

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Ionalee Wyllie (Applicant)
AND The Wellington Free Ambulance Service Inc (Respondent)
REPRESENTATIVES L Strachan and R Moodie for Applicant
S Dalzell for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 25 July 2005
MEETING
DATE OF 5 September 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. The applicant, Ms Ionalee Wyllie, claims that her dismissal for serious misconduct was unjustified substantively and procedurally, primarily because dismissal was too serious a response, as a proper investigation would have disclosed, and because of disparity of treatment. The respondent, the Wellington Free Ambulance Service (Wellington Free/the Ambulance Service), considers that Ms Wyllie was justifiably dismissed because she fell asleep on shift for an extended period, when responsible for its communications centre.

The Facts

2. Mr Marty Smyth is the General Manager of the Ambulance Service. On Monday, 6 December 2004 Mr Smyth was informed by two junior staff members that their supervisor, Ms Wyllie, had fallen asleep for more than an hour during their day shift the day before, Sunday.

3. Not surprisingly, Mr Smyth took this allegation seriously. Ms Wyllie was the team leader in charge of the communications centre for the Ambulance Service that day. She was thus responsible for supervising communication officers, who took emergency 111 calls and other calls to the Ambulance Service, and for dispatching ambulances as required. Mr Smyth prepared a letter that day for Ms Wyllie noting the allegation and indicating that if it was found to be misconduct, a warning or summary dismissal could occur. A meeting was arranged for the next week.
4. Mr Smyth later got written statements from the two other control room workers. Another worker who was in and out of the communications centre also gave a report, which confirmed the key points made by the two junior communications officers. They alleged that Ms Wyllie had said the night before that she was going out drinking and would be late, despite advice that this was not a good idea. She allegedly stated that if she was going to be out late she would ring in sick. They also claimed that Ms Wyllie told people that she had drunk a lot of alcohol the night before. One staff member thought she had a body odour of alcohol. Concerns were also raised about the lack of support given to the junior staff that day.
5. The main issue raised was that in the afternoon Ms Wyllie pulled up a Laz-e-Boy chair to the consul she was responsible for, put her headphones on and went to sleep. She remained asleep during a number of calls, including 111 and medical alarm calls. They accepted that they could have woken Ms Wyllie up had they wanted to, even although Ms Wyllie was in a deep sleep.
6. A meeting was held with Ms Wyllie on 13 December 2004. At that meeting she was represented by her union delegate. The allegations were put to Ms Wyllie and she was under no misapprehension about how serious they were. The key points of that meeting were that Ms Wyllie admitted to shifting the Laz-e-Boy in front of the consul after lunch, because she was tired, although she had declined an offer of going off-site for a sleep. Because it was a slow day she fell asleep. She explained that she was naturally a deep sleeper. She accepted that she was responsible for the communications centre at the time. She apologised for putting her colleagues in a difficult position. She denied being drunk the night before. Ms Wyllie's explanation that she was entitled to go out at night was accepted, as was her explanation that she

had not been hung over. The key matter raised on Ms Wyllie's behalf was that the other staff should have woken her.

7. The meeting was adjourned so that all the notes of the investigations and the statements gathered could be provided to Ms Wyllie. These were then clarified. The meeting was then adjourned so that Ms Wyllie's explanations could be considered. Ms Wyllie was then told that there would be a preliminary decision made and that she would have a further opportunity to respond to that preliminary view.
8. Mr Smyth determined that summary dismissal was the appropriate response to Ms Wyllie's admitted falling asleep on the job. In his view she had fallen asleep on duty while in a "mission critical" position and, if a 111 call had to be dealt with differently than ordinarily, this would have seriously compromised Wellington Free's services. In Mr Smyth's view Ms Wyllie had an absolute responsibility to remain in command of the communications centre during her shift and had neglected those responsibilities.
9. Mr Smyth informed Ms Wyllie of his preliminary conclusions at a meeting held on 14 December. Ms Wyllie was offered some time to consider this preliminary finding and come back with any mitigating circumstances and comments for Mr Smyth's consideration. The issue of her being unable to take her breaks was raised, although without any details. Ms Wyllie was then given paid time off to complete her response, which she did on 14 December.
10. In her letter Ms Wyllie was again most apologetic for her having fallen asleep at work, as was consistently her behaviour throughout. Ms Wyllie made a commitment that such an event would never reoccur. She said that she never intended to fall asleep, but that she was concerned that she had not been woken because there would have been no backlash from her against that. She also stated –

“Unfortunately, because of the nature of the job, being in a team leader role during both night duty and weekend shifts means that I have to remain available at all times. Because there is no one available to relieve me of my duty during my allocated breaks, I have to take these where and when able, fitting these around the needs of the call centre at the time. On a number of occasions this will result in me not being able to take the allocated 30 minute breaks due to the current workload. To date, during these times I am always available to answer any questions or pick up the additional workload.”

