

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2014] NZERA Auckland 342  
5461059**

BETWEEN

PHILIP DEIBERT  
Applicant

AND

WURTH (NZ) LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Robert Morgan, Advocate for Applicant  
Bethany Frowein, Counsel for Respondent

Investigation Meeting: 6 August 2014 at Auckland

Submissions received: 6 & 7 August 2014 from Applicant and  
from Respondent

Determination: 20 August 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Philip Deibert, claims that he was unjustifiably dismissed by the Respondent, Wurth (NZ) Ltd (Wurth) on 21 November 2013.

[2] Wurth denies that it unjustifiably dismissed Mr Deibert, and claims that he was justifiably dismissed following a number of disciplinary meetings, disciplinary warnings and his long history of absenteeism.

**Issues**

[3] The issue for determination is whether or not Mr Deibert was unjustifiably dismissed by Wurth.

**Background Facts**

[4] Wurth supplies fixing and assembly products to the automotive, cargo, metal and construction industries throughout New Zealand. It employs approximately 120 employees of which 70% comprise the sales force.

[5] Mr Deibert commenced employment with Wurth on 10 December 2010 as a Sales Representative. He was part of Sales Team 2 which comprised six employees and a manager, and covered the area from the top of the North Island to Manukau City.

[6] Mr Deibert was issued with an individual employment agreement (the Employment Agreement) which set out at clause 3.2 the obligations of the employee:

*3.2 Obligations of the Employee*

*The Employee shall:*

- (i) Comply with all reasonable and lawful instructions provided to them by the Employer;*
- (ii) Perform their duties with all reasonable skill and diligence;*
- (iii) Conduct their duties in the best interest of the Employer and the employment relationship;*
- (iv) Deal with the Employer in good faith in all aspects of the employment relationship;*
- (v) Comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer from time to time;*
- (vi) Take all practical steps to perform the job in a way that is safe and healthy for themselves and their fellow employees.*

[7] Mr Deibert was also issued with a copy of the Wurth Staff Manual which included the following procedures regarding sick leave:

**Procedures Regarding Sick Leave**

*If you are unable to work due to illness it is important that you telephone your supervisor, advising the nature of the illness and the day you believe you will return to work.*

*It is expected that all staff give a minimum of one hour notice at all times. ...*

*If you require an extended period of leave (due to accident or illness), you will need to inform your supervisor and keep them updated on the*

*estimated date you will be returning to work. It is important that you are in contact with your supervisor on a regular basis to ensure that your position of employment is protected.*

[8] Wurth use a system known as: “*My Staff Info*” for recording sick and other leave. “*My Staff Info*” automatically transfers the data entered into the payroll system and updates the employees’ monthly salary payments as appropriate.

[9] Mr Deibert attended an induction on 13 and 14 February 2013 at which Ms Bjorny Avery, Chief Financial Officer, conducted the part of the induction concerned with the operation of “*My Staff Info*”. As part of the induction, Ms Avery said that Wurth provides new employees with a document labelled “*Applying for leave in “My Staff Info*” which gives detailed instructions on the process of applying for leave through “*My Staff Info*” and includes a screenshot of each step.

[10] Ms Avery stated that she believed Mr Deibert would also have been shown how to use “*My Staff Info*” by his manager, Mr Phillippe Guerra, when he joined Wurth, as it is part of Wurth’s standard initial two-week training.

[11] Mr Deibert confirmed at the Investigation Meeting that he had been familiar with the contents of the Employment Agreement and the Staff Manual.

#### *Events prior to 14 May 2013*

##### *(i) 20 March 2013 Meeting*

[12] Ms Barbara Finch, Human Capital, said that she had attended a meeting with Mr Deibert on 20 March 2013 following his having had a period of absence without notification to Wurth. Also present at the meeting were Mr Danny Scott, Managing Director, and Mr Guerra.

[13] Ms Finch said that during the meeting Mr Deibert had explained about his personal situation involving marital difficulties resulting in his wife and children returning to Denmark. Ms Finch said that during the meeting Mr Deibert had appeared to be very stressed and upset as a result of his personal situation.

