

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Mason Collins (applicant)
AND Kaans Catering Supplies Ltd (respondent)
REPRESENTATIVES Michael Guest, advocate for the applicant
Willie Martin, counsel for the respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING Dunedin 15 November 2006
DATE OF DETERMINATION 20 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mason Collins worked for Kaans Catering Supplies Limited from about April 2002 until he was dismissed in December 2004. On Monday 6 December 2004, Mr Collins did not report for work at 5.00am. Later, he phoned in sick. Mr Collins returned to work on Wednesday 8 December 2004. There was a meeting that day following which he was dismissed. In his statement of problem, Mr Collins says that the circumstances do not justify dismissal because he was sick. Kaans in its statement in reply explains that there was a history of Mr Collins not reporting for work, that he had received a final warning on 12 October 2004 for lateness, that he was reminded of the warning on 20 October, that events on 12 November show he knew he was at risk of dismissal for any further infraction and that he was justifiably dismissed on 8 December after being given a proper opportunity to explain.

[2] To resolve the problem, it is necessary to explain in further detail the history of warnings and incidents before December 2004 then outline the disciplinary process adopted by Kaans on 8 December 2004 before considering whether the decision to dismiss is justifiable.

[3] In his statement of evidence Mr Collins raised complaints of predetermination and unpleasant conduct during the disciplinary meeting by the company's solicitor. However, these allegations were withdrawn by counsel during the investigation meeting.

Warnings

[4] The first complaint about which there is any detail is in respect of a warning given on 28 April 2003. Mr Collins recalls little of the circumstances. There is a letter headed *SECOND WRITTEN WARNING* which explains that Mr Collins did not report for work on Saturday 26 April 2003. His explanation was that that he had woken at 11am, realised that he had missed his run so decided not to report at all without ringing in to work.

[5] There is a note of a meeting dated 6 October 2003, signed for by Mr Collins as an accurate account, which records a discussion between him and two managers about *continued lateness and attitude issues*. It records a commitment by Mr Collins to improve.

[6] There were further difficulties in July 2004. In a letter dated 15 July 2004, the company raised several concerns including Mr Collins's failure to report for duty or phone in on 15 July 2004. Following a meeting, the company wrote to Mr Collins on 23 July 2004 confirming that it had decided to issue a written warning. Mr Collins was required to remedy the complaints by (amongst other things) telephoning within 30 minutes of his start time if unable to report. He was also required to report for work on time.

[7] In October 2004 the company again raised with Mr Collins a concern about his timekeeping. By a letter dated 8 October 2004, Mr Collins was called to a meeting to explain his timekeeping over the preceding week which had varied between about 30 and 90 minutes late. At the meeting, Mr Collins explained his lateness by reference to his domestic situation but the company decided that the explanation was not acceptable and Mr Collins was given a final written warning that future misconduct may result in disciplinary action including dismissal.

[8] Mr Collins did not report for work on 20 October 2004. He was phoned by a staff member and told her that he was sick. Mr Collins was told later by Lindsay Kaan (the manager) that he must ensure he phones in before 5.00am (his starting time) if he is unwell.

[9] On 13 November 2004 Mr Collins failed to clock in. This was noticed on 16 November when timecards were being processed for wages. Mr Collins was asked his starting time so that his wages could be processed and he said he started at 6.00am, his usual Saturday start time. On or about 16 November, it came to Mr Kaan's attention that Mr Collins had actually been late on 13 November. Mr Kaan spoke to Mr Collins who said he had not clocked in hoping that that his lateness would not be noticed since he knew he could lose his job over it. Mr Kaan told Mr Collins that lateness and lying to hide it were not acceptable.

6 & 7 December 2004

[10] Mr Collins did not report at 5.00am, his starting time. Not having heard from Mr Collins, his supervisor (Chris Knox) phoned and woke Mr Collins at about 5.30am. Mr Knox's evidence is that Mr Collins said that his starting time was 6.00am and he would be in then. He recalls this because it was his first day as supervisor and he was surprised to hear that Mr Collins did not start at the same time as others. Mr Collins in his evidence says that he told Mr Knox that he was unwell but would try to make it into work by 6.00am. I prefer the evidence of Mr Knox on the point. At about 6.00am, Mr Collins rang and spoke to a receptionist. His evidence is that he told the receptionist that he was still unwell and would not be in. There is a file note dated 6 December created by Raewyn Nyhof (HR Manager) that records Mr Collins telling the receptionist that he was *not feeling 100% and won't be in* and that he was *a bit chesty*. I prefer Mrs Nyhof's evidence of what was said. Ms Nyhof drafted a letter to Mr Collins (dated 6 December) raising as a concern his failure to report and him telling the supervisor that his start time was 6.00am. She rang Mr Collins and read him the letter which required him to attend a disciplinary meeting on 8 December 2004.

