

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 41/10
5151586

BETWEEN ESLAM MAZROUAA
Applicant

AND KORDIA LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Rodger Pool, counsel for Applicant, in part, and
thereafter Applicant in person
Christopher Eggleston, counsel for Respondent

Investigation Meeting: 11 and 12 August 2009 in Auckland

Submissions received: 26 August and 16 September 2009 from Respondent
9 September 2009 from Applicant

Determination: 2 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Eslam Mazrouaa started work as an operations engineer for Kordia Limited on 31 March 2008. He was dismissed on 11 November 2008 because Kordia managers were dissatisfied with his explanations for returning to work eleven days late from a period of leave.

[2] Mr Mazrouaa is an Egyptian national and a Muslim. He has lived in New Zealand since March 2006 and now has permanent residence. In September 2008 he was granted leave to Egypt to visit his family during the period of Ramadan and the following Eid holidays. He was due to return to his job at Kordia by 20 October 2008 but did not return to work until 31 October 2008.

[3] Mr Mazrouaa says he was unjustifiably dismissed and subject to prior

discrimination which affected the decision to dismiss him. He says the decision was made, after an initial disciplinary meeting, without waiting for further information from him and without a full opportunity to respond to Kordia's reasons for its decision. He seeks remedies of reinstatement, lost wages, and compensation for hurt and humiliation.

[4] Kordia defends its decision as one, applying the statutory test at s103A of the Employment Relations Act 2000 (the Act), that a fair and reasonable employer would have made in all the circumstances at the time. It says it fairly investigated Mr Mazrouaa's reasons for his late return to work and was entitled to come to its view that he deliberately stayed away longer than the period for which he was granted leave and had not made genuine efforts to return on time. It denies any negative discriminatory treatment of Mr Mazrouaa.

The investigation

[5] For the purposes of the Authority's investigation written witness statements were lodged by Mr Mazrouaa; his former manager at Kordia, Jan Rajwer; and Kordia's human resources manager, Russell Bell. Mr Bell made the decision to dismiss Mr Mazrouaa.

[6] Affirmed affidavits were also lodged by three witnesses resident in Egypt: Bayoumi Elewa Mazrouaa, the father of Mr Mazrouaa; Enas Elshahed, a Cairo travel agent who had made air travel bookings on Mr Mazrouaa's behalf; and Saifudin Al Jafferjee, a family friend who had liaised on Mr Mazrouaa's behalf with Ms Elshahed. These witnesses gave further affirmed oral evidence by telephone during the investigation meeting, answering questions from the Authority and counsel. That oral evidence was taken with the assistance of an interpreter of Arabic.

[7] Mr Mazrouaa, Mr Rajwer and Mr Bell were present throughout the meeting and also answered questions under oath or affirmation.

[8] Partway through the investigation Mr Mazrouaa's counsel, Mr Pool, was given leave to withdraw as a representative and give oral evidence as a witness. He gave evidence, in answer to questions, about his dealings on Mr Mazrouaa's behalf with Mr

Bell. At issue was whether the parties had agreed to allow for additional information to be provided by Mr Mazrouaa before a decision was made and whether Mr Pool had agreed to dispense with a second disciplinary meeting on the basis that Mr Bell had already reached a firm decision to dismiss.

The issues

[9] The issues for resolution by the Authority are:

- (i) what arrangements had been made for Mr Mazrouaa's leave; and
- (ii) whether Kordia fairly investigated Mr Mazrouaa's reasons for returning later than 20 October 2008; and
- (iii) whether the decision to dismiss was made prematurely; and
- (iv) whether the decision was influenced by discrimination against Mr Mazrouaa; and
- (v) if there were any unjustified actions by Kordia, what remedies should be awarded to Mr Mazrouaa?

Leave arrangements

[10] Mr Mazrouaa's written evidence asserted that he was assured that he could take a six week vacation during 2008 and he had accepted the job with Kordia on that understanding. He said this assurance was made in discussion with Mr Rajwer either before starting the job or early in September. He says Mr Rajwer reneged on that assurance on 7 September when Mr Mazrouaa said he planned to take six weeks leave from 22 September. He says Mr Rajwer would only approve four weeks leave and rejected a proposal from Mr Mazrouaa to take a further two weeks working remotely from overseas, using a laptop computer and phone.