[14] Mr Scott had explained about Wurth’s procedures and expectations and verbally warned Mr Deibert that if leave was taken for a period of three or more consecutive days a medical certificate was required and the Wurth reporting and recording instructions were to be followed.

[15] Mr Deibert said that he had accepted the verbal warning and the fact that he should have notified Wurth of his absence, especially since he had customers who had been expecting him to visit them.

(ii) *8 April 2013 Meeting*

[16] Ms Finch said that there had been a further meeting with Mr Deibert on 8 April 2013 as a result of his taking leave from 23 March to 5 April 2013 without adhering to the correct reporting and recording procedures.

[17] Mr Deibert said that he had arranged to take leave with Mr Guerra; however this had not been recorded. He had apologised to Wurth and acknowledged that sales figures had suffered as a result of his absence.

[18] On 10 April 2013 Mr Scott issued Mr Deibert with a formal warning letter which stated (incorrectly referring to the date of the meeting held on 8 April 2013 as 4 April 2013):

*On Thursday 4<sup>th</sup> April 2013 you met with Danny Scott, Philippe Guerra and Barbara Finch. At this meeting you were advised that your time management has been unsatisfactory, and that immediate improvement is necessary.*

*In the meeting you were asked if you had anything you wished to say or to respond to the situation and you said that there were recent personal and family issues which has affected your work.*

*After considering the situation it is expected that your time management improves and specifically that you communicate any late starts or early finishes on a regular basis with Philippe whilst working through this trialing (sic) time. This must also be entered into the My Staff Info website ...*

*This formal letter is to remain in place for a period of 24 months and may result in disciplinary action if your performance does not improve”.*

(iii) *Absence 6-10 May 2013*

[19] Ms Avery said that Mr Deibert had been absent from work during the period 6 to 10 May 2013, however no notification of absence or medical certificate had been received from him.

[20] On 15 May 2013 Ms Firth had written to Mr Deibert advising him of a meeting to be held on 20 May 2013. The letter had stated areas of concern regarding Mr Deibert's behaviour as being:

- *Failing to enter leave into the "my staff info" website for absenteeism*
- *Failing to communicate with your Area Manager*
- *Abandonment of employment for 3 days*

[21] The letter further advised that Wurth considered that Mr Deibert had breached clause 3.2 'Obligations of the Employee' of the Employment Agreement and advised that disciplinary action might be taken following the meeting, including a written warning, or that his employment might be in jeopardy. Mr Deibert had also been advised that he was welcome to have a support person present at the meeting.

[22] Ms Avery said that Mr Deibert had been absent on 20 May 2013, so the meeting did not take place as scheduled. However as he had not responded to or refuted the assertions in the letter, it had been placed on his personnel file.

#### *14 May 2013 accident*

[23] Mr Deibert said he had slipped down a small flight of stairs on 14 May 2013 when leaving the premises of a customer he had been visiting and in so doing he had twisted his right knee.

[24] He said he had reported the accident to a lady in the office of the customer; however it transpired subsequently that this accident had not been recorded in the customer's health and safety log.

[25] As a result of this accident his knee was causing him some discomfort, and he had visited the A&E department at Auckland Hospital where a doctor completed a form to be submitted to ACC.

[26] Mr Deibert said he had reported the accident to the Human Resources department at Wurth.

[27] Ms Avery disagreed that Mr Deibert had reported the accident to Wurth and said that there was no record of Mr Deibert having reported the accident which took place on 14 May 2013, and that the first Wurth had known of the accident had been when she had received a letter from ACC. Upon receipt of the letter she had queried it with Ms Finch; however Ms Finch had stated that she had been unaware of any accident on 14 May 2013.

[28] Mr Deibert had not been certified as unfit to attend work following the incident on 14 May 2013; however he had taken some time off work following the incident.