[11] Around lunchtime on 6 December 2004 Mr Collins made an appointment to see his doctor. The appointment was for the next day. After seeing Mr Collins on 7 December, the doctor certified Mr Collins unfit for work from 6 December. The certificate states that Mr Collins should be fit to return to work on 8 December.

[12] Mr Collins phoned and left a message at 5.24am on 7 December saying that he was *a bit chesty* and would not be in. He said nothing about the doctor's appointment.

8 December 2004 – Disciplinary meeting

[13] Mr Collins says in evidence that when he was given the 6 December 2004 letter on 8 December, a work mate asked Mrs Nyhof if he would be dismissed and Mrs Nyhof said *No*. I do not accept that Mrs Nyhof said anything to cause Mr Collins to think he was not at risk of dismissal. The evidence establishes that the company had arranged for its lawyer to be present for the disciplinary meeting and the 6 December 2004 letter is very clear about the risk of dismissal. It is most unlikely that Mrs Nyhof would have said anything inconsistent with the letter.

[14] The meeting was convened at 10.00am. Present were Mr Collins, Mrs Nyhof and Grant Walker (Kaan's lawyer). There are notes of the meeting made by Mr Walker and Mrs Nyhof which I accept conveys an accurate picture of what happened. Mr Collins did not seek to challenge that given the withdrawal of several allegations referred to above. At the beginning of the meeting, Mr Collins said that he did not want a representative. He referred to the medical certificate and said he had got a chill on Sunday from being outside and he did not have asthma sprays. Mr Collins denied pretending to Mr Knox that his start time was 6.00am. He said that he did not ring at 5.00am because no-one was there and he wanted to speak to someone personally. He acknowledged that the rule was to call before 5.00am. He also said that he planned not to go to work so did not get up. Mr Collins described the difference between him and Mr Knox as a miscommunication, he apologised and said he would set his alarm in the future for 4.30 if sick. Mr Collins was asked to wait while the employer considered what to do.

[15] Mrs Nyhof's evidence is that she made the decision to dismiss, that being within her authority. In the end she decided that there was no reliable indication that Mr Collins would change his behaviour so that she had lost trust and confidence in him as an employee. A letter was drafted and the decision was conveyed to Mr Collins that he was summarily dismissed. He finished work there and then.

Justification

[16] Whether the dismissal is justified must be determined, on an objective basis, 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] One of the circumstances is the importance to the employer's business of staff starting on time to ensure that the business meets its obligations to customers. The employer had implemented in 2003 a bonus structure that provided a financial inducement for punctuality and good work.

[18] There is now no challenge to the process adopted by Kaans in conducting its disciplinary process. In the face of the evidence from Kaans, that is an appropriate concession. The gist of the remaining claim by Mr Collins is that he should not have been dismissed because his absence is explained by a genuine illness on this occasion. That marks the difference from the earlier absences and lateness which (it is conceded) were the result of slackness.

[19] There would be merit in the point except that is not what happened. Mr Collins told Mrs Nyhof that he preplanned not to go to work so he did not get up on the Monday. At the point that it was likely he would not be reporting for work, he should have rung his employer or arranged for that to happen. That he did not reflects his attitude to meeting his obligations, the same attitude that had caused the earlier warnings. It is beyond question that Mr Collins knew what his obligation was; he simply ignored it. When he was phoned by his supervisor after the start time on Monday he conveyed the impression that he was not due at work until 6.00am. There was no mention of illness. Mrs Nyhof preferred the supervisor's account of the exchange as she was entitled to do having given Mr Collins a reasonable chance to explain his side. The employer's concern was not about the reason for the absence; it was about the failure to advise in a timely manner. That is a concern any fair and reasonable employer would have had in circumstances which include a history of similar problems. I also accept that a fair and reasonable employer would have dismissed Mr Collins given the background of warnings which include a final written warning.

Summary

[20] For the reasons expressed above, Mr Collins does not have a sustainable personal grievance.

[21] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority