

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 92
5324218

BETWEEN PAUL DEERNESS
Applicant

AND METLIFECARE THE
POYNTON LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: J Moore, counsel for applicant
 A Peskett, counsel for respondent

Investigation Meeting: 3 February 2011

Determination: 10 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paul Deerness says his former employer, Metlifecare the Poynton Limited (MPL) dismissed him unjustifiably. The dismissal followed an allegation - which was denied - that he was asleep at work.

[2] MPL says the dismissal was justified.

Background

[3] Mr Deerness was employed as a gardener/maintenance person at a retirement village owned and operated by MPL. His employment commenced on 8 June 2009. His duties included providing general handyman services in the village buildings.

[4] The village is newly-opened and is in a prime location. MPL seeks to attract higher-end purchasers and to provide amenities and levels of service to a corresponding level. As part of its marketing it maintains fully furnished show apartments for display to prospective residents.

[5] At or about 12.30 pm on 22 March 2010 Mr Deerness was on the couch in the lounge of one of the apartments when Lynda Hull, the village manager, entered with a visitor who was a prospective resident.

[6] On Ms Hull's account, she had been talking to the visitor while she approached the door to the apartment, unlocked it (although she considered it should not have been locked), and moved through an entrance area to the apartment's kitchen. On entering the kitchen the visitor hesitated, and both the visitor and Ms Hull looked over the breakfast bar to see Mr Deerness slumped in a semi-sitting position on the couch. The visitor giggled and made a comment about Mr Deerness being asleep on the job. Mr Deerness rose unsteadily from the couch, appeared startled and was red in the face. He left the apartment without saying anything.

[7] Ms Hull believed Mr Deerness had been asleep. He looked to her as if he were asleep, and despite the sounds of the door being unlocked and of her voice in conversation he did not stir until she and the visitor had reached the kitchen. When he did stir, he behaved as if he had been awoken unexpectedly. Ms Hull also noticed that the cushions were not placed as they should have been on the couch, rather they were stacked and dented as if someone had been lying on them.

[8] On Mr Deerness' account he was in the apartment to water the plants on the balcony. When Ms Hull and the visitor entered he was sitting on the couch waiting for water to drain from the plants he had just watered, intending to mop up any spillage before leaving. He denied being asleep, and said that when he became aware of the presence of Ms Hull and the visitor he picked up his tools, said good morning and left the apartment. Ms Hull denied both the greeting and that Mr Deerness left carrying tools. Mr Deerness also said he had heard Ms Hull and the visitor in the corridor outside the apartment, although he did not hear the visitor speak.

[9] The next morning Ms Hull asked Mr Deerness to explain what he had been doing in the show apartment the previous day. She told him he was lying on the couch and it appeared he had been asleep. The matter was serious. Mr Deerness denied being asleep. He told Ms Hull that if she perceived he had been asleep he could not change that. He said in evidence he regarded the approach as an accusation, but I do not accept that Ms Hull did any more than raise the incident and seek a response as she was entitled to do.

[10] It was common ground in the evidence that Ms Hull did not see Mr Deerness lying on the couch – rather he was sitting. From the parties' physical demonstrations given at the investigation meeting I consider it common ground that he was in a slumped position, although the degree of the slump was debatable. Ms Hull explained her earlier account of how Mr Deerness appeared by saying that at the time she was more concerned about the visitor's impression and what the visitor saw. Unfortunately, however, that approach led to a less-than accurate initial account of her own observations.

[11] Ms Hull consulted with Colleen Tang, the general manager human resources, about what to do. As a result, by letter dated 23 March 2010 Ms Hull issued Mr Deerness with a letter dated 23 March 2010 saying:

... we need to meet with you to discuss an incident in which you were asleep on the job, and which I witnessed when I was showing a prospective resident show apartment 1311 approx 12.30 pm Monday 22 March 2010.

This is an investigatory meeting that, depending on the outcome, could be considered serious misconduct, and result in disciplinary action, including termination.

You are encouraged to bring a support person to the meeting. Colleen Tang from Metlifecare Support Office and I will be meeting with you. I confirm the meeting for Wednesday March 24th at 11 am.

[12] A meeting duly went ahead at or about 11 am on 24 March. According to Ms Hull, before the meeting she telephoned the visitor and sought her impression of the incident in the apartment. The visitor commented 'you have staff sleeping on the job'. In oral evidence Ms Hull said she also asked the visitor what she saw, to which the visitor replied that she saw Mr Deerness sitting on the couch with his head in his hands.

[13] Mr Deerness attended the meeting alone. When Mrs Tang asked whether he wished to defer the meeting because he did not have a support person he replied that this was an investigation and he did not believe a support person was needed at that stage. When informed that the outcome 'could provide information which would affect our decision of the serious misconduct, including termination' Mr Deerness confirmed that he wanted to proceed.