[29] On 29 May 2013 Mr Deibert's knee had been further injured as a result of an incident involving a dog. Following this incident Mr Deibert had supplied a medical certificate which stated that he was unfit for work from 1 July 2013 for 14 days. This period of absence was subsequently extended and in fact Mr Deibert did not return to work at Wurth prior to the date his employment was terminated on 21 November 2013.

[30] Mr Deibert said he had attended an appointment with an Orthopaedic Surgeon, Ms Josie Sinclair, on 5 August 2013, and he had notified Wurth of the appointment on 15 July 2013. Ms Sinclair had concluded that surgery was the best option to assist the knee to a full recovery.

[31] On 6 August 2013 Mr Deibert had been medically certified as "*Fit for some work*" from 7 August until 30 September 2013. However Ms Avery said that in practice, due to the restrictions imposed by the 7 August 2013 medical certificate in relation to sitting and driving, Mr Deibert could not carry out the responsibilities of his position, and he had not returned to work on restricted duties.

*29 August 2013 letter to Orthopaedic Surgeon*

[32] On 29 August 2013 in order to establish when Mr Deibert would be able to return to full-time work and what, if any, limitations there might be on his return, Ms Finch had written with Mr Deibert's permission to Ms Sinclair and requested information regarding:

- The confirmed date of surgery;
- Length of recovery from surgery;
- When Mr Deibert might be fit to return to work;
- What physical restrictions might prevent Mr Deibert from performing his duties as a Sales Representative; and
- When he would be fit to drive a company vehicle.

*Meeting to be held on 25 September 2013*

[33] Having received no response to this letter, Ms Finch had written to Mr Deibert on 11 September 2013 by emailed letter requesting that he attend a meeting with her and Mr Scott on 25 September 2013 and provide them with the requested information.

[34] In the letter Ms Finch advised that Wurth had been concerned about Mr Deibert's ongoing employment in circumstances in which he had been absent for 13 weeks and no response had been received to the information requested from Ms Sinclair. The letter also advised that disciplinary action might be taken depending on the outcome of the meeting, and advised Mr Deibert that he was welcome to have a support person present.

[35] By email dated 18 September 2013 Mr Deibert confirmed that he would be attending the meeting.

[36] Ms Finch said that she and Mr Scott had been ready to hold the meeting on 25 September 2013; however Mr Deibert had not arrived at Wurth for the meeting. No notification had been received from Mr Deibert that he would not be attending the meeting following the emailed confirmation of his attendance on 18 September 2013.

[37] Mr Deibert said that he had provided a letter to Wurth providing the information sought from Ms Sinclair, and in these circumstances he had not considered it to be important or necessary for him to attend the meeting on 25 September 2013.

[38] On 26 September 2013 Ms Finch sent Mr Deibert an email advised that the meeting which should have taken place on 25 September would be rescheduled to 2 October 2013. Mr Deibert had responded that he had been confused about times and dates, advised that he had booked an appointment with his doctor on 2 October 2013, and requested that the meeting be rescheduled to take place on 4 October 2013.

[39] Ms Avery said the meeting had not taken place on 4 October 2013 due to Mr Scott being overseas on that date.

[40] Wurth had received a medical certificate dated 2 October 2013 declaring Mr Deibert unfit for work from 1 October until 20 November 2013. On 15 October 2013 Ms Finch had written to Mr Deibert advising that a meeting had been scheduled for 8 November 2013 with herself and Mr Scott, and advising that:

*The purpose of this meeting is to discuss your recovery and your return to work on 20<sup>th</sup> November after an operation on your knee (7<sup>th</sup> October 2013).*

[41] On 21 October 2013 Mr Deibert received notification that he had been selected for interview for another position within Wurth for which he had applied, and had been subsequently interviewed for the position.

*Meeting on 8 November 2014*

[42] Mr Deibert attended the meeting on 8 November 2013 and said that he had advised Wurth at the meeting that he expected to be fit to return to work on 20 November 2013 and was advised that Wurth would require full medical clearance for him to do so.

[43] Ms Finch said that Mr Deibert had presented as fit to return to work on 20 November 2013, he appeared to be fully recovered from the surgery and had told her and Mr Scott that he had been cycling 2.5 kms each day.

