

Determination Number: AA 317/05

File Number: AEA 471/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Steven (Tipene) Hemara (applicant)
AND	The Warehouse Limited (respondent)
REPRESENTATIVES	Andrew Golightly for the applicant Monica Maharaj for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Whangarei, 9 August 2005
DATE OF DETERMINATION	19 August 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Tipene Hemara says that the Company unjustifiably dismissed him – statement of problem received on 12 May 2005. He claims lost wages of \$2,688.00 gross and compensation for humiliation, etc of \$7,000 as well as costs.
2. The Company says Mr Hemara was justifiably dismissed for refusing to follow a reasonable instruction – statement in reply received on 25 May.

3. The parties underwent mediation but their employment relationship problem remained unresolved. They subsequently agreed to a one-day investigation in Whangarei on 9 August. Witness statements and relevant documents were usefully provided in advance. Efforts by the party during the investigation to settle the matter on their own terms were not successful. At the conclusion of the investigation agreement was reached on a schedule for closing comments: counsel for the applicant elected not to exercise the opportunity to make final, closing comment.

Dismissal

4. The relevant facts are not in dispute.
5. The Company is a well-known retailer operating throughout New Zealand.
6. Mr Hemara started work with the Company on its Whangarei Nightfill team on 2 September 2002.
7. Mr Hemara was subsequently promoted to the position of Nightfill Supervisor.
8. On 16 October 2004 Mr Hemara became aware that the Nightfill Team Leader Assistant would not be present for his scheduled shift on Monday 18 October: the applicant approached his Supervisor and offered to take that person's place. Mr Hemara says he made the offer because he was concerned to ensure there was adequate support for another Nightfill supervisor who was resuming work on that evening for the first time following an absence of 3-months parental leave. The Supervisor declined the applicant's offer and told him not to work that shift.
9. Mr Hemara went to work on 18 October, notwithstanding the Supervisor's instruction.
10. On 19 October he returned to work his normal rostered shift. When questioned by the Supervisor, Mr Hemara confirmed he had worked on the 18th.
11. On 2 November Mr Hemara received written advice of a disciplinary meeting to be held the following day. It was alleged he had worked on 18 October when he had

been told by management not to do so and that he had therefore breached Company House Rule 22 (*"Refusal to follow reasonable instructions of management."*).

12. The advice of 2 November warned Mr Hemara he could be dismissed; he was invited to bring a support person and that the purpose of the meeting was to get his full explanation.
13. A disciplinary meeting was held on 3 November and another followed on the 5th at the conclusion of which Mr Hemara was dismissed for serious misconduct.
14. A letter dated 5 November setting out the reasons for the decision to dismiss the applicant was forwarded to Mr Hemara: unfortunately he did not receive the letter as he was no longer living at the address to which the letter was sent.
15. Advice of Mr Hemara's personal grievance was sent to the Company in a letter dated 26 November.
16. On 13 December Mr Hemara found new employment.

Applicant's Position

17. The applicant argues that the disciplinary action taken by the Company was too severe in regards to his conduct.
18. The dismissal was also unjustified as the Company failed to take account of all the relevant circumstances including Mr Hemara's previous history and his willingness to assist. He had no disciplinary record. He was committed to the job and to the Company's people relations philosophy. Consistent with his commitment to that philosophy, he disregarded his supervisor's instruction in order to assist a friend who had just returned from parental leave. He did not understand that disciplinary action could be taken against him for helping a fellow worker.
19. Issue is taken with whether he was instructed or advised or requested not to work the shift.

Respondent's Position

20. The Company properly accepts that it carries the burden of proving that Mr Hemara's dismissal was justified.
21. It also accepts that the Honda standard should apply, i.e. the onus is discharged where the evidence is "*as convincing as the charge is grave*": *Honda NZ Limited v NZ Shipwrights Union* [1990] 3 NZILR 23.
22. The Company says it justifiably dismissed Mr Hemara and that it did so in a procedurally fair manner. In the alternative, if the dismissal was not justified, the respondent says the applicant breached the terms of his employment and repudiated the terms of his agreement to the extent that he should enjoy no remedies, i.e. the level of his contributory fault should be set at 100%.
23. By disobeying his supervisor's instruction Mr Hemara's conduct amounted to serious misconduct and was in breach of the Company's House Rules as well as his obligations of trust and confidence to the respondent to the extent it was unable to allow him to remain in its employment.

Discussion and Findings

24. I cannot find any basis to the applicant's claim that he was subject to an unfair process: rather, I find that in the period leading up to his dismissal he received clear advice (on 2 November) of his employer's concerns. He was also told that the matter was serious and he could be dismissed. He was advised he could bring a representative to the disciplinary meeting on the following day. There is no evidence to support a claim that the Company's mind was already set against the applicant. The respondent has provided a proper explanation of circumstances outside of its control that caused it to start its investigation no more than two weeks later than what might otherwise have been the case: there was no inordinate or unfair delay.
25. The applicant properly does not take issue with the reasonableness of his supervisor's instruction on 16 October, to not work the shift he in fact worked. It was not for Mr Hemara to set his hours of employment. Consistent with its contracted

obligations to Mr Hemara, the Company clearly enjoyed the right to direct the applicant to not work shifts over and above his agreed hours.

26. As is set out in the dismissal advice of 5 November, the Company has throughout said that Mr Hemara was dismissed because he breached Company House Rule 22, i.e. that he refused to follow a reasonable instruction.
27. Counsel for Mr Hemara, Mr Andrew Golightly, argues that the words used by his client's supervisor directing the former not to undertake the additional shift were less than an instruction but that instead he was advised. "*Instruction*" has the primary meaning of "*a direction or order*" (Concise Oxford Dictionary, 10th Ed.) whereas "*advise*" is defined as to "*recommend*". I am satisfied that the facts are clear. The supervisor did not recommend that Mr Hemara not work the additional shift: he was, I find, clearly directed.
28. While the rule as stated is plural, and it is agreed that Mr Hemara refused to follow a single instruction, I am satisfied that it is implied in any employment agreement that a refusal to follow a single instruction may open the way to dismissal for serious misconduct.
29. In *Northern Distribution Union v BP Oil* [1992] 3 ERNZ 483 the Court of Appeal described the kind of conduct that will justify summary dismissal as, "... *conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship*" (p. 487).
30. In *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448 the Court of Appeal said it had to be satisfied that "*the decision to dismiss was one which a reasonable and fair employer could have taken*".
31. And:

The burden on the employer was not that of proving the employee's serious misconduct to the Court, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.

(457); and

In a case of summary dismissal, if the employer showed that the conduct was such that a fair and reasonable employer could see it deeply impaired basic trust and confidence, it would hardly be necessary to consider, as a separate step, whether in all the circumstances the employee ought to have been dismissed. That depended on whether the fair and reasonable employer took into account all the relevant circumstances of the conduct and the particular relationship in determining that the necessary confidence and trust had been deeply impaired.

(458)

32. In *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, the Court of Appeal endorsed the observations of Richardson J in *Air New Zealand v Johnston* [1992] 1 ERNZ 700:

A dismissal is unjustifiable if it is not capable of being shown to be just in all the circumstances. Justifiability is directed at considerations of moral justice. Whether a dismissal is justifiable can only be determined by considering and balancing the interests of worker and employer. It is whether what was done and how it was done ... is just and reasonable to both parties in all the circumstances including ... the reason for the dismissal.

(330)

33. In *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917, the Court of Appeal observed:

Disobedience of an order which an employer has the lawful authority to give to the employee is a form of misconduct but it does not necessarily follow, at common law, that such an act of disobedience justifies dismissal. The disobedience must be wilful, a word which in this context "connote[s] some deliberate design or purpose to derogate from duty". ... It has an overtone of the knowingly improper. There has to be something which amounts to a deliberate flouting of the terms of employment contract.

Overlaid upon the common law is of course the Employment Contracts Act 1991 and its requirement that a dismissal must be justified by the employer both substantively and procedurally. There must be good faith and fair treatment. ...

We agree ... that “ultimately the test is not whether there was wilful disobedience to obey a lawful and reasonable instruction, but rather whether the conduct of the worker justifies dismissal.”

(922)

34. This application is to be determined in terms of the current Act. It was recently amended: s. 4 expressly requires of parties to an employment relationship to deal with each other in good faith and that that duty,

(1A) (a) is wider in scope than the implied mutual obligations of trust and confidence, and

(b) requires the parties ... to be active and constructive in establishing and maintaining a productive employment relationship

35. For the following reasons, and bearing the above in mind, I am satisfied that Mr Hemara was unjustifiably dismissed.

36. This was not an instance of the applicant repeatedly refusing a reasonable instruction. In this case the disobedience was unprecedented. The instruction given to him was clear although, in the context prevailing at the time, low key: Mr Hemara was not advised that disobedience could be construed as serious misconduct. It can be said that the consequences of disobedience were not clearly put, or obvious, to the applicant: he was an *“ignorant employee”*, unaware at the time of the relevant House Rule and unknowing as to the potential consequences of his action – see *Chief Executive of the Department of Inland Revenue v Buchanan and Anor*, 16 December 2004, Goddard CJ, WC 20A/04, pars 35, 36 & 37, currently on challenge.

37. While the minutes of the meeting on 3 November record Mr Hemara as confirming he knew that by coming to work he was in breach of the Company House Rules, it was not disputed in the Authority’s investigation that he only became aware of House Rule 22 and that his action could amount to a breach of the same after he undertook the extra shift, as a consequence of his employer’s advice of a disciplinary investigation.

38. In dismissing the applicant the Company relied on a finding that Mr Hemara had said he would do the days he wanted to work and that, separately and later, he also said

he would do it again to help out a mate, i.e. come into work when told not to. During the 3 November interview Mr Hemara said he could not remember saying to his supervisor he would work the days he wanted. During the Authority's interview he confirmed he had said that to his supervisor, in the presence of others, but only as a joke – he was not serious.

39. I find that the conclusions drawn by the Company, as to the significance of Mr Hemara's statements, to have been unsupported by the bare words of the interview alone, i.e. the conclusions were not open to a fair and reasonable employer. I also find that, because of their significance, the conclusions drawn by the Company should have been investigated further and reported back to the applicant and his advisor for further comment, before the Company determined to dismiss Mr Hemara. This is because the Company preferred the supervisor's recollection to that of the applicant as a result of specific advice as to when Mr Hemara was alleged to have made the relevant comment: the applicant was entitled to have those details put to him so as to refresh his memory, if necessary, so that he might give his version as to the relevant context.
40. This is also so because the respondent significantly reframed the serious misconduct issue originally put to Mr Hemara: without notice to the applicant, it inserted an emphasis on how the applicant might behave in the future without fairly and reasonably putting Mr Hemara on notice as to its concerns. I find it was necessary to report this preliminary view back to Mr Hemara because the question put to the applicant during the interview and his answer were too broadly stated to be able to support the serious conclusion reached by the Company: it required more certainty as to Mr Hemara's attitude and intentions. Mr Hemara was entitled to comment on the Company's preliminary assessment as to the significance of his reply that he would do it again to help out a mate. This is because his reply was interpreted as a determined assertion that he would purposefully disregard the Company's legitimate requirements in the future. It is too great a leap for the respondent to make. That is because such an interpretation is seriously at odds with what was known to the Company about Mr Hemara: his work history to date was exemplary. He was clearly committed to the Company, to making a career with the Company, and to his fellow-workers. The latter was a singular and prominent theme in Mr Hemara's

performance reviews. During his nearly two-years with the Company they had recorded the following (verbatim):

Team work is awesome.

Tipene is a quiet achiever, is very passionate about his role. March 2003

He has a lot of ideas and his willingness to help others/customers is very highly effective. August 2003

He has met my expectation as a person and fellow team member in the past and in the previous recent months he has exceeded them. August 2003

Tipene over the last 6 months you have shown me your commitment to The Warehouse and especially Nightfill. You have been very supportive to the team and have made yourself flexible to meet the sometimes rocky road that has happened within our team I would personally like to let you know that your consistent 'steadiness' has helped me through this time. I look forward to the next 6 months. August 2004

41. Furthermore, the applicant's work conduct, and his commitment to his team, was entirely consistent with the Company's philosophy, which includes an attribution to its "People First culture" as the reason for much of its success (refer to the website attachment to the applicant's witness statement). The Company regards its "employees as (its) greatest asset. They choose to stay with us because we care and we take time to recognise individual qualities. ... Within the business we all work together, and our team spirit comes through because we enjoy being successful ..." (above).
42. That approach is reinforced by the respondent's stated team work objective which Mr Hemara signed off on 24 March 2003:

To work within the team and play an active role in achieving the teams goals and objectives.

One of the secrets to The Warehouse's success is that we work together as a team. We pull in the same direction and we all pull together. ...

We support each other and are always willing to give other team members a helping hand.