[14] In evidence Mr Deerness said he did not consider a support person necessary because the purpose of the meeting was to consider the facts, and there was no possibility he would be found to be asleep. He said there was no merit in the notion that he was asleep and he thought he could conduct the matter on his own. That is why he did not attend with a support person, and why he responded as he did to the offer to have the meeting deferred.

[15] Ms Hull continued the meeting by correcting her statement that she had seen Mr Deerness lying down. She also advised that she had spoken to the visitor, who was clear in her mind that Mr Deerness had been caught sleeping. Mr Deerness said in evidence he was further advised that the visitor had seen him with his head in his hands, but said he was unable to clarify that any further. He also said he was told only that the visitor had said it looked as if he was asleep.

[16] Mr Deerness denied being asleep, and explained he had been in the apartment for five minutes, watering plants. He had sat down for no more than a minute. According to the meeting note, when asked why he sat down he replied that he had done so because he was working on his own and was busy. In evidence he said his explanation was that he was waiting for the plants to drain. Ms Hull and Mrs Tang denied that explanation was given, saying the explanation was the one noted.

[17] Mr Deerness characterised the meeting as a continual attempt by Mrs Tang to elicit an admission that he had been asleep, which he denied continually, and that Mrs Tang became increasingly aggressive as his denials continued. I do not accept that characterisation. Mr Deerness was asked a number of questions aimed at eliciting an explanation of what had occurred, although he did continue to deny being asleep at all. I address the questioning further in discussing the justification for the dismissal.

[18] The meeting was adjourned at 11.20 am. Both Ms Hull and Mrs Tang considered Mr Deerness to be a good employee. Mrs Tang said she had been looking for an explanation of why Mr Deerness was asleep, and if there had been any extenuating circumstances she would have accepted that. However Mr Deerness was not attempting to excuse any behaviour, rather to deny it. Mrs Tang went over Ms Hull's account again, and was satisfied Ms Hull was certain of what she saw.

[19] When the meeting resumed Mrs Tang advised that a decision was close and asked if there was anything Mr Deerness wished to add. He replied that he had heard Ms Hull and the visitor at the door, and had not been asleep. He was busy and had not had a break, so he sat down.

[20] Mr Deerness said in evidence he advised at that point that he wanted a support person. However he also said he objected to a further adjournment because he wanted Mrs Tang to proceed to make a decision.

[21] There was a further adjournment. During the adjournment Ms Hull and Mrs Tang concluded that Mr Deerness' explanation of why he was on the couch was not credible, and gave weight to Ms Hull's and the visitor's assertions that Mr Deerness was asleep.

[22] When the meeting resumed Mrs Tang said a decision had been made. According to the meeting note and to Ms Hull and Mrs Tang, Mr Deerness then advised that he wanted a support person. Mrs Tang pointed out that he had already been offered an opportunity to have the meeting deferred while he arranged for a support person, and now a decision had been made. I prefer MPL's evidence as it is more consistent and more likely. I add that the matter of representation was not pursued in submissions. Had it been pursued, on the evidence I heard I would have been likely to find Mr Deerness was given an adequate opportunity to obtain representation and must take responsibility for the choices he made in that respect.

[23] Mr Deerness was advised Ms Hull's account was preferred and his employment was to be terminated on the ground of his serious misconduct.

[24] In addition the house rules, of which Mr Deerness was aware, were taken into account. They provided in part as follows:

Matters that may constitute serious misconduct and may result in instant dismissal include, but are not limited to:

*Sleeping:
. sleeping whilst on duty*

[25] Accordingly Mr Deerness' employment ended the same day.

Determination

1. The test of justification

[26] The test of the justification for a dismissal is whether dismissal was the action a fair and reasonable employer would have taken in all the circumstances at the time. In cases of alleged misconduct the test incorporates an assessment of whether the employer's belief that the misconduct in question occurred followed a full and fair investigation, which yielded information on which that belief could reasonably be founded.

1. Whether a full and fair investigation was carried out

[27] As well as denying that he was asleep at all, Mr Deerness says the associated investigation was not full and fair.

[28] I consider the concerns about the investigation were affected by the lack of a clear distinction between Ms Hull's role as a principal witness to the incident, and the line manager with responsibility for disciplinary matters at the village. There was also no clear distinction in practice between the roles of Mrs Tang and Ms Hull in the disciplinary process, when such a distinction should have been made.

[29] This was most apparent when the adjournments to the 24 March meeting were called. If Ms Hull was a witness only, and not the decision-maker, she should not have adjourned with Mrs Tang to discuss the disciplinary outcome. If Mrs Tang was the decision-maker it was not appropriate for her to confirm Ms Hull's recollection

during the adjournment and in the absence of Mr Deerness as she did. If Mrs Tang's checking of Ms Hull's recollection was intended to assist Ms Hull to decide or participate in deciding the disciplinary outcome, this underlines the blurring of roles.