[11] Mr Mazrouaa's verbal evidence did not support his assertion of promises for six weeks leave. Instead he recalled Mr Rajwer had said such leave "*may be possible or be feasible*". He remembered replying that he needed six weeks but "*if work needed me I would take what I can*". On the basis of that evidence, and Mr Rajwer's evidence that no assurances were given, I find there was no commitment by Kordia to providing Mr Mazrouaa with a six week long holiday at any period during 2008. Neither was there any specific commitment that six weeks leave could be taken in the

September-October period. Rather Mr Rajwer had encouraged Mr Mazrouaa to take any extended leave he wanted in February, prior to starting work for Kordia, or in June.

[12] Accordingly I find that Kordia did act not unreasonably in approving four weeks leave and rejecting Mr Mazrouaa's proposal that he be permitted to stay away from its premises for a further two weeks working "remotely". The four weeks leave that was granted was in excess of his existing leave entitlement. He had a leave entitlement of 9 days of annual leave and one lieu day. Mr Rajwer approved use of that leave and a further ten days of unpaid leave to allow for a four week holiday. Kordia had no operational reason for Mr Mazrouaa to work remotely and was not obliged to allow him to do so to enable him to stay longer in Egypt. Its actions in that respect were not unjustified.

Was Mr Mazrouaa's later return fairly investigated?

The circumstances of his late return

[13] On 7 September Mr Mazrouaa had asked his father in Egypt to book a flight for him from Cairo to Auckland at the end of October as his return flight would be cheaper if booked there.

[14] A few days later he booked a one-way ticket from Auckland to Cairo. By this time Mr Mazrouaa also knew that Mr Rajwer had not approved a period of six weeks leave. He then let his father know not to pay for a return flight to New Zealand and spent some time trying to convince first Mr Rajwer, and then Mr Bell, to change the decision on the length of leave granted.

[15] By 16 September Mr Mazrouaa was aware that neither manager would change his mind on that decision. Mr Mazrouaa then contacted his father again asking him to arrange a return flight that would get him back to Auckland in time to start work on 20 October. He left for Egypt on 20 September with no return fare booked.

[16] Once in Egypt Mr Mazrouaa made further inquiries, through Mr Saifudin, of the travel agent about a return flight. He requested a seat on either an Emirates or

Singapore Air flight as their seats were wider and Mr Mazrouaa – as he put it in his oral evidence – is “*a big guy*”.

[17] On 2 or 3 October Mr Mazrouaa received news from the travel agent that the only available flight within those criteria was one with Emirates on 22 October. Although this was two days later than when he was required back at work Mr Mazrouaa booked that seat rather than taking the chance of not finding another flight until even later.

[18] Mr Mazrouaa did not attempt to contact Kordia about the delay until 9 October when he left a voice mail message on Mr Rajwer’s mobile phone. He tried again in the following days and spoke briefly to Mr Rajwer on 15 October and twice at more length on 17 October. Mr Rajwer was annoyed at Mr Mazrouaa’s news and told him that it was not Kordia’s problem if there were no available flights. Mr Rajwer also cautioned Mr Mazrouaa that he could face disciplinary consequences if he did not get back to work by 20 October. Mr Mazrouaa asked if he could return to work on 24 October instead but Mr Rajwer advised him by email on 19 October that this was “*not acceptable*” and that Kordia would “*consider termination*” if he did not return to work on 20 October. Mr Mazrouaa replied by email that he was “*stuck*” in Egypt and would not return to Auckland on 24 October. He referred to difficulties in getting a return flight as coming about “*after Kordia canceled (sic) two weeks of my already verbally (sic) agreed vacation*”.

[19] The following day Mr Rajwer sent Mr Mazrouaa a further email advising that he had done an internet search of flights available from Cairo to Auckland for 20 October. He had found “*many available*” at discounted fares. He stated that he did not accept Mr Mazrouaa could not arrange a flight back to New Zealand. He summarised his “*current point of view*” as being that Mr Mazrouaa had never intended to return on the required date and that his actions appeared to be a considered and deliberate breach of his obligations to Kordia. Mr Rajwer went on to tell Mr Mazrouaa that he would be asked for an explanation at a disciplinary meeting on 28 October, warned the consequences could include disciplinary action, and recommended bringing a representative to assist him.

[20] On 21 October Mr Mazrouaa got news from his travel agent that he needed a

visa for a transit stop in Australia. He went to the Australian embassy on the morning of 22 October – the day of his booked flight – but could not get a visa until 26 October. He then arranged a further booking for a flight on 28 October.

[21] He had advised Mr Rajwer on 24 October of the further delay. Once he had the visa he again emailed advising that he would now not return to New Zealand until 30 October.

[22] He returned to the Kordia office at 7.30am on 31 October and was suspended later that morning.

[23] Mr Rajwer, in his oral evidence, said the effect of Mr Mazrouaa’s late return was that rosters for other staff had to be rearranged, responses to customers’ requests were delayed or referred to other staff, and some tasks were reallocated to teams in other parts of Kordia.

[24] A disciplinary meeting was held on 10 November.

Kordia’s investigation and decision

[25] Mr Bell produced a four page written summary of what was discussed at the disciplinary meeting and his analysis of the issues arising. He stated his “*major conclusion*” in this way:

[Mr Mazrouaa]’s failure to attend work is of [Mr Mazrouaa]’s making. [Mr Mazrouaa] booked a trip to Egypt based on leave that he knew had not been granted to him. Most people would clearly understand that to obtain permission to have 6 weeks away from work in their first year would be unusual and require clear permission. Kordia cannot be held responsible for [Mr Mazrouaa]’s clear reluctance to accept this and failure to take the appropriate actions to ensure his timely return to work. Kordia has shown compassion for his personal circumstances by agreeing to an extra two weeks leave without pay.

[26] He summarised further conclusions as:

- (i) Mr Mazrouaa was not misled to think he could have six weeks leave; and
- (ii) Mr Mazrouaa tried to shift the blame for the situation onto Kordia by saying it had “*cancelled*” his leave; and

- (iii) Mr Mazrouaa had deliberately booked a trip knowing he did not have leave approved; and
- (iv) Mr Mazrouaa had not genuinely tried to return by 20 October; and
- (v) Mr Mazrouaa had not been truthful in what he had said; and
- (vi) Mr Mazrouaa's actions appeared considered and deliberate; and
- (vii) Mr Mazrouaa had known on 3 October that he would return to work late but waited until the last opportunity to make this known to Kordia; and
- (viii) Mr Mazrouaa had neglected his duty to his employer.

[27] On the basis of those conclusions Mr Bell considered Kordia could no longer have trust and confidence in Mr Mazrouaa and he should be dismissed.

Applying the test of justification

[28] In justifying that decision under s103A of the Employment Relations Act 2000 (the Act) Kordia does not have to prove the facts of what it considered to be Mr Mazrouaa's serious misconduct. It must, however, show it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. It was not required to conduct a trial or even a judicial process but must have met some fundamental requirements of natural justice, including complying with its own disciplinary policies and giving Mr Mazrouaa a proper opportunity to comment on the allegations made against him. Where there is contention over the employee's actions, the focus is on whether the employer had reasonable grounds to believe and did honestly believe that there had been misconduct by the employees or whether it had an honest belief on reasonable grounds.¹

[29] I find Mr Bell's conclusions in this case were ones that a fair and reasonable employer would reach in all the circumstances at the time.

[30] Such an employer would be sceptical that an employee – having been refused leave for six weeks – ended up staying away almost exactly that period through a series of what the employee said were mishaps or other matters entirely beyond his control.

¹ *Air New Zealand v Hudson* [2006] ERNZ 415 at [144] and [135].

[31] Kordia's conclusion that Mr Mazrouaa's late return was deliberate and not accidental could honestly and reasonably be reached in light of the following aspects of his conduct:

- (i) He claimed to be unaware the airlines flying out of Cairo would be so busy around the end of Ramadan and the beginning of Eid, when he must of known that many Egyptians – like himself – would travel to be with family at this time; and
- (ii) He limited his chances of getting a return flight by insisting his seat could be booked on only one of two airlines; and
- (iii) He delayed by at least six days letting Mr Rajwer know of the delay in his return; and
- (iv) He had taken no steps to check visa requirements for his return travel; and
- (v) His accusation that Kordia had caused the problem by “cancelling” two weeks of his leave was entirely disingenuous as he was never entitled to that leave, Kordia had never agreed to it, and the matter had been well canvassed in discussions with managers before he left New Zealand.

[32] Throughout Mr Mazrouaa refused to accept any responsibility for failing to return to work on time. This is evidenced by this comment in his written closing submissions to the Authority: *“All I did was getting late (sic) from a vacation and it was 100% out of my hand”*.

[33] He had a proper opportunity to answer Kordia's allegations in the disciplinary meeting on 10 November. He had adequate notice and the benefit of representation by experienced counsel. The central allegation – that his lateness was deliberate – had been made plain to him as early as Mr Rajwer's email of 20 October.

Was the decision to dismiss him made prematurely?

[34] There are two concerns that Kordia's decision, and the conclusions it was based on, were reached prematurely:

- (i) Mr Mazrouaa had offered to produce phone records from Egypt to confirm that he had made repeated attempts to let Mr Rajwer know

of the delays; and

- (ii) Mr Bell's decision was reached without providing Mr Mazrouaa an opportunity to comment on the conclusions that Mr Bell made after hearing from him on 10 November.

[35] Even if I prefer Mr Pool's evidence over that of Mr Bell's on the first point, I do not accept it shows any fatal flaw in the quality of Kordia's decision. The phone records – which were available to the Authority but not to Kordia at the time it made its decision – do not change the factual accuracy of a key point that Mr Bell's written conclusions showed he was aware of on 10 November. Mr Mazrouaa knew on 3 October that he was not travelling back until at least 22 October but did nothing to inform Mr Rajwer of this for another six days, however often he then phoned after 9 October.

[36] Kordia's disciplinary policy provides for a meeting or interview at which a staff member has the opportunity to provide an explanation and ask questions. Following that the manager conducts any necessary further investigation and determines whether an allegation is substantiated. The last stage is described in this way:

The staff member's manager or his/her representative will then call a meeting to convey the decision to the staff member concerned. ... After the meeting the decision will be confirmed in writing.

[37] I do not accept the argument, arising from Mr Pool's evidence, that Mr Mazrouaa was denied an opportunity to comment on any proposal by Mr Bell to dismiss. The policy does not require that and the requirements of natural justice are met by the earlier stages of Kordia's written policy. Mr Mazrouaa was aware of the prospect of dismissal as an outcome through the notice of the disciplinary meeting and had an opportunity to comment on it in that meeting.

[38] When Mr Bell rang Mr Pool to arrange a second meeting Mr Pool had asked its purpose. Mr Bell, properly in terms of the policy, said it was to convey the decision. Mr Pool asked to be told the decision and said there was no point meeting. Mr Bell told him. From that exchange I do not accept Mr Mazrouaa can now successfully assert predetermination or a failure of nature justice.

Was Mr Mazrouaa discriminated against?

[39] I also find that Mr Mazrouaa failed to establish any factual foundation for what he described in his evidence as racial harassment during his employment.

[40] Not long after starting the job he had complained about overhearing two staff members talking during a lunch break about an item of international news and referring to Muslims and “*terrorists*”. The conversation included a comment from one that “*terrorists*” should be shot.

[41] I accept the evidence of Mr Rajwer and Mr Bell that they had both taken prompt steps to sensitively deal with Mr Mazrouaa’s concerns. Another manager was delegated to deal with that office situation and Mr Bell later had a follow-up conversation with Mr Mazrouaa.

[42] I note two other instances in which Mr Mazrouaa said he was subjected to offensive “*racial and religious comments*”.

[43] The first concerned an evening when team members were ordering pizza for an after-work social event. The staff member taking orders made a point of saying that one without pork should be ordered for Mr Mazrouaa.

[44] The second concerned a discussion between Mr Mazrouaa and Mr Rajwer when they were alone in the office after having the pizza. Mr Mazrouaa had asked whether Mr Rajwer had any religious beliefs. In the course of the ensuing conversation Mr Rajwer expressed the view that dietary restrictions against eating certain meats, including pork, had an understandable health purposes historically but he doubted they should be given any religious significance. Mr Rajwer says he called such practices “*silly*” while Mr Mazrouaa recalls him using the word “*stupid*”. Whichever word was used Mr Rajwer accepts his views upset Mr Mazrouaa.

[45] Neither example discloses any racial discrimination. They both relate to religious views or practices. The first is an example of other staff members being sensitive to Mr Mazrouaa’s dietary preferences and not intentionally offensive.

[46] In the second example it was Mr Mazrouaa who initiated a conversation about religion. The rights Mr Mazrouaa asserts do not exist in a vacuum or solely for his benefit. As Mr Mazrouaa is entitled to freedom *of* religion in a diverse and democratic society, so are others entitled to freedom *from* religion and to freedom of speech about religious practices. Mr Rajwer was entitled to have a different view about a practice of a particular religion and express it when Mr Mazrouaa invited discussion of religious matters. It was a personal rather than work-related conversation. I accept Mr Rajwer's evidence that he did not intend to be offensive. When it became clear that his view angered Mr Mazrouaa, Mr Rajwer did not press or repeat it but instead promptly ended the discussion.

Determination

[47] For the reasons given I find that Kordia's actions in deciding to dismiss Mr Mazrouaa were justified. Accordingly his personal grievance application is dismissed.

Costs

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. Should they be unable to do so, Kordia may lodge and serve a memorandum as to costs within 28 days from the date of this determination. From the day any such memorandum is lodged and served, Mr Mazrouaa will then have 14 days to lodge any memorandum in reply before the Authority determines costs. No application will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority