

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN James Robert McNeill
AND Solid Energy New Zealand Ltd
REPRESENTATIVES Simon Mitchell for Applicant
Andrew Shaw for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 8 February 2007
SUBMISSIONS RECEIVED 9 February, 12 February 2007
DATE OF DETERMINATION 1 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr McNeill is a keen fisherman who suffers from hay fever. During almost ten years as an electrician at East Mine, Huntly, he has on occasions taken sick leave either because of the hay fever itself or more commonly because of the side effects of the medication he used to treat it. He has also regularly taken time off work to go sea fishing. In November 2005 he received a formal warning for being absent from work, without leave, to attend a fishing trip.

[2] On the evening of 30 January 2006 he rang the respondent and advised that he had hay fever and would not be coming in to his midnight shift. He called a friend, asked her to make a similar call for him the following evening, and then he got some sleep. Next morning, at 7.00 am he put to sea for a two day fishing trip 80 kilometres offshore and out of cell phone range. This trip had been pre-booked.

[3] Mr McNeill was also a delegate for the Engineering Printing and Manufacturing Union. When he went in to work on 1 February, he was called upon to represent a co-worker who was being asked to answer allegations about being absent without leave on the nights of 30 and 31 January. This person had in fact been on the same fishing trip as Mr McNeill and had applied for annual leave to attend it. When that leave was declined, he went anyway. Mr McNeill acted as his representative during the ensuing disciplinary process but did not mention that he was also on the trip.

[4] About a week later Mine Manager Paul Hunt discovered that it was being discussed around the mine that Mr McNeill had been on the trip himself. On hearing this, he commenced an inquiry into Mr McNeill's own actions on 30 and 31 January. The end result was that on 6 March 2006, Mr McNeill was dismissed for serious misconduct involving falsification of sick leave.

[5] Mr McNeill told me he considers this dismissal unfair and seeks reinstatement, lost earnings and compensation. He told me he does not think he did anything wrong because

all he did was go fishing whilst ill, which he believed was allowed. He suspects that the fact that he was a delegate was a factor in the way he was treated on this occasion because in that capacity he had confronted Mr Hunt over a range of issues.

[6] Mr Mitchell does not raise any major issues with the form of the respondent's inquiry into Mr McNeill's conduct. It is not asserted that the respondent omitted to inquire into relevant matters or that Mr McNeill was denied an opportunity to be heard. However Mr Mitchell does say that on the evidence gathered during the inquiry, it was not open to Mr Hunt to conclude that Mr McNeill had falsified a sick leave application. He says that Mr Hunt was influenced by a sense that he had been misled, but this was not supported by the information in front of him. He says that the conclusions were therefore flawed and the dismissal substantively unjustified.

[7] Mr Shaw for the respondent submits that *"the only real issue for the Authority to determine is whether a fair and reasonable employer would dismiss an employee in these circumstances. Given the significant evidence before the respondent when coming to this decision, it is submitted that on an objective basis, a fair and reasonable employer would dismiss..."*

Issues for determination

[8] The key issues for determination in this case are therefore:

- i. whether the respondent in this case was entitled to conclude that the applicant had misleadingly and/or fraudulently misused his sick leave, and if so,
- ii. whether the dismissal was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

(i) Was the respondent entitled to conclude that the applicant had misleadingly and/or fraudulently misused his sick leave?

[9] The allegation against Mr McNeill was that he had: *"falsified verbal applications for sick leave, in breach of company policy and [his] obligations under his collective employment agreement for rostered shifts...when [he] undertook a two day fishing trip."*

[10] Mr McNeill was suspended on 14 February. On 15 and 21 February meetings were conducted with him and his representative in order for the respondent to put its concerns to him for comment and for him to respond to information obtained through interviews with other staff who had been on the trip.

[11] On 23 February in a detailed three and a half page letter to Mr McNeill Mr Hunt set out his *"tentative conclusions"* that Mr McNeill had misused and falsified sick leave. He noted as relevant that Mr McNeill had requested and been given annual leave for a fishing trip on 24 and 25 January 2006 but worked those days after all when the trip was cancelled due to bad weather. The trip was rescheduled to 31 and 1 February. Mr McNeill did not apply for annual leave for those days but neither did he cancel his seat on the trip as had some of his workmates. In the end he rang in sick and then went on the trip. He did not talk to his Shift Manager about attending work and undertaking alternative duties. He had not seen a doctor but diagnosed himself and took unidentified over-the-counter medication which he claimed upset his stomach. Mr Hunt noted that one of the others on the trip had mentioned that Mr McNeill was taking medication but none gave any indication that Mr McNeill was suffering severe sickness at that time.

[12] He also noted that Mr McNeill had been made aware of his obligations relating to applications for leave. This was done through the provisions of the collective agreement, through company policies, and by means of a personal reminder in a letter to him dated 3 February 2004. In addition he noted that Mr McNeill had been warned, in November 2005, about taking unauthorised leave.

[13] At the end of the letter he summarised as follows:

"I have concluded on balance that:

- (a) While suspicious, I cannot discount the fact that you may have suffered hay fever on 30 and 31 January 2006, and that you may have taken medication from a yellow box for this. Further, this hay fever and the medication taken for it may have caused some upset to your stomach, so that you could not undertake your normal duties underground.*
- (b) I have concluded that despite the above, you should have consulted with your shift underground Manager and/or made yourself available to attend work to undertake alternative duties to your normal job. It is clear that if you could undertake a two day sea fishing trip (especially when you suffer from seasickness and hay fever medication affects your stomach), then you could have undertaken alternative duties at Solid Energy on 31 January 2006. Further to commit to a two day fishing trip from 31 January 2006 is a clear misuse of sick leave.*
- (c) I have concluded that you could not have known on 30 January 2006 (when you first called in sick and requested your friend [S] to contact Solid Energy advising that you were going to be sick also on [the next day]) that you would have been sick (or unable to carry out your normal duties) from 10.00pm [the next day] let alone whether you would have been able to undertake alternative duties on that day. It is my opinion that these actions indicate predetermination and confirms dishonesty, which leads me to have concerns with the trust and confidence that I can have in you as an employee."*

[14] The parties met again on 2 March in order for Mr McNeill and his representative to deliver his response to these tentative conclusions. On his behalf, Mr McNeill's representative confirmed that he considered the investigation to have been thorough. However, he said, Mr McNeill continued to say that he had been sick with hay fever and that the drugs he took for this caused side effects. He said he was entitled pursuant to the Holidays Act 2003 to three days off work as a result and that the question of light or alternative duties was not relevant. He denied pre-meditation and said that the fishing trip was just coincidental to the hay fever.

[15] On 6 March Mr Hunt advised Mr McNeill that his employment would be terminated. He confirmed this decision, and the reasons for it in a letter dated 6 March where he noted Mr McNeill's awareness of Solid Energy's processes for requesting sick leave (through the respondent's policies, the provisions of the collective agreement, the letter dated 3 February 2003 and the warning of November 2005.) He also noted that Mr McNeill could not have known in advance that he would be unfit for work for two days and that his actions in arranging for a friend to call in for him indicated predetermination.

[16] Mr Mitchell argues that Mr Hunt had accepted that Mr McNeill was sick when he said (in the letter of 23 February as quoted above) that he could not discount the possibility that Mr McNeill had hay fever. He says that once this had been accepted, what Mr McNeill did whilst on sick leave became his business only.

[17] At my investigation meeting, Mr Hunt explained that if all Mr McNeill had done was to ring in sick on the first day, and go to bed, he would have seen no grounds for concern. However he had concluded that there was an element of dishonesty in Mr McNeill's conduct in arranging for someone to ring in for him on the second day. He felt Mr McNeill could not have known on the first day how he would be on the second day. This conduct, coupled with Mr McNeill's prior history of being warned for going off fishing without permission, led him to feel he could no longer trust Mr McNeill. Finally, Mr Hunt said, Mr McNeill remained firm (right up to the dismissal) in the view that he had done nothing wrong. This Mr Hunt told me reinforced his belief that he could no longer have confidence in Mr McNeill.