... To maintain a successful team we need to: -

2/ *Be willing to help each other*

(attachment to applicant's witness statement)

43. Mr Hemara's fulsome performance reviews clearly record how much to heart he had taken the Company's values, and his degree of commitment to his team. Mr Hemara's consistent explanation for disobeying his supervisor's instruction not to work an extra shift was clearly an expression of the same, that he was minded to help a fellow employee.
44. Ironically, it might be said that Mr Hemara's dismissal resulted from his over zealous commitment to the Company and to his team. As the Company's counsel, Ms Monica Maharaj, observes in her submissions, there does not appear to be any reported authorities of employees working additional hours when not being required to (and being dismissed for serious misconduct as a result). Mr Hemara's action goes a long way to explaining his motive. It is difficult to draw from that behaviour, as the respondent would have me accept, the conclusion that the applicant deliberately acted against his employer's interests and that it therefore justifiably lost all trust and confidence in him. In all the circumstances I do not accept that his action amounted to serious misconduct.
45. Having regard to the above, I am satisfied that the Company had no fair and reasonable basis to conclude that Mr Hemara would refuse reasonable instructions in the future. This is because his action was unprecedented. Furthermore, the Company knew that the applicant had previously complied with an instruction to cease taking "*extra privileges*" that were not consistent with Company policy (refer to par. 5 of the supervisor's witness statement): in other words, the applicant's willingness to otherwise accept and adhere to Company instruction was well known to the respondent.
46. Finally, while the minutes of the 3 and 5 November meetings do not record it, the applicant's 26 November advice of his personal grievance set out Mr Hemara's offer to work one shift for free or forfeit the pay he received for working the unauthorised

shift. That offer is not disputed by the respondent. In reality it received the value of Mr Hemara's labour. Via his offer it also had the option of recovering any wages not budgeted for. The Company had before it clear evidence of an employee who appreciated the significance of his action only after the event, as well as his willingness to meet his employer's legitimate requirements.

47. I am satisfied that Mr Hemara's action in working the unauthorised shift did not amount to a wilful disobedience or that he knowingly worked the shift while appreciating it was improper to do so. The evidence before the Company, which I find it did not properly weigh, was of an employee who genuinely sought to assist while failing to appreciate that his initiative was inappropriate and might be construed as serious misconduct. The Company has failed to establish that it had fair and reasonable grounds to conclude that Mr Hemara's conduct was unjustifiable. The evidence before the Authority's investigation is that it failed to consider and balance its and its employee's interests. The decision to dismiss was not just to both parties in all the circumstances: *Oram* (above), etc applied.

Remedies

48. The remedies sought by Mr Hemara are lost wages of \$2,688.00 gross and compensation for humiliation, etc of \$7,000 as well as costs. By finding work 5 weeks after his dismissal I am satisfied Mr Hemara clearly made prompt effort to mitigate his losses following his unjustified dismissal. It therefore follows that he must succeed with his claim for lost wages: s 123 (1) (b) of the Act applied.
49. I am also satisfied from the applicant's evidence, and that of his former partner, that he was distressed by the circumstances of his unjustified dismissal.
50. The degree of humiliation, etc for Mr Hemara was – I find – all the greater because of his genuine commitment to the Company and his wish to pursue a career with it (refer to his aspirations as detailed in the applicant's performance review).
51. I therefore find as fully made out the claim for \$7,000 humiliation, etc: s. 123 (1) (c) (i) of the Act applied.

Contributing Behaviour

52. Mr Hemara's unjustified dismissal resulted from his decision to ignore the direction of his supervisor and work an unauthorised shift. There is a direct causal connection between that misplaced initiative and the Company's decision to dismiss the applicant. Having regard to the overall circumstances of the unjustified dismissal, and in particular Mr Hemara's mitigating offer to pay-back his unauthorised shift, I am satisfied that Mr Hemara's contribution is properly measured as 5%. All of the remedies awarded the applicant are to be reduced by that amount: s. 124 of the Act applied.

Determination

53. For the reasons set out above I find in favour of Tipene Hemara's claim against that he was unjustifiably dismissed by The Warehouse Limited. The respondent is therefore directed to pay to Mr Hemara the following monies:

- a. Unpaid salary totalling \$2,688.00 gross (two thousand, six hundred and eighty eight dollars) less 5% for contributory fault; and
- b. Compensation for humiliation, etc of \$7,000.00 (seven thousand dollars) less 5% for contributory fault.

54. The parties are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher

Member of Employment Relations Authority