

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 255/09
5138988

BETWEEN DAVID MERCER
 Applicant

AND MAORI TELEVISION
 SERVICE
 Respondent

Member of Authority: Robin Arthur

Representatives: Marcus Mitchell Paewai for Applicant
 Blair Edwards for Respondent

Investigation Meeting: 17 February and 5 March 2009

Determination: 30 July 2009

DETERMINATION OF THE AUTHORITY

[1] The Authority has investigated the dismissal of David Mercer by Maori Television Service (MTS) on 30 June 2008. An application for interim reinstatement was declined by Authority determination AA423/08 (12 December 2008).

[2] Mr Mercer worked as a camera operator for MTS from February 2004. Between March 2004 and December 2007 he was formally disciplined on a number of occasions for repeated lateness and an incident involving misuse of an MTS vehicle. He received a final written warning in September 2007.

[3] In December 2007 Mr Mercer and MTS representatives attended mediation with a Department of Labour mediator. They settled issues between them at that time on the basis recorded in a certified, written agreement. The agreement confirmed his final written warning and provided for six-weekly performance review assessments for the following eight months. Mr Mercer was required to advise his managers of

any absence or lateness by no later than one hour before his shift was due to start. Dismissal was identified as an outcome if he did not comply with the agreement.

[4] In January 2008 Mr Mercer attended a *hohou rongu* meeting – a form of internal mediation used within MTS. At this meeting producers and managers spoke of the effect Mr Mercer’s timekeeping issues had on their work. Shortly after Mr Mercer was also provided with a written review form setting out nine performance issues and the expectation associated with each issue. He says he accepted the identified expectations in good faith.

[5] A review meeting held in February identified that Mr Mercer was meeting those expectations. By a second meeting, in April, he was identified as meeting all but two expectations which concerned communication and positive feedback.

[6] A third review meeting, on 16 June 2008, concluded that Mr Mercer’s performance, measured against each of the nine expectations, was either “*unsatisfactory*” or “*not achieved*”.

[7] On 27 June Mr Mercer, accompanied by his representative at that time, attended a disciplinary meeting with MTS Operations Manager Jason Shazell and human resources advisor Gwen Arago-Kemp. He was asked to respond to four allegations regarding lateness or absence at work. His responses were:

- (i) he was late to work by 30 minutes on 26 May 2008 because he was delayed by an accident on the motorway; and
- (ii) he was late to work by 1 hour and 45 minutes on 27 May 2008 because he made a mistake reading his roster; and
- (iii) he called in sick only a few minutes before his shift was due to start on 13 June 2008 because he had a “guts ache” and had been unsure earlier that morning whether he might be well enough to get to work; and
- (iv) he was not late to work by 15 minutes on 16 June 2008.

[8] On 30 June Mr Shazell met again with Mr Mercer and dismissed him because (i) he had failed to meet obligations under the earlier settlement agreement and (ii) his performance as measured through the review process had “*fallen to below the satisfactory level required*”.

[9] In bringing his claim to the Authority Mr Mercer argued that his dismissal was unjustified because:

- (i) The eight-month review period contemplated in the December 2007 settlement agreement had not finished; and
- (ii) He was not given sufficient opportunity and assistance to improve his performance after the unsatisfactory 16 June performance review; and
- (iii) The dismissal decision was pre-determined as evidenced by alleged comments from a senior MTS manager that he was “*just waiting for an excuse to fire [Mr Mercer]*”; and
- (iv) There were procedural flaws in the notification and conduct of investigation and disciplinary meetings called by MTS.
- (v) The alleged instances of lateness were not serious enough to warrant dismissal.

[10] He sought remedies of reinstatement, lost wages, compensation for humiliation and loss of mana, and a contribution to his costs for bringing his claim.

Issues

[11] The general issue for determination is whether the decision of MTS to dismiss Mr Mercer – and how it went about making that decision – meets the statutory test of justification set out at s103A of the Employment Relations Act 2000 (the Act). It requires determination of the following specific issues:

- (i) Was MTS required to wait for the whole eight month review period before being entitled to consider dismiss Mr Mercer?
- (ii) Was the decision pre-determined?
- (iii) Was the notification and conduct of the disciplinary process flawed?
- (iv) Were the alleged instances sufficiently serious to warrant dismissal?

The investigation

[12] For the purposes of this investigation I considered written witness statements from Mr Mercer and the following MTS personnel: Mr Shazell, Ms Arago-Kemp, senior camera operator Bretton Richards, facilities manager Maawhi Torrance, and

general manager Barry Russ. MTS lodged statements from six other employees but I did not find it necessary to interview them or refer to their statements in preparing this determination.

[13] During an investigation held over two days the witnesses named above attended and, under oath or affirmation, answered