IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 49
3017671

	BETWEEN	ARTHI EMMANUEL Applicant
	AND	WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Natalie Griffin, Counsel for the Respondent
Investigation Meeting:	13 February 2018 in Hamilton
Oral determination:	13 February 2018
Written record issued:	14 February 2018

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Waikato District Health Board dismissed Arthi Emmanuel on 11 August 2017 for serious misconduct. Ms Emmanuel had worked for WDHB since 8 October 2012, initially as an accounts clerk and later as an administrator in its parking and cashier team.

[2] A letter advising Ms Emmanuel of the summary termination of her employment gave five reasons for that decision, made by WDHB manager payments and revenue Amanda Riggs. Firstly, Ms Emmanuel was said to have been absent from work without authority on Monday, 24 July 2017. Secondly, she was said not to have informed an appropriate manager of that absence. Thirdly, she had admitted arriving five minutes late to work on Tuesday, 25 July 2017. Fourthly, she was said to have misled WDHB by failing to provide a truthful explanation of why she was unable to attend work on 24 July. Fifthly, she had failed to provide evidence

regarding purchase of an airline ticket in support of an explanation she gave for her absence.

[3] Ms Emmanuel claimed her dismissal was unjustified and sought remedies of reinstatement, payment of lost wages and compensation for distress caused to her by WDHB's investigation and decision to dismiss her.

The Authority's investigation

[4] In investigating Ms Emmanuel's claim the Authority received written witness statements from her, Ms Riggs, WDHB director of finance support Brenda Allison, WDHB human resource advisor Clare Bateson, WDHB finance service customer services team leader Rhonda Samson and WDHB parking administrator Nisha Smith. Each witness attended the investigation meeting and, under oath or affirmation, answered questions about their statements. Ms Emmanuel and, on WDHB's behalf, Ms Griffin gave oral closing submissions on the issues for determination.

[5] As permitted by s 174A and s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

The issues

[6] For reasons that follow, two issues required determination:

(i) Did WDHB carry out a full and fair investigation of its concerns regarding Ms Emmanuel's conduct on 24 and 25 July 2017 and what she had said in response to its concerns?

(ii) If so, was its finding of serious misconduct and its decision to dismiss her, what a fair and reasonable employer could have done in all the circumstances at the time?

The test of justification

[7] As Ms Emmanuel had raised a personal grievance about her dismissal and how it was decided, WDHB bore the statutory burden of establishing what it did, and how it did so, was what a fair and reasonable employer could have done in all the

circumstances at the time.[1] In assessing whether that test of justification has been met, the Authority does not substitute its own view of whether the employer's actions were too harsh. Rather it considers whether the particular employer's actions met the objective standard of being within the range of responses open to a fair and reasonable employer. Fairness requires an employer to raise its concerns with the employee and give her or him a reasonable opportunity to respond before then genuinely considering any explanation given. If defects in that process are more than minor and result in the employee being treated unfairly, the decisions made in it are unjustified.

[8] When an employer has dismissed an employee for serious misconduct, the employer's representative who made that decision must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable inquiries which left the employer's representative with grounds for believing, and she or he did honestly believe, that the employee was at fault.[2]

How the problem arose

[9] Ms Emmanuel was on annual leave from 12 July to 21 July 2017. She had travelled to Fiji during those days. On her return she drove from Hamilton to Palmerston North to visit family during the weekend that began on 21 July. She was due to return to work on 24 July. She said she had been unwell during the weekend and, at the suggestion of her brother-in-law, decided to return to Hamilton by flying from Palmerston North rather than driving. She said her brother-in-law had arranged a ticket for a flight early on the morning of 24 July but she arrived at the airport too late to catch that flight. She then unsuccessfully tried to send an email to her team leader, Ms Samson, and copied the email to Ms Smith as well. Ms Emmanuel's email to Ms Samson 'bounced back' because she had misspelt Ms Samson's surname in her WDHB email address. Unknown to Ms Emmanuel Ms Samson had arranged to take an annual leave day that morning so, even if correctly addressed, would not have seen her email. Ms Emmanuel, on receiving the 'bounce back' of her email to Ms Samson, had then sent separate emails to Ms Smith and a text to another staff member asking them to advise Ms Samson her flight had been "cancelled". Ms Smith had replied: "Shoot just got this hun algood I see you Wednesday".

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[1] Employment Relations Act 2000, s 103A.
[2] *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA) at 556 and (1990) ERNZ Sel Cas 985 at 993.

[10] In her message to Ms Samson on the morning of 24 July Ms Emmanuel advised she had now made a flight booking for the next day and would be at work on Wednesday, that is 26 July. However, instead of flying to Hamilton, Ms Emmanuel drove from Palmerston North later on Monday 24 July and went to work on the morning of Tuesday 25 July. She arrived there at 8.05am, five minutes after her expected start time for each work day.

[11] On the morning of 24 July Ms Allison had learned of Ms Emmanuel's absence and contacted Ms Smith who told her about Ms Emmanuel's email to Ms Samson, including the reference to a flight being "cancelled". Ms Allison, who at the time assumed Ms Emmanuel was still in Fiji, then sent an email to Ms Emmanuel asking why her flight was cancelled. After Ms Emmanuel arrived at work on 25 July Ms Allison arranged to meet with her the following day and, in that discussion, learned that Ms Emmanuel had been in Palmerston North.

[12] Through her management role Ms Allison was aware of attendance issues previously raised with Ms Emmanuel in 2013, 2015 and 2016. Ms Allison did not believe Ms Emmanuel's story about a cancelled flight. Ms Allison was herself due to take extended leave around that time so arranged for Ms Riggs, with the assistance of Ms Bateson, to investigate what had happened.

[13] Those arrangements resulted in two disciplinary meetings being held with Ms Emmanuel and Ms Riggs making the decision to dismiss her.

Fairness of the investigation

[14] The process followed by Ms Riggs, with the assistance of Ms Bates, followed standard steps of fairness. The allegations were clearly identified in the letter sent to Ms Emmanuel calling her to a disciplinary meeting. She was provided with copies of statements from Ms Allison, Ms Samson, Ms Smith and one other worker who had each provided relevant information about Ms Emmanuel's communication with them. A disciplinary meeting began on 4 August but was adjourned until a later date, 11 August, so Ms Emmanuel could attend with PSA representatives. Notes of that meeting, which Ms Emmanuel accepted were accurate, showed she was given an opportunity to respond fully both to the allegations and, after an adjournment, to Ms Riggs' preliminary decision that serious misconduct was established and dismissal was warranted.

[15] Broadly put, there were three criticisms of the sufficiency of WDHB's inquiry and the conclusions Ms Riggs reached – firstly, that Ms Emmanuel had made prompt and diligent efforts to let her manager know about her delayed return to work on 24 July; secondly, WDHB's representatives could and should have done more to find out about the flight Ms Emmanuel said she had booked but missed; and thirdly, it was unfair to rely on her previous disciplinary history. For reasons that follow, each criticism was satisfactorily answered through the Authority's investigation.

[16] Firstly, it was correct that Ms Emmanuel had appeared to make diligent efforts from early in the morning of 24 July to let her team leader, Ms Samson, know about her unexpected absence that day. This included through messages to Ms Smith. When Ms Smith's email on 24 July had said "all good" Ms Emmanuel said she had reasonably understood Ms Samson had been informed, via Ms Smith, and had approved her return on Wednesday, 26 July. Ms Smith's response had not told Ms Emmanuel that Ms Samson was away from work. However, even accepting Ms Emmanuel's criticism on that point was correct, it did not address the substance of WDHB's concern about her conduct or its reason for her dismissal. Those concerns were about why she had not made suitable arrangements to get to work on time on 24 July in the first place and the misleading explanation she later gave about the arrangements she had made.

[17] Secondly, Ms Riggs and Ms Bateson, in conducting the disciplinary investigation, should have done more to check the facts around the supposed flight booking made and Ms Emmanuel's explanation of it. Neither in response to a request made by Ms Allison on 24 July nor by the time of the 11 August disciplinary meeting had Ms Emmanuel provided a copy of any documents showing a flight itinerary or booking. Instead, at the 11 August disciplinary meeting, Ms Emmanuel said that her brother-in-law was "happy" to provide her flight itinerary, although not immediately as he was on a flight himself that day. Given the existence of a booking, which was in doubt, and the time that a supposed flight might have got Ms Emmanuel to work on 24 July were both central to the credibility of her account, more should have been done then to establish the true situation. Several months later, while preparing her witness statement for the Authority investigation, Ms Bateson made some inquiries of Air New Zealand that cast some doubt on whether there was even a flight from

Palmerston North at the time Ms Emmanuel had said she had been booked to leave. The proper time to carry out those inquiries was August 2017, before a disciplinary decision on Ms Emmanuel's conduct was made, not in January 2018 when preparing for an Authority investigation.

[18] However that defect, while potentially not minor, had not resulted in Ms Emmanuel being treated unfairly. This was because, by the time of the Authority investigation, Ms Emmanuel had still not produced any evidence that such a flight booking was ever made. And her oral evidence, in answer to questions at the Authority investigation meeting, revealed none was. Rather Ms Emmanuel's answers revealed she was going to attempt to fly on 'standby', that is turning up at the airport and hoping there was available seat and paying for it then. It was not correct to say her flight or booking was "cancelled". She also gave no explanation as to why she had arrived too late to board the supposed flight. And, even if she had got a seat on such flight, it would have not got her to work on 24 July until around two hours after her starting time.

[19] Thirdly, for reasons explained further below, WDHB could fairly have considered Ms Emmanuel's prior disciplinary history in relation to its concerns about the 24 July events. The potential effect of that history, concerning absences from work, was squarely identified in the 31 July letter sent to her that set out the allegations to be investigated:

> WDHB notes that you have a history of written warnings relating (in part) to your high level of unplanned absences. WDHB requires the trust and confidence in its employees to attend work when scheduled to do so, on time and in a fit state to work.

[20] In 2013 Ms Emmanuel received two written cautions about failing to notify her supervisor when she was absent from work. On 26 November 2013 she was issued with a first written warning after using 30 days of sick leave and leave without pay since she began working for WDHB late in 2012. In 2015 further unsatisfactory instances concerning her attendance resulted in a formal management plan being imposed. This included requirements for Ms Emmanuel to advise her supervisor of any absence and to provide a medical certificate for each occasion she claimed sick

leave. Further absences in March 2016 resulted in another written warning on 4 April 2016.

The finding of serious misconduct

[21] The finding of serious conduct was with the range of responses open to a fair and reasonable employer in the circumstances of what Ms Emmanuel had done, against the background of a history of attendance issues over several years.

[22] Ms Riggs had made reasonable inquiries about what had happened that had left her with grounds for believing Ms Emmanuel had not been truthful about her account of events, specifically that the reason for her absence from work on 24 July was because a flight was "cancelled". There was nothing to suggest Ms Riggs' belief was not honestly held.

[23] The explanation given on Ms Emmanuel's behalf during the disciplinary meeting suggested her reference to cancellation had been misunderstood and she had only meant she was not able to use the booking made. However Ms Riggs could reasonably have come to the view that Ms Emmanuel's explanation was simply not credible. Instead of honestly explaining she was late, Ms Emmanuel had initially attempted to create the impression that what happened was due to circumstances beyond her control. Given her history of absences from work, and prior disciplinary measures that had resulted, her attempt to deflect personal responsibility was an obvious motivation for the misleading excuse she had given.

[24] The previous disciplinary measures, although formally expired, could be relied on in those circumstances for the conclusion that, given her misleading behaviour in the most recent event, Ms Emmanuel could not be trusted to meet her responsibilities to attend work on time and to be honest about occasions where she was not able to do so. It was probably not a conclusion that could have been justified if what happened on 24 July, and being five minutes late on 25 July, were one-off events or Ms Emmanuel had given a more credible explanation for her belated return from leave. But given that background of similar unsatisfactory conduct over a number of years, it was within the range of responses that a fair and reasonable employer could have made in deciding it no longer had the necessary trust and confidence to continue its employment relationship with Ms Emmanuel. In those particular circumstances Ms

Riggs, on behalf of WDHB, was justified in reaching the conclusion and decision she did.

[25] Ms Emmanuel did not have the grounds for a personal grievance for unjustified dismissal and, by this determination, her application has been dismissed.

Costs

[26] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[27] If they are not able to do so and an Authority determination on costs is needed WDHB may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Emmanuel would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[28] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[3]

Robin Arthur
Member of the Employment Relations Authority

[3] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].