

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 91/08
5094566

BETWEEN EKUALE FA'ATAU
Applicant

AND OCS LIMITED
Respondent

Member of Authority: G J Wood

Representatives: T Oldfield for Applicant
P McBride for Respondent

Investigation Meeting: 1 May 2008 at Wellington

Submissions received: 6 June 2008

Determination: 30 June 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Fa'atau claims his dismissal by the respondent (OCS) is unjustified on grounds of both substance and procedure. OCS considers that Mr Fa'atau was justifiably dismissed for not following specific instructions about work to be completed, subsequently refusing to turn up to work, and then wrongly and/or dishonestly claiming to have had some permission for that absence.

Findings of Fact

[2] There can be no certainty about events which took place many months ago. The Authority is, however, required to determine what it considers occurred on the balance of probabilities, i.e. what is more likely than not to have been the situation.

[3] In my findings on disputed areas of fact, which mainly related to the disciplinary meetings between the parties, I have relied principally on OCS's witness

Mr Paul McGrath, its Southern Operations Manager. He was the only one to have compiled written notes of the meeting. Various people who gave evidence for Mr Fa'atau, including himself, confirmed many of the aspects of Mr McGrath's evidence. In fact almost all of Mr McGrath's evidence is confirmed by one or other of Mr Fa'atau's witnesses. Given that Mr McGrath took notes at the time or soon afterwards, I have therefore relied on his notes in disputed areas of fact. I have also done so in part because Mr Fa'atau continued to maintain, even when it was not sustainable, that he had not previously been warned, when in fact this had occurred.

[4] Mr Fa'atau had been a cleaner at Wellington Hospital for over 11 years, until June 2007. He had only been employed by OCS, however, since it took over the cleaning contract for the Hospital in April 2005.

[5] For one hour each evening, Mr Fa'atau was responsible for cleaning one floor of the Riddiford Hostel. Capital & Coast District Health Board (CCDHB) had identified a number of concerns over the quality of cleaning done in the hostel over a period of time. In addition, cleaners such as Mr Fa'atau had complained about not having enough hours to do the cleaning at the hostel. OCS accordingly decided to put extra resources into getting the standard of cleanliness at Riddiford Hostel up to scratch, so that cleaning in future would only have to be at a maintenance level. Extra staff, including managers such as Mr McGrath, was brought in during June 2007 for this purpose.

[6] With an inspection by CCDHB and OCS due on Friday, 22 June, Mr McGrath approached Mr Fa'atau, who already knew that the standard of cleaning at Riddiford Hostel was in issue, with specific instructions about what work he was to do that evening (21 June), in advance of the inspection. He was told not to do his normal duties, but to concentrate on cleaning the entrance way area, the bathroom walls and floor and other specific duties of that kind. Although English is not Mr Fa'atau's first language, he understood that he was not to do his normal duties but to do the given duties instead. Mr McGrath estimated that the work required would take no more than 40 minutes or so. I accept his assessment.

[7] Unfortunately, when the inspection was undertaken, it was clear that Mr Fa'atau had done little of the specific work expected of him. It is still not clear what work he did that day.

[8] This was obviously of concern to Mr McGrath. The following Monday Mr Fa'atau was therefore given a letter requiring him to attend a disciplinary meeting in two days time. The letter provides the time at which the disciplinary meeting was to take place, unless another time was suggested. Mr Fa'atau was informed that:

The area of concern is that you failed to follow a verbal instruction on the required cleaning of Level 3 Riddiford Building. You were advised and shown what was expected and agreed that you understood the instructions and that this would be completed in your shift. It is completely unacceptable to find this area unchanged during an inspection by OCS management and CCDHB staff on Friday 25 June 2007 at 1.30pm. This is a failure to obey a verbal instruction by company management and is serious misconduct. This continued poor performance is unacceptable and could result in your dismissal.

[9] Mr Fa'atau was informed of his rights of representation and that he would be given an opportunity to explain his version of events on the day.

[10] At the meeting, Mr Fa'atau was represented by two Service and Food Workers Union delegates, who both had some previous experience in disciplinary meetings. At the meeting, Mr McGrath outlined what work Mr Fa'atau had agreed to do on 21 June and that much of that work had not been completed. Mr Fa'atau stated that it was an old building and he did not have enough time, but had done some of the work.

[11] Mr Fa'atau then informed OCS that he had not in fact done the cleaning at the Riddiford Hostel the previous night, Tuesday. He stated that he had already told the senior union delegate, and a supervisor, that he did not intend to do that hour's work any more. This came as a complete surprise to OCS management as they had never been so informed.

[12] Mr McGrath stated that he had serious concerns about this and that it was unacceptable for Mr Fa'atau to decide not to clean the area, especially given the ongoing issues over the cleanliness of the hospital. Mr McGrath also noted that such action required prior notice and had to be discussed with the on-site manager.

[13] In response to a question as to what he had actually done the night before, Mr Fa'atau indicated that he had done cleaning duties elsewhere in the hospital. When asked who had authorised Mr Fa'atau's absence from the hostel, Mr Fa'atau replied that he had decided not to do the job. Mr McGrath then informed him that he needed to carry on cleaning the hostel until a replacement could be found and he needed to give notice in writing.

[14] It was then decided to adjourn the meeting so that investigations could be conducted with other staff and supervisors involved in Mr Fa'atau's decision not to clean the hostel any more. It was stated that the meeting would recommence at the same time the next day.

[15] Mr Fa'atau then went with his union delegates to inspect the areas of concern in Riddiford Hostel. There the delegates helped him to do extra cleaning to ensure that OCS's concerns were met.

[16] Mr Fa'atau also later prepared a letter (the next day) telling the local manager that he did not want to work at the hostel any more, as he did not have enough time to do the work required in the hour given.

[17] The supervisor in question was spoken to by OCS management and she stated that she had advised Mr Fa'atau when he asked to stop work at the Riddiford Hostel that he had to carry on doing the job, and that if he wanted to change he needed to arrange that through the local manager by making a written application. As it happens, that was consistent with the advice Mr Fa'atau had also received from the union's senior site delegate.

[18] At the reconvened meeting, Mr Fa'atau was again represented, but this time by one union delegate only. At the meeting Mr Fa'atau was questioned about the supervisor's comments, which he disputed. The supervisor was then called into the meeting. She and Mr Fa'atau maintained their positions. Mr McGrath then emphasised his concerns about the cleaning not being done prior to inspection and that Mr Fa'atau had taken it upon himself not to clean the hostel at all on the day in question. In particular, he was concerned that this could have health and safety implications.

[19] Mr Fa'atau emphasised that he did not have enough time in the one hour allocated to do all the work required and that he had been working in that area for four years. Mr McGrath made it clear he did not believe Mr Fa'atau about what he had told his supervisor. Mr McGrath then asked if there was anything else Mr Fa'atau wanted to say.

[20] Mr Fa'atau's representative then asked for the meeting to be adjourned until the next week for a union organiser to be present. Mr McGrath indicated that matters had moved past that and he was now going to adjourn the meeting to make a decision.

[21] After an adjournment, Mr McGrath came back to the meeting and informed Mr Fa'atau that he was being summarily dismissed. He did so on the basis that Mr Fa'atau had been given specific instructions to do a particular set of jobs instead of his normal work because of the inspection and that he had failed to do what he had been directed to do. He then, in Mr McGrath's view, later simply failed to turn up to perform those particular duties, despite being told to do so by a supervisor. He was also concerned that Mr Fa'atau had wrongly or dishonestly claimed to have had permission to do that.

[22] The OCS handbook sets out what constitutes serious misconduct providing grounds for summary dismissal. Included are:

- *Gross negligence or wilful behaviour causing injury or resulting in the loss or damage to company or client property, reputation, financial position or adversely affecting safety or quality; and*
- *Refusal or failure to follow lawful written or verbal instructions of company management supervisors except where there is a real and immediate danger of injury to an employee or others.*

[23] The handbook also provides for the following offences that may constitute less serious misconduct and for which the penalty may be a warning:

- *Careless or indifferent performance of duties;*
- *Incompetence or unsatisfactory job performance; and*
- *Unauthorised absence from the workplace.*

[24] The union later wrote to the local manager asking her why Mr Fa'atau had in fact been dismissed. It was told that he had failed to carry out an instruction to do specific work on a specific date and had not done so to a satisfactory standard. In OCS's statement in reply, it was stated that Mr Fa'atau was dismissed for failure to follow lawful and reasonable instructions as to the cleaning duties, compounded by his failure to attend work.

[25] Despite mediation and attempts at the conclusion of the investigation meeting, the parties have been unable to resolve the issues between them. It therefore falls to the Authority to determine the matter.

The Law

[26] The test for unjustifiable dismissal is set out in *White v. Auckland District Health Board* [2007] ERNZ 66 at paras.[96] and [97] which state that the Authority:

... must first consider justification objectively. That is to be compared to, subjectively, the way in which the affected employee or the affected employer may have considered justification. Objective in this sense may be likened to dispassionate or disinterested.

The Court or Authority's focus is to be on "the employer's" actions, and "how the employer acted". So it is the employer's conduct in dismissing or disadvantaging an employee in employment that is to be the focus of the inquiry. That phrase also directs that there be two separate considerations, first of what the employer did (the substantive dismissal or justification and the grounds for it) and, second, how the employer acted (the process leading to those outcomes). In both cases, substance and procedure, the Court or Authority must be satisfied that what the employer did and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or disadvantage occurred. As I found in the interlocutory injunction judgment in this case, the Court must apply the standards of a notional employer to the conduct of the actual employer. In doing so the Court (and the Authority) must draw on their knowledge and experience on, and expertise in, employment relations in determining whether they are satisfied that what the employer did met those notional standards.

Determination

[27] I find that OCS has met its duties to Mr Fa'atau in how it acted in investigating the disciplinary issues it had with him. Mr Fa'atau was given notice of OCS's concerns that he had not undertaken his duties as specifically directed and that summary dismissal was a potential outcome. He was given the opportunity to obtain representation and was represented by union delegates with some experience in disciplinary matters. He attended two meetings during which he was able to put forward any explanation he wanted to give.

[28] OCS was justified in not acceding to the union delegate's request at the very end of the second meeting for the matter to commence again with a paid union official representing Mr Fa'atau. Mr Fa'atau had gone to the virtual end of the process before raising such a possibility and OCS was justified in concluding that it was too late by then. Mr Fa'atau had the benefit of a bilingual union delegate and I accept that OCS ran the meetings in such a way that Mr Fa'atau was aware of the issues at all times. I do not accept that there were any other issues in Mr McGrath's mind at the time than those he told the Authority. There was no suggestion of bias by Mr McGrath.

[29] In respect of the issue of Mr Fa'atau's wilful refusal to undertake the Riddiford Hostel part of his duties, this was fairly investigated because when Mr Fa'atau himself first raised the matter, the meeting was adjourned for further investigations to take place. Mr Fa'atau then had the opportunity to put his side at the subsequent meeting, which involved the person he said had given him authority. He was also told of the seriousness with which OCS was dealing with that particular issue. Given that it was Mr Fa'atau who first raised this matter it is not surprising that OCS did not commence a separate investigation. The investigation that it did carry out, however, was sufficiently full and fair.

[30] While OCS did not carry out a separate investigation into the issue of whether Mr Fa'atau had lied to it during the course of the disciplinary investigation I am satisfied that Mr McGrath told Mr Fa'atau that that was his belief, and for reasons given below it was not a major issue in Mr McGrath's mind in any event.

[31] I turn to the decision to dismiss Mr Fa'atau summarily. OCS was entitled to conclude, as it did, that Mr Fa'atau had refused a specific and clear direction as to what work he was to do on 21 June. Mr McGrath, like the Authority, could not ascertain with any certainty why Mr Fa'atau had not done what he was told to do, despite asking him. It was Mr McGrath's judgment, based on personal experience, that there was less than an hour's work to do and therefore there was no excuse for Mr Fa'atau not having completed that work. OCS was entitled to reject his view that there was not enough time. It was therefore open to Mr McGrath to conclude, as he did, that Mr Fa'atau had not obeyed a lawful instruction, although as noted above, the reason for that is still not clear. What is clear is that there was sufficient time given, on that evening at least, for Mr Fa'atau to do the jobs required of him.

[32] What is also clear is that OCS was entitled to conclude that Mr Fa'atau had no justification whatsoever for simply refusing to clean the hostel the night before the disciplinary meeting. In fact he was advised by his own union representative that he simply could not refuse to do so, but that he had to discuss it with management. He did not do so, as OCS also concluded after hearing from him and the supervisor. He therefore left OCS exposed because his floor of the hostel was not cleaned. This could have had implications for health and safety at Wellington Hospital and OCS's cleaning contract with CCDHB accordingly.

[33] Mr Fa'atau was employed to do a series of jobs each night. He decided he simply was not going to do one significant job for his own reasons, without even informing anyone in authority. This constituted serious misconduct in terms of the OCS's policy as it was clearly wilful behaviour adversely affecting safety and quality. While also misconduct under the Code, OCS was entitled to conclude that his decision went beyond that. Mr Fa'atau's decision was not compatible with OCS being able to have trust and confidence that he would faithfully discharge his duties to his employer. Thus the conduct was of the sort that deeply impaired or was destructive of that basic confidence or trust that is an essential of the employment relationship - see for example *Northern Distribution IUW v. BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA).

[34] Mr McGrath also relied on what he found to be lying or a wrong explanation by Mr Fa'atau about seeking approval to not do his job at the Riddiford Hostel. I conclude that rather than a separate ground for dismissal, this was a subsidiary issue that assisted Mr McGrath in determining that he could no longer have trust and confidence in Mr Fa'atau, but that his main reliance was on the combination of the first two issues, as was made clear in the two earliest pieces of correspondence.

[35] I accept that in these circumstances a fair and reasonable employer would not continue to have trust and confidence in Mr Fa'atau, because of his proven serious misconduct. Not only had he failed to complete an important task given to him that very day, he had subsequently decided on his own volition, and despite warnings not to do so, to refuse to do a major part of his work, leaving part of the Riddiford Hostel not cleaned with all the potential safety and commercial problems that that could have burdened OCS with.

[36] I am also satisfied that Mr McGrath took into account mitigating factors such as Mr Fa'atau's length of service in coming to the decision to dismiss.

[37] In all these circumstances, I conclude that the decision to dismiss was one a fair and reasonable employer would have taken in all the circumstances. I therefore dismiss Mr Fa'atau's claim.

Costs

[38] Costs are reserved.

G J Wood
Member of the Employment Relations Authority