On this day as in the past, I was unable to leave the communications centre for these breaks so as normally occurs I try to find some time during the shift in which I can have some form of relaxation. On this day I chose a quieter period in the afternoon and used the Laz-e-Boy. The reason it was placed by the consul was because I was aware that I cannot abdicate my duties and may be required to take over again. As stated previously, I was unusually tired this day and I fell asleep, and again I apologise for this.”

11. Ms Wyllie went on to accept that disciplinary action was warranted, but not dismissal.
12. Another worker raised a delicate matter about Ms Wyllie’s health on her behalf before the final meeting. Mr Smyth took this matter into account, but did not consider that it would have led to any greater risk than normal of Ms Wyllie falling asleep, because he was given no information which indicated that.
13. Mr Smyth did not accept Ms Wyllie’s explanation that she could not take her contracted breaks and that this caused her to fall asleep. First, he considered that even if it were true, it was no reason for Ms Wyllie to fall asleep. She had not done so on any other occasion. Second, he considered that it was Ms Wyllie’s responsibility to ensure that she had breaks and that other supervisors in her position who worked on the weekends did exactly that. Third, Ms Wyllie had never raised the issue of breaks with him before.
14. Accordingly, Mr Smyth wrote to Ms Wyllie on 15 December 2004 dismissing her summarily. This decision was made solely because she fell asleep while on duty as the team leader in the emergency ambulance communications centre. As Mr Smyth made clear, Wellington Free’s disciplinary policy provides that sleeping during work hours constitutes serious misconduct and that serious misconduct will result in summary dismissal. Dismissal was chosen because of Mr Smyth’s view that Ms Wyllie’s actions had seriously eroded his trust and confidence in her ability to perform as a manager.
15. Well after her dismissal, Ms Wyllie’s representatives raised a number of concerns on her behalf, relating to a heart condition and another medical condition that may have been affecting her at the time of her dismissal, as well as examples of other staff either falling asleep or walking off the job while they were meant to be on duty in the

communications centre. Ms Wyllie had in fact been aware of all the matters that had occurred before her dismissal, but had not raised them with Wellington Free.

The Law

16. In respect of the test for justification of dismissal, the Authority has to determine on an objective basis whether the dismissal was justified, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.
17. Disparity issues were dealt with in *NZFP Pulp and Paper Co. Ltd v Horn* [1996] 1 ERNZ 278 at 282-3 in the following terms –

“Although in some cases employers investigating alleged breaches of contract which might, if established, result in dismissal conduct a distinct two-stage inquiry in the nature of separate determinations of liability and sanction, that is not always so. An employer, having concluded the existence of serious misconduct sufficient to warrant dismissal, may so inform an employee and offer that employee the opportunity of making submissions on what should be the sanction therefor.

In such circumstances a prudent employee might seek to advance an argument that similar misconduct by other employees in the past had not attracted the ultimate sanction of summary dismissal. That would be in the nature of an anticipatory argument against disparity.”

Determination

18. In the context of this case, I determine that a fair and reasonable employer would only investigate matters that were in fact raised with it by an employee at a disciplinary meeting. For instance, Ms Wyllie had a medical condition which caused her to often have a low heart beat, which the Ambulance Service in its wider sense was aware of. However, the fact that Ms Wyllie did not raise it as an explanation meant the Wellington Free was not required to consider that matter as part of its disciplinary process. After all, it was entitled to consider that if Ms Wyllie felt such matters were relevant, then she or her representative would have raised them. In any event, where Ms Wyllie did have a medical condition which she felt might have impacted on her behaviour that day, she did in fact raise it, albeit indirectly through another person, and I accept that Mr Smyth took this matter into account.

19. Ms Wyllie also claimed to be intimidated by Mr Smyth. However, on the one occasion where she felt she had no choice but to raise personal matters with him, she did. The situation is no different whatsoever in the context of a disciplinary interview, where Ms Wyllie not only knew her job was on the line, but at a later stage knew of a preliminary decision that the investigation would result in her dismissal. In any event, there was no direct evidence of any intimidation. In fact, Mr Smyth accepted a number of Ms Wyllie's explanations such as over the amount of alcohol she may have drunk. Furthermore, Ms Wyllie was represented at all her meetings with Mr Smyth.
20. Mr Smyth is also accused of pre-determination. The only evidence of this is the fact that subsequent to Ms Wyllie's dismissal a worker fell asleep for a few minutes on night duty and was dealt with by the supervisor in the communication centre at the time. Counselling rather than dismissal resulted. This is not an issue for disparity as it had not occurred at the time Ms Wyllie was dismissed, but it is evidence of possible pre-determination. However, in the absence of any other evidence of pre-determination I do not accept this submission. Mr Smyth was entitled to reach the conclusion he did for the reasons given elsewhere. The lighter treatment later awarded a more junior worker is not conclusive and does not prove the claim of pre-determination, I find.
21. Turning to the substance of the matter, I accept that there was confusion about how and when Ms Wyllie was to get the breaks she was entitled to. While I accept that Ms Wyllie did not believe that she could call on other staff to cover for her during the weekends, I also accept Mr Smyth's view that this was not the reason for Ms Wyllie falling asleep. She did not give this explanation at the first meeting when she had an opportunity to explain why she had fallen asleep, and Mr Smyth was entitled to consider that the more likely cause was because Ms Wyllie had had to survive on 3 or 4 hour's sleep the night before.
22. What a fair and reasonable employer would do in any particular circumstances must be grounded in the business of that employer. Obviously Wellington Free's business in the communication centre involves ensuring that all calls are answered, as much information as is appropriate is garnered from each caller, and that an efficient response is forthcoming. Equally obviously, none of these functions can be carried out

by a worker who has fallen asleep. Given the explanations proffered at the time, a fair and reasonable employer would most likely have concluded that Ms Wyllie fell asleep during work hours because she had had insufficient sleep the previous evening and the reason for that was that she had decided to go out drinking, whatever the level of alcohol consumed, and try and manage on 3 or 4 hour's sleep, which she was unable to do. A fair and reasonable employer was likely to have concluded that knowing that there could be little more serious misconduct than falling asleep at work; Ms Wyllie put her employment at risk the night before by staying out late and not getting enough sleep. The failure of her junior staff to wake her is not relevant - it is akin to blaming the victim for a misdeed. Those staff did nothing to cause Ms Wyllie to fall asleep – that was a matter within her own control. Wellington Free, as a service organisation, can not be seen to have supervisors in charge of the communications centre asleep on duty, as it could call into question the efficacy of its services. As a result it was entitled to conclude that it had lost trust and confidence in Ms Wyllie. It was within its power to determine that she not be given a second chance, which others might have given her.

23. In this case Ms Wyllie was aware of all the cases of alleged disparity, but she did not raise them, despite having a full opportunity to do so. Ms Wyllie should have taken that opportunity.
24. In any event, Mr Smyth was not aware of the earlier actions of another supervisor who had left his post, as it occurred before he became a manager at the Ambulance Service. That incident can also be distinguished on the grounds that it related to a temporary breakdown in workplace relationships which involved more than one person.
25. The other case, which was more analogous to this one, involved an allegation that a communications staff member fell asleep during her night shift was investigated and the Ambulance Service concluded that she had not fallen asleep, but in fact had merely blinked when someone chose to take a photograph of her. Therefore there is no disparity in this case.
26. The process adopted by Wellington Free Ambulance in this case was therefore, overall, a fair one, I find. The allegations were put to Ms Wyllie clearly. She had

several opportunities to explain her position and to raise any matters that she wanted to that might be taken into account in her favour by Wellington Free. She was even given the ability to make submissions on the preliminary finding of serious misconduct leading to summary dismissal. Her misconduct and the penalty for it were contained in Wellington Free's disciplinary policies. There was no disparity of treatment. Dismissal was what a fair and reasonable employer would have done in these circumstances, I therefore conclude.

27. I therefore dismiss Ms Wyllie's claim for unjustified dismissal.

Costs

28. Costs are reserved.

G J Wood
Member of Employment Relations Authority