[44] Mr Deibert had agreed to organise a medical certificate from his doctor providing full clearance for work on 20 November 2013 and advised Wurth that he had scheduled an appointment with his doctor for this purpose on 18 November 2013.

[45] Mr Deibert said that he had in fact made an appointment to see his doctor on 19 November 2013; however when he had arrived at the doctor's surgery for the appointment he had been told that the doctor was not available and his appointment had been rescheduled for the following day.

[46] Ms Finch said that Wurth had been expecting Mr Deibert to attend for work at 8.00 a.m. on 20 November 2013 with a medical clearance certificate, however at 7.55 a.m. he had emailed to advise that his medical appointment had been rescheduled to that day. The email stated:

*Good morning Barbara,*

*My GP attended a clinic for another Doctor yesterday or something. ...  
all I know is that my appointment was rescheduled to today. 20/11*

*I will phone you directly when I receive my clearance.*

*Any news on the position in Whangarei ...*

[47] Mr Deibert had not indicated that he would attend for work on 20 November 2013 following the appointment with the doctor, and he did not attend for work at any time during that day.

[48] As a result Ms Finch emailed a letter to Mr Deibert advising him that Wurth did not consider his email advice to be acceptable, and requesting that he attend a meeting the following day with her and Ms Avery. The letter also advised that disciplinary action might be taken depending on the outcome of the meeting, and advised Mr Deibert that he was welcome to have a support person present.

[49] Mr Deibert said that he had attended the meeting held on 21 November 2013 in business attire; however Ms Avery and Ms Finch disagreed and said that Mr Deibert had attended the meeting in beach attire, namely a t-shirt and shorts rather than in the Wurth standard business dress for a sales person of a business shirt with dress trousers.

[50] Ms Avery said that during the meeting Mr Deibert:

- had not provided a satisfactory explanation for not having obtained a medical certificate prior to the scheduled and agreed starting date;
- had not provided any explanation for his failure to give advance warning about his inability to start on the agreed start date despite having told Ms Finch on 8 November that he already made a doctor's appointment for 18 November 2013; and
- when asked whether he had any intention of returning to work, he had shrugged his shoulders.

[51] Ms Avery said that Mr Deibert had given her and Ms Finch the distinct impression that he was not interested in returning to work at Wurth. She had also considered that even prior to his injury; Mr Deibert had lost interest in his work as a result of his personal issues.

[52] Having considered all the circumstances, Ms Avery said that the decision had been made to terminate Mr Deibert's employment.

[53] By letter dated 3 December 2013 Wurth confirmed its decision to terminate Mr Deibert's employment. The letter concluded:

*Based on the information you have supplied and taking your answers into consideration we have found that you have failed to comply with section 3.2 Obligations of the Employee in your contract, namely:*

*3.2 Obligations of the Employee*

*The Employee shall:*

- (vii) *Comply with all reasonable and lawful instructions provided to them by the Employer;*
- (viii) *Perform their duties with all reasonable skill and diligence;*

- (ix) *Conduct their duties in the best interest of the Employer and the employment relationship;*
- (x) *Deal with the Employer in good faith in all aspects of the employment relationship;*
- (xi) *Comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer from time to time;*
- (xii) *Take all practical steps to perform the job in a way that is safe and healthy for themselves and their fellow employees.*

*We have reached the view that we have more than supported you and have reached the point that we need to say that we have supported you as much as we can reasonably be expected to do.*

*We are therefore terminating your position on the basis of failing to meet your obligations as an employee, namely failing to return to work on 20<sup>th</sup> November 2013.*

## **Determination**

### **The Law**

[54] The law is clear that an employer is not bound to hold a job open indefinitely in the case of an employee who is no longer able to perform the duties for which they were employed. In *Hoskin v Coastal Fish Supplies Ltd*<sup>1</sup> Judge Horn made the statement: “*There can come a point at which an employer ... can fairly cry halt*” which has been regularly cited since that time. Similarly in *Canterbury Clerical Workers IUW v Andrews & Beaven Ltd*<sup>2</sup> Judge Castle stated:<sup>3</sup>

*... it is well established law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period ...*

However such a decision must be justifiable.

[55] The Test of Justification in s103A of the Employment Relations Act 2000 (the Act) states:

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<sup>1</sup> [1985] ACJ 124

<sup>2</sup> [1983] ACJ 875

<sup>3</sup> Ibid at 877

### ***S103A Test of Justification***

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

[56] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Wurth must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[57] In accordance with s 103A (3) of the Act the Authority must also consider whether:

- (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee ...*
- (b) ... the employer raised the concerns that the employer had with the employee ...*
- (c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[58] Mr Deibert had a history of absenteeism commencing less than three months into his employment. At the time of the termination of his employment Mr Deibert had been absent for approximately half of the 12 months he had worked for Wurth.

[59] The issues Wurth had in regards to Mr Deibert's absence concerned his lack of notification to Wurth, and the failure to use the "My Staff Info" system. I note that Mr Deibert confirmed that he was familiar with the requirements of the Employment Agreement regarding his obligations as an employee, and with the provisions of the Staff Manual, including the "Procedures Regarding Sick Leave".

[60] Mr Deibert failed to notify his absences on three separate occasions during March, April or early May 2013, although he could have done so remotely on the “*My Staff Info*” system. At no time did Mr Deibert claim that he did not understand how to use “*My Staff Info*” and no reason was provided by him either during the meetings held with Wurth on 20 March or 8 April 2013 or during the Investigation Meeting, for his not having notified his absences, other than those attributable to his personal situation at that time.

[61] Mr Deibert had been clearly advised of Wurth’s expectations as regards his absenteeism and notification thereof in the letters dated 10 April and 15 May 2013.

[62] Following the accident on 14 May 2013 and more significantly the subsequent incident on 29 May 2013, Mr Deibert commenced a lengthy period of absence. There is no dispute that this period was covered by the provision of medical certificates, however when Wurth tried to ascertain information it required to provide for Mr Wurth’s fitness to return to full-time work by writing to the Orthopaedic Surgeon it had received no response.

[63] Accordingly, Wurth had arranged to meet with Mr Deibert on 25 September 2013 to ascertain this information. Mr Deibert having been able to supply the requested information in writing prior to the scheduled meeting, he thereafter failed to be co-operative. In particular he:

- confirmed that he would attend the meeting scheduled to be held on 25 September 2013, but did not subsequently notify that he would not be attending, such that Wurth convened the meeting in the expectation of his attendance,
- did not attend the meeting on 25 September 2013 despite having been advised of the reasons for it and the potentially serious implications, nor did he try to ascertain if his attendance at the meeting was still required in the circumstances of his having provided the requested information;
- had advised Wurth at the meeting held on 8 November 2013 that he had scheduled an appointment with his doctor on 18 November 2013 for the purpose of obtaining full medical clearance for a return to work on 20 November 2013, however he did not schedule an appointment until 19 November 2013;
- did not inform Wurth of his non-attendance for work as expected until 5 minutes prior to the expected start time on 20 November 2013 despite the

knowledge that Wurth was expecting him to present for work at 8.00 a.m. that day;

- did not attend for work at Wurth following his doctor's appointment on 20 November 2013, or advise Wurth that he did not intend to do so; and
- conveyed to Ms Avery and Ms Finch by his attire and attitude at the meeting held on 21 November 2013 that he had little or no intention of resuming his work at Wurth on that day or indeed subsequently.

[64] I find Mr Deibert's actions to have been in breach of clause 3.2 (iv) of the Employment Agreement which specified the employee's obligation to: "*Deal with the Employer in good faith in all aspects of the employment relationship*" and the good faith duties as set out in s 4 of the Act, in particular the requirement in s 4 (b) of the Act that the employee be: "*responsive and communicative*".

[65] I determine that the decision by Wurth to terminate Mr Deibert's employment was a decision a fair and reasonable employer could have made in all the circumstances at the relevant time.

### **Costs**

[66] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**