Determination

[18] The tentative conclusions expressed in subparagraph (c) (quoted above) were reasonable ones to be drawn from the information available to Mr Hunt. I accept that the respondent was entitled to conclude that Mr McNeill misled it in arranging for a friend to

call in for him on the second day of his absence. At the time he asked her to do this neither he nor she knew how he would be the next day. He asked her to say something which he knew might prove to be false. Then he put himself out of phone range and made himself unavailable for work whatever happened. I conclude that these elements of Mr McNeill's conduct amounted to a misleading and/or fraudulent misuse of his sick leave.

Was the dismissal what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred?

[19] Both parties have referred me to the following provisions of the Holiday's Act 2003:

64 Employee must notify employer of intention to take leave

An employee who intends to take sick leave or bereavement leave must notify the employer of that intention-

- (a) *as early as possible before the employee is due to start work on the day that is intended to be taken as sick leave or bereavement leave..."*

And:

"68 Proof of sickness or injury

- (1) *An employer may require an employee to produce proof of sickness or injury for sick leave taken under section 65 if the sickness or injury that gave rise to the leave is for a period of 3 or more consecutive calendar days, whether or not the days would otherwise be working days for the employee.*
- (2) *Subsection (1) does not prevent an employer and employee from agreeing that the employee will produce proof of sickness or injury for sick leave provided to the employee in addition to the entitlement set out in section 65."*

[20] The collective agreement provides for unlimited sick leave although payment can be withheld if there are concerns about the authenticity of the leave. The following provisions apply:

"19.5 Sick/Domestic Leave

Solid Energy's general policy is that pay continues when employees need to be absent due to genuine illness or the illness of their partner or a dependent. Employees may be required to present a medical certificate. Where there are concerns about the authenticity, frequency, length or pattern of an employee's absences on such leave, Solid Energy may decide to decline the application and make an appropriate deduction from the employee's fortnightly pay.

Additionally, Solid Energy may, at its expense, require employees to undergo a medical examination by a doctor nominated by the Company.

Employees are required to advise Solid Energy before their normal start time on any day of absence.¹

The EPMU will assist the company in resolving an individual's poor level of attendance.

Sick/Domestic Leave is calculated at Base Rate and paid on the basis of the employee's normal rostered hours."

And:

"27 Code of Conduct – Schedule C

The following are the minimum requirements to be observed whilst employed by Solid Energy...

¹ It is not disputed that an exception is made where an employee is too ill to call, in which case the call may be made by a family member, however Mr McNeill does not suggest he was too ill to call.

27.1 Attendance

Employees are required to start work on time, to observe the proper times for breaks and to work until the scheduled time to cease work.

Employees not able to attend work for any reason must make all reasonable effort to advise Solid Energy before the scheduled start work time on each day of absence. Where deemed appropriate by Solid Energy, employees are required to comply with the procedures regarding time recording."

...

27.6 False Declarations

Wilfully making false declarations is not permitted.

...

FOR A SERIOUS BREACH OF THE CODE OF CONDUCT THE EMPLOYEE(S) CONCERNED WILL BE LIABLE TO DISMISSAL WITHOUT NOTICE"

Determination

[21] Neither the applicant nor any of the company witnesses was able to tell me exactly how much sick leave Mr McNeill had taken although it was common ground that he had had relatively recent absences, including a period of sick leave just prior to Christmas 2005. At that time his doctor had authorised an absence of 12 days although he did not use quite all of that time. On balance I have concluded that the absences which led to this employment relationship problem were in excess of the statutory entitlement of 5 days per annum. For that reason they fall to be governed by the provisions of the employment agreement rather than the Holidays Act 2003.

[22] Mr McNeill's conduct was a misuse of the sick leave provisions in clause 19.5 and like any such misuse it adversely affected his attendance. He was absent without leave for two days in November 2005, and made himself unavailable for work on the second missed shift in this case. A total of three days work was lost in three months.

[23] Such conduct may be addressed through the provisions of Clause 19.5 which set out that "*Where there are concerns about the authenticity, frequency, length or pattern of an employee's absences on such leave, Solid Energy may decline the application and make an appropriate deduction from the employee's fortnightly pay.*" It also requires union and employer to work together "*in resolving an individual's poor level of attendance.*" Pursuant to clause 19, therefore, poor attendance resulting from misuse of the sick leave provisions is in the first instance to be treated as something less than serious misconduct, and addressed as set out there.

[24] There is no evidence that the company worked with the union or even just with Mr McNeill to resolve his poor level of attendance prior to his dismissal. The respondent has argued that Mr McNeill's actions went beyond what could be addressed by the remedial mechanisms of clause 19.5. It says that he misled his employer when he arranged, ahead of time, for someone to call in sick for him, and because of this his conduct amounted to serious misconduct. That is to say, the element of deception elevated the seriousness of his conduct to "*a false declaration*" (a breach of clause 27.6) rather than just "*a poor level of attendance*" pursuant to clause 19.5.

[25] I do not accept this submission. There is always an element of deception in any misuse of sick leave since it involves the taking of leave when someone is not ill, or at least not ill enough to justify a day off work. The collective agreement contains specific procedures at clause 19 to deal with such misuse. Misuse cannot be elevated to the level of a "*serious breach of the Code of Conduct*" without first exhausting what is available there.

[26] The employer here did not apply the relevant provisions of clause 19. It failed to use agreed procedures. A fair and reasonable employer would not dismiss until it had done so.

In such circumstances it cannot be said that this dismissal was justified. The essential test in s.103 has not been met. I conclude that Mr McNeill was unjustifiably dismissed.

Remedies and Contributory Conduct.

[27] Although this dismissal was unjustified Mr McNeill's contribution to the situation that gave rise to it was at the higher end of the scale. Given the open-ended nature of the sick leave provisions contained in this collective agreement, it is reasonable for the employer to expect employees to adhere to procedures for notification of sickness and applications for leave. Anything less would leave the provision of unlimited sick leave open to abuse. I accept that in this context, and in the context of a prior warning for unauthorised leave, Mr McNeill's conduct would be of particular concern to Mr Hunt.

[28] In addition, when asked to account for his behaviour, Mr McNeill persisted in the view that he had done nothing wrong. After questioning him about this myself I was not surprised that Mr Hunt felt that his trust in Mr McNeill had been seriously compromised. Mr McNeill took an extraordinarily cavalier approach to his obligation to meet his side of the employment bargain, seeming almost to see it as an imposition to be required to attend work if it did not suit him. In such circumstances, I consider that reinstatement would be totally impracticable, and further consider that remedies should be reduced by 50%.

[29] Turning first to compensation for hurt and humiliation I note that I heard credible evidence that Mr McNeill took his dismissal very hard. Partly because of his conviction that he had done no wrong he found it a great shock. He had worked at the mine for many years and his co-workers were his fishing companions and his community. I consider an appropriate level of compensation would have been \$10,000.00 however on the basis of contributory conduct this is reduced to \$5,000.00.

[30] As for lost earnings, Mr McNeill told me that for the first four months after he left the mine he was too demoralised and depressed to look for work. During this time he earned \$860.00 from casual work offered to him by a friend and this eventually turned into a full time job. He did not however provide medical or other evidence to support the assertion that he was unable to mitigate his loss and I am not convinced that in the current labour market he needed to be unemployed for as long as he was. I am not prepared to award four months lost earnings. Instead I award three months lost earnings reduced on the basis of contributory conduct to give an award of six weeks wages.

[31] At the investigation meeting I was not provided with payslips wage records or other evidence which would enable me to quantify Mr McNeill's lost earnings but the parties assured me that in the event of an order for lost earnings, they would be able to resolve that issue. I leave it to them to calculate precisely what wages Mr McNeill is owed.

Costs

[32] I leave it to the parties also to discuss this issue. In the event it cannot be resolved any application for costs must be made within 28 days of the date of this determination.

Summary of Orders

[33] The respondent is ordered to pay to Mr McNeill the following sums:

- i. \$5,000.00 compensation pursuant to s.123(c) (i), and**
- ii. Six weeks lost wages.**

