations.

[13] A disciplinary investigation meeting was held on 23 March 2005. Mr Thomas was well prepared for the meeting and as a result of his responses to the allegations, no disciplinary action was taken by Skycity.

[14] Mr Thomas says Skycity failed to undertake preliminary investigations prior to making a decision to embark on a disciplinary process and that this was unfair and unjustified. Skycity says it had information which indicated Mr Thomas had breached its policies and as he was in a position of trust and confidence it was important that all matters be put before him for his explanation. Mr McCloskey told the Authority that discussing the matters with people who were no longer in the organisation could be seen as going behind Mr Thomas's back. A person who could have provided more information to Skycity was a friend of Mr Thomas and there was a risk she would contact Mr Thomas before Skycity had an opportunity to put Mr Thomas on notice of the information it had to hand. Mr McCloskey says that this would have been unfair to Mr Thomas. He said he wanted to get the facts from Mr Thomas first, so that he could assess how best to handle matters from there on.

[15] Mr Drake, on behalf of Mr Thomas, submitted that in this case the onus was on Skycity to take great care to ensure a proper and sufficient enquiry into the circumstances was undertaken before making allegations and subjecting Mr Thomas to a disciplinary hearing. In support of this submission Mr Drake referred me to the decision of the Employment Court in *Flight Attendants*

Assn v Air NZ (NO 3) [1991] 2 ERNZ 835. He submitted that a correct reading of that case required the employer to work through stages, the first stage of which was to complete a proper and sufficient enquiry before deciding to embark on a disciplinary process.

[16] Ms Wilson on behalf of Skycity submitted that the onus is on the employer to show that there had been a proper and sufficient enquiry into the circumstances before a decision was made. [my emphasis]

[17] I accept the submissions of Ms Wilson. The law relating to the process to be followed in a disciplinary setting is well settled. The minimum requirements as set out in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Limited* [1990] 1 NZILR 35 are well known and do not need repeating here. In this matter it seems to me Skycity were between the proverbial rock and hard place. It did not want to go outside the organisation before discussing the matters with Mr Thomas, the managers were aware that before discussing the matters with Mr Thomas they had to provide him with all the information available and caution him in relation to possible consequences and provide an opportunity for him to seek advice.

[18] The Authority is often asked to determine applications by employees seeking to restrain an employer from embarking on a disciplinary process. The Authority and the Court have consistently maintained that an employer is not only entitled, but is bound to conduct an investigation into an employees conduct and performance that is of concern. The Court has stated that it is a grave matter for the Court to interfere with that entitlement (*Russell v Wanganui City College* [1998] 3 ERNZ 1076). The Court will not interfere with the employer's disciplinary process unless the inquiry has the potential to infringe the lawful rights and protections of an employee (*Wackrow v Fonterra Co-operative Group Limited* [2004] 1 ERNZ 350).

[19] Standing back and looking at this matter overall, I am satisfied Skycity has followed a fair and reasonable process which led to a conclusion that no misconduct had occurred and no disciplinary action was taken. I am satisfied that the process followed by Skycity did not breach the implied terms of Mr Thomas' employment agreement with Skycity. Mr Thomas has not suffered a disadvantage in his employment.

Did Skycity breach the good faith obligations of the Employment Relations Act?

[20] I am satisfied that Skycity did not conduct itself in a manner which breached its obligations to act in good faith towards Mr Thomas.

Costs

[21] The parties are to attempt to reach agreement on the matter of costs, failing which leave is reserved for the matter to be put to the Authority.

Vicki Campbell
Member of Employment Relations Authority