



New Zealand Employment Relations Authority Decisions

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Green v Wellington Zoo Trust (Wellington) [2011] NZERA 972; [2011] NZERA Wellington 157 (13 October 2011)

Last Updated: 25 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 157
5318145

BETWEEN KELLY GREEN Applicant

AND WELLINGTON ZOO TRUST Respondent

Member of Authority: G J Wood

Representatives: Nikki Flint for the Applicant

David Burton for the Respondent Investigation Meeting: 14 June 2011 at Wellington Submissions Received: 30 June 2011

Determination: 13 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Kelly Green, a former Zoo Keeper for the respondent, (Wellington Zoo/the Zoo) claims that she was unjustifiably suspended and then unjustifiably dismissed by the Zoo.

[2] By contrast, the Zoo claims that Ms Green was justifiably suspended, and justifiably dismissed for gross negligence following a full and fair process.

Factual discussion

[3] On 15 July 2010 Ms Karen Fifield, the Chief Executive of Wellington Zoo, was informed by her Manager People and Culture that on 24 June Ms Green had allegedly left the Zoo's peahen in an enclosure with a large violent bird (Bruce the Brolga), when Bruce was being fed, and that the peahen was attacked and had to be euthanased later that day. Because zoo keepers are entrusted with the safety and

wellbeing of animals in their care, Ms Fifield considered that this was a matter that had to be investigated.

[4] However, despite the period of time since the incident, the investigation did not commence until all staff, including Ms Green's manager, were back at work from leave. While Ms Fifield was to be ultimately responsible for any disciplinary decisions resulting from the investigation, the investigation was conducted in its initial stages by the General Manager Operations and the Manager People and Culture.

[5] The investigation began with an analysis of the daily reports and other documentary records held by the Zoo. One of those records was a file note prepared by Ms Green's supervisor of a conversation she had with Ms Green on the day of the incident, which was completed some five days later.

[6] I accept the accuracy of the note as the sole documentary evidence prepared near to the time, even although Ms Green does not accept its validity. In particular Ms Green considers that comments she made at the time were simply made with the benefit of hindsight rather than what later came to be seen by the Zoo as admissions.

[7] That note reflects that Ms Green informed the supervisor that the broilga had killed the peahen but that a group of schoolchildren in the vicinity had not noticed anything, although that later turned out to be incorrect. The file note records, and I accept accurately:

When I asked how the peahen had got in with the broilga Kelly told me that it had gone in for food when she was locking away the broilga and she had locked them in together. When I questioned that action she said that she thought it would fly out over the top as it had done in the past when in with the guinea fowl. She said that she had noticed it had looked a bit slow and she suspected it had been sick in the previous two days and that was why it was perhaps unable to get away from the broilga.

The broilga has a known history of aggression toward people and other animals. It has been witnessed attacking a wallaby and suspected of killing other birds including another broilga in the past.

[8] I so conclude because not only were the records documented close to the time, but many of the comments were later repeated by Ms Green, although later again they were denied, once formal disciplinary proceedings had been initiated and Ms Green had instructed counsel. Most importantly, as noted above, in early conversations

Ms Green answered direct questions about how the peahen had got in the enclosure and why she had left it there by stating that she thought the peahen would fly out of the enclosure. It is less likely than not that Ms Green would have said that if she had not actually seen the peahen in the enclosure.

[9] On the morning of 29 July Ms Green was informed by her supervisor that there was to be a meeting that afternoon to discuss the peahen incident. Ms Green did not object to that and met with her managers and the Manager People and Culture at

3.30pm.

[10] I accept, for the same reasons as above, that the Zoo's meeting record is accurate, despite Ms Green claiming again that some of her comments were made with hindsight rather than what she actually remembered occurring.

[11] At the meeting it was explained to Ms Green that the purpose of this investigatory meeting was to discuss her recollection of events around the incident before deciding how to progress. Ms Green agreed to share her memory of the event and the record notes state that she said:

When closing Bruce in, Kelly remembers seeing out the corner of her eye that the peahen had followed Bruce into the enclosed area. The peahen had done this once before but as it is a free flying bird, Kelly thought it would just fly out over the gates. Because of this, Kelly wasn't worried about the peahen being in there with Bruce even though Bruce was known as a vicious bird. Bruce had been known to attack other animals and humans before. Kelly acknowledged she had noticed the peahen hadn't been looking like herself over the last few days and had appeared sluggish.

[12] When asked to explain the peahen's condition further, the notes record:

Kelly said she had noticed the peahen wasn't herself on the Sunday before. It seemed slightly slower and sluggish for a few days but she couldn't put her finger on what was wrong. She acknowledged that she didn't take this into consideration when she left the peahen locked in with Bruce and she had also had not recorded her observation of the peahen's sluggish behaviour in the daily reports.

[13] Ms Green was told that the investigation would continue, including management talking to other staff and that there was the potential of further disciplinary action, including a formal warning or dismissal. However, Ms Green was also told that no conclusion had yet been reached. By the end of the meeting Ms Green had become extremely upset.

[14] Meetings with two staff members were held by 3 August, but no particularly relevant information was obtained.

[15] Subsequent to that Ms Fifield, the Chief Executive, became directly involved in the investigation. Ms Fairfield decided that a formal disciplinary meeting was required and that Ms Green should be suspended in the meantime.

[16] The first Ms Green knew of the suspension was when she received a letter from the General Manager, which was dated 3 August. The letter states, amongst other things, under the heading of *Preliminary findings and concerns*:

Your action of knowingly locking the peahen in with the broilga is unacceptable. Our initial views are that:

- 1. You have acted with gross negligence;*
- 2. You have committed a fundamental breach of the terms of you[r] employment as you have failed to ensure the health, safety and welfare of the animals in your care in accordance with your core responsibilities in your position as Keeper;*
- 3. [You] have destroyed or seriously damaged the necessary trust and confidence we need in you.*

[17] Disciplinary action was referred to, and said to possibly include dismissal.

[18] Ms Green was invited to a formal disciplinary meeting on 5 August and was advised that:

... we wish to suspend you from duties on full pay until the meeting on Thursday 5 August at 12pm. If you are not in agreement with our decision to suspend you, you should let us know immediately what your objections are.

[19] While Ms Green made no objection at that time, she promptly sought legal advice and Ms Flint wrote on her behalf on 9 August, claiming that the disciplinary investigation had already taken place, that Ms Green had not been offered representation, and that despite the delay in investigating the matter preliminary conclusions had already been drawn by the Zoo. The advancing of any disciplinary measures was seen as pre-determination. It was also submitted to the Zoo that Ms Green was suspended without consultation and there was not *just cause for it*, particularly as she had continued to carry on with her job for over a month. Ms Green denied any negligence, stating that this incident could have been caused by any other

staff member in her position at that time. She therefore raised a disadvantage grievance.

[20] The formal disciplinary meeting was delayed until 12 August. It was a very short meeting, during which Ms Green tabled a written statement and a few clarifying questions were asked, before Ms Green was too upset to continue. In her statement Ms Green noted:

It is hard to recall events after such a long time, even by the 29 July;

That the peahen looked a big sluggish but that was not an absolute indicator of ill health;

That she accepted she had *caught a glimpse of something as she was locking the cage but did not consciously realise that it was the peahen until after the incident*;

That management were aware that she had been suffering from depression;

That she loves her job but it can be stressful and exhausting;

That she has worked for over four years and is a capable Keeper, and that she did not feel that she was grossly negligent or that she breached the terms of her employment;

That the peahen had had a tumour that nobody was aware of and yet anybody could have followed up and not just her.

[21] The Zoo decided that it needed to undertake further investigations, given the change in Ms Green's account of her understanding of how the incident arose.

[22] First, Ms Fifield met with Ms Green's supervisor, to find out why she had delayed reporting the incident. This was said to be because she did not want to get Ms Green into trouble. The supervisor was subsequently given a verbal warning for her failure to inform management of the incident.

[23] The supervisor was then given Ms Green's written statement. She reiterated that Ms Green had told her that the peahen had been locked in with the brolga and that

she thought it would fly out as it had done this before. She also noted that the first report from Ms Green came within an hour of the incident.

[24] The supervisor stated that it was basic zoo keeping to ensure animals are not confined in a small space together if they are possibly incompatible, and given that Ms Green at least accepted that she had caught a glimpse of something, it was her responsibility to ensure all the animals involved were safe, whatever sort of animal it was. She also noted that Ms Green appeared to be the only one who had noticed problems with the peahen's behaviour and she should have notified other staff of that fact.

[25] Ms Fifield then interviewed the student who had been in attendance with Ms Green when the incident occurred. She had not noticed the peahen being in the stable with the brolga. While the student did not see anything, she told Zoo management that Ms Green had told her that it was usual for the peahen and the brolga to be locked in together and she thought the peahen would fly out if it needed to. Previously Ms Green had told the student that the peahen was not itself and that she would report that later that afternoon.

[26] Ms Fifield then went on a tour of the enclosure with the student, to get a better idea of what may have occurred. The walk-through demonstrated to Ms Fifield's satisfaction that Ms Green should have been aware of another animal being locked into the stable with Bruce the brolga.

[27] On 19 August Ms Fifield wrote to Ms Green giving her the Zoo's preliminary decision. She noted that the Zoo believed that on two occasions Ms Green had admitted seeing the peahen in with the brolga, and therefore did not accept the different version of events given by her in writing at the meeting on 12 August. It also noted that it was Ms Green's responsibility to

ensure the safety of the animals in her care, and that she admitted having caught a glimpse of something which could have been harmed by the brolga.

[28] The Zoo's preliminary decision was that Ms Green had:

1. Acted with gross negligence;

2. Committed a fundamental breach of the terms of you[r] employment as you have failed to ensure the health, safety and welfare of the animals in your care in accordance with the core responsibilities of your position as a Keeper;

3. Have destroyed or so seriously damaged the necessary trust and confidence we need to have in you that your employment cannot continue.

[29] A response was sought from Ms Green. Ms Flint responded on Ms Green's behalf seeking all information, such as records of discussions with the supervisor and the student. Dismissal was not seen as warranted:

Ms Green understands that this incident was serious, and does accept partial responsibility. Our client denies that she "... knowingly lock[ed] the peahen ..." into the enclosure. This was not a deliberate or malicious action on the part of our client, and should not be treated as such. Accordingly, the level of negligence and the damage to the trust her employer can have in her cannot be so egregious as to warrant dismissal from her employment.

[30] Attached to that letter was a response by Ms Green, which refers to her answers being given only with the benefit of hindsight, although she accepts that she should have checked what the *glimpse of something* she saw was, and not assumed it was a pigeon as was usually the case. She also accepted that she should have recorded the peahen's change in behaviour but this was not her normal practice and that the student was wrong in stating that she had talked about the peahen's state before the incident, because it was afterwards.

[31] On 24 August all relevant documentation was provided to Ms Green, except that the full records that the Manager People and Culture had worked through were never provided to Ms Green before she was dismissed.

[32] On 25 August Ms Flint responded requesting further details on the information provided. Subsequently, the daily reports for 21 and 22 June were provided, as well as the timeline. A response was sought from Ms Green before 27 August so that a final decision could then be made.

[33] Ms Green's response in effect repeated her position that she did not see the peahen and therefore could not have been grossly negligent.

[34] On 1 September Ms Green was notified of the decision to dismiss her. The letter stated:

We prefer your frank statements that you provided on the two earlier occasions that you remembered seeing the peahen follow the brolga

into the stable. Our view is that you did see the peahen enter the stable as you have earlier advised.

You have also acknowledged that the peahen was looking a "bit sluggish" when you were last on duty before the incident. In such circumstances your duty to the peahen was even higher. You allowed it to be shut in with an aggressive animal knowing that she was not her usual self.

However, our decision is also made on the basis where you accept in your recent responses that you caught "a glimpse of something" when you shut the stable. It is an elementary tenet of zoo keeping that you do not confine animals in a small space unless you know that they do not pose a threat to each other. In this scenario, it was also your responsibility to ensure the safety of the animals in your care. No animal should have been confined with the brolga which is a known aggressive animal. The "something" you saw could have caused harm or it could have been harmed. In this case, the brolga caused the death of the peahen due to your actions.

[35] Ms Green's dismissal was to take effect immediately, but she was paid a notice period of four weeks.

[36] Ms Green subsequently raised another personal grievance of unjustified dismissal.

[37] Subsequent to mediation, Ms Fifield wrote to Ms Flint stating, amongst other things:

Kelly has many positive qualities that will assist her in obtaining alternative employment. She has excellent artistic skills and has good people skills. I would like to assist Kelly in a positive way.

To this end I am offering out-placement counselling and assistance to obtain alternative employment to a value of \$3,000 (plus GST). I also offer Kelly introductions to contacts of mine that can discuss alternative careers with Zoos, if Kelly wishes to remain

connected with Zoos.

If Kelly would like to consider this, I am happy to discuss this.

[38] The letter also dealt with several aspects of what the Zoo considered were weak points in Ms Green's claims. Ms Green did not take up the offers, not having trust in the Zoo any longer, after having been suspended and dismissed.

[39] Although Ms Green is not seeking reinstatement, the parties have been unable to come to a settlement and it therefore falls to the Authority to make a determination.

The law

[40] As was held in *Chief Executive of the Department of Inland Revenue v. Buchanan (No 2)* [2005] NZCA 428; [2005] ERNZ 767 at para.[36]:

The correct approach is to evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal. We do not agree with the Chief Judge that a failure to establish wilfulness creates a presumption that the conduct was not serious misconduct. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

[41] As can be seen from the language of that section, that case was determined under the provisions of the [Employment Contracts Act 1991](#). The basic principles of analysis still apply, however.

Determination

[42] After a full investigation, I have concluded that Ms Green did make admissions to seeing the peahen in the enclosure with the brologa, but the question for determination is whether or not it was appropriate for the Zoo to do so at the time. I consider that it was. The inconsistency in Ms Green asserting that her comments were made in hindsight was no less apparent at the time than it is now. For the same reasons as I have concluded that she did make these admissions, I accept that a fair and reasonable employer such as the Zoo would have done so at the time as well.

[43] While there was no doubt that Ms Green did not deliberately fail in her obligations as a keeper, the obligations on her were to ensure animal safety. Her wrongful assumption that the peahen would simply fly out of the enclosure was a fundamental failure that went to the core of her obligations as a zoo keeper. This is particularly so in the circumstances where she was aware that the peahen was not "looking herself". Furthermore, there is no doubt that such behaviour does constitute gross negligence and is therefore serious misconduct warranting dismissal. This was thus a failure to do precisely what Ms Green was employed to do, and therefore would fairly be categorised as serious misconduct warranting dismissal.

[44] Even in the alternative, Ms Green now admits seeing something out of the corner of her eye. A keeper's obligations towards animal safety meant that she should

have gone further and investigated whether animal safety might have been at risk. Again, this was a serious error of judgment which would deeply impair trust and confidence an employer like a zoo would have in a keeper.

[45] It was submitted that the procedure followed by the Zoo was flawed from the outset, principally because Ms Green was not given notice that this was a serious matter that could result in her dismissal, and thus she had no opportunity to be represented, nor was she given proper notice of allegations.

[46] I accept that at some point an employee is entitled to be told of allegations against him or her and have a formal opportunity to respond to them, with representation if desired. However, an employer is not required to give employees such notice in all circumstances, particularly in the preliminary period of an investigation. At some point, an investigation goes beyond a preliminary fact-finding investigation and moves into a disciplinary process, at which point such safeguards are required. In this case, there is no doubt that the preliminary discussion held between Ms Green and her supervisor can in no way be described as part of the disciplinary investigation. Quite properly, Ms Green went to see her supervisor to tell her of the incident. She could not expect to be given any caution or notice of a disciplinary investigation when zoo management did not even know the incident had occurred.

[47] It therefore follows that there was no unfairness in the Zoo relying on what

Ms Green told her supervisor on the day.

[48] I accept, however, that it would have been more prudent for the Zoo management to have informed Ms Green of the potential for disciplinary consequences before the end of the first formal meeting with management on 29 July, which was the first time it did so. However, I conclude that the interview was a preliminary investigation rather than a disciplinary investigation, because at that time the Zoo's focus was to ascertain the facts and it interviewed Ms Green as the key zoo employee involved accordingly. At that meeting, Ms Green was simply asked to give Zoo management her recollection of the

event. She was not questioned on what had occurred, except to give further details in some respects. It was not alleged that she had done anything wrong, nor was she questioned closely about her recollection of events. On the other hand, it was as a result of her comments at this interview and earlier that the Zoo came to the preliminary view that she had acted with gross negligence. Read in context, however, those were allegations as much as preliminary findings at that point.

[49] Although the interview took place several weeks after the incident, Ms Green was given several hours' notice of the meeting and that it would be about her recollection of what had happened in the enclosure.

[50] There was certainly no reason why the supervisor should not have been present at such a preliminary interview, despite Ms Green's representative's submissions to the contrary.

[51] While it is true that Ms Green gave quite a different version of events when represented, that does not mean that Zoo management was not entitled to take into account those earlier comments, because this was a preliminary investigation and at that time Zoo management treated it as a fact-finding exercise only. Although that did change later, the fact is that it was a fair and reasonable approach by the Zoo at the time. I deal with the Zoo's subsequent use of that information to suspend Ms Green separately.

[52] On balance, I conclude that it was fair and reasonable for Zoo management to conduct a preliminary investigation into what had happened before formulating disciplinary charges against Ms Green, and that it was entitled to take into account statements that she made at that meeting in determining to dismiss her. Thus, in the particular circumstances of this case, it was fair and reasonable for the Zoo to investigate through its management team what had occurred and, having reflected on that information, to determine that there were potentially matters of serious misconduct warranting a disciplinary investigation.

[53] I accept that all information was not provided to Ms Green as promptly as could have been the case but do not accept that she was prejudiced in any way by this.

[54] I am satisfied that Ms Green knew full well from the Zoo's letters what was being alleged because it is reasonably clear on its face, as for example the letter of 19 August. I therefore accept that what the Zoo did by dismissing Ms Green and how it acted were what a fair and reasonable employer would have done in all the circumstances of the case. I therefore dismiss Ms Green's claims other than her unjustified suspension.

[55] Ms Green's suspension, by contrast, clearly was not the action a fair and reasonable employer would have taken. First, in the absence of a contractual provision suspension is not usually justifiable. In the vast majority of such cases consultation is also required before suspension in order for it to be justifiable. Here the Zoo's letter of suspension was effectively a *fait accompli*, rather than consultation, as it stated that the decision to suspend had already been made, and only granted her an opportunity to object, rather than be consulted beforehand, as the law requires.

[56] I note here that often employers consider that it may be held against them if they do not suspend an employee accused of serious misconduct. That is not the case and whether or not an employee is suspended is an entirely separate matter to be judged on its own merits. Given that Ms Green had already been working for at least five weeks since the incident without any problem there seemed to be no good reason for her to be suspended, as she appeared to pose no more of a threat to animal safety than before. No consideration appears to have been given to placing her on alternate duties either. I conclude that this decision was as much to highlight the Zoo's *Preliminary findings* as anything else and constitutes an unjustifiable disadvantage to her employment.

[57] Ms Green gave evidence of being humiliated over her suspension for no good cause and of being in shock, particularly as it seemed to her to show that the Zoo had already made a decision on her guilt. In these circumstances compensation in the sum of \$1,000 is appropriate. There can be no contribution on her part to the suspension itself.

Conclusion

[58] Ms Green was justifiably dismissed for gross negligence, but was unjustifiably suspended. As a result I order the respondent, the Wellington Zoo Trust, to pay to the applicant, Ms Kelly Green, the sum of \$1,000 under s.123(1)(c)(i) of the Act.

Costs

[59] Costs are reserved.

G J Wood

Member of the Employment Relations Authority