[30] The bare fact that the principal witness to an incident may also be the decision-maker in the resulting disciplinary context is not necessarily fatal to the justification for a dismissal. In small organisations such dual roles may be unavoidable although the employer should remain open to the possibility that an observation was interpreted wrongly.¹ However although not every organisation is resourced to allow a manager with direct involvement in an alleged incident of misconduct to step aside from the disciplinary response for which the manager would usually be responsible, that was possible here. Ms Hull should have restricted herself to the role of witness, and either Mrs Tang or another manager could have taken sole responsibility for the disciplinary investigation and the decision on the outcome. Mrs Tang's involvement was not effected in a manner sufficient to establish this distance, and Ms Hull did not restrict herself to the role of witness.

[31] In an associated concern, Mr Deerness believed the outcome was predetermined. I do not accept that the dismissal itself was predetermined, because Ms Tang was prepared to consider whether there were 'extenuating circumstances' and Ms Hull was also essentially well-disposed towards him. Otherwise, during the meeting Mrs Tang appeared to be carrying out the investigation function yet the only person she questioned in any detail was Mr Deerness. I find the approach to the questioning did indicate an existing assumption that Mr Deerness had been asleep.

[32] The way in which information from the visitor was obtained and presented also gave Mr Deerness reason for concern. In particular Ms Hull, not Mrs Tang, had questioned the visitor about the incident and commented on the result during the meeting. At the same time, Ms Hull's evidence was that she was reluctant to involve the visitor at all because the visitor was a potential resident. Accordingly her purpose was not to obtain a full statement from the visitor for use in the disciplinary process, and she did not ask the visitor for such a statement. The motive for her approach was to attempt to re-confirm her own view of what she had seen. That in effect was all she intended to convey to Mr Deerness during the 24 March meeting.

¹ See for example the observations in *The Warehouse Limited v Cooper* [2000] 2 ERNZ 351 at [32]

[33] If the visitor's account was to be relied on as part of the investigation, the investigator should have obtained the account and put it to Mr Deerness for his comment. If the account was not relied on, it should not have been invoked.

[34] I do not accept the further submission that the visitor's account was central to the decision to dismiss. Ms Hull was a witness to the incident in her own right. Unfortunately her actions immediately following her discovery of Mr Deerness were capable of undermining rather than supporting her evidence. She explained that she acted as she did because of a lack of experience and confidence in the processes for addressing such incidents. I am satisfied she was not uncertain of what she saw, rather she was uncertain of how to address it and what to do about it.

[35] In conclusion, the disciplinary process was flawed.

3. The conclusion that the misconduct occurred

[36] Although I find that the procedure followed in reaching the decision to dismiss was flawed, the decision rested on Ms Hull's account and Mr Deerness' responses. Most importantly it resulted from the acceptance of Ms Hull's observation that Mr Deerness was asleep.

[37] With reference to the evidence in the Authority, I have considered the extent to which Ms Hull's account may be unreliable in the light of the errors in approach I have identified. I have noted the conflict in the evidence about whether Mr Deerness had tools with him when he left the apartment, and whether he spoke as he left, but concluded that a resolution of that conflict does not bear directly on whether Mr Deerness was asleep when Ms Hull and the visitor entered the apartment. I have also considered Mr Deerness' repeated and adamant denials that he was asleep.

[38] I also take into account that Ms Hull described herself as a talkative person who was talking constantly as she approached and entered the apartment. Her description was apt. In addition she has a strong and clear voice. She knew that of herself, and so did Mrs Tang. If Mr Deerness had been awake when Ms Hull and the visitor entered the apartment, he would have heard them and moved before he did. If, as he said he did, he heard Ms Hull's voice and the key in the lock, he would at least

have begun to stand and would probably already have been on his feet by the time Ms Hull observed him. I find on the evidence that he had not moved. Accordingly I consider it likely that Mr Deerness was still sitting on the couch because he had not heard the approach, and this in turn was because he was asleep.

[39] Thus my conclusion that Mr Deerness was asleep when Ms Hull and the visitor entered the apartment does not differ from the conclusion of Ms Hull and Mrs Tang.

4. Conclusion on the justification for the dismissal

[40] Although I have found the disciplinary procedure to be flawed, Mr Deerness was asleep when Ms Hull first observed him in the apartment. I find Ms Hull had reasonable grounds for concluding that was what she saw, and Mrs Tang was entitled to believe Ms Hull's account. I do not consider the procedural flaws vitiate the justification for the dismissal.

[41] Accordingly I find the dismissal was justified.

Costs

[42] Costs are reserved.

[43] If either party seeks an order from the Authority they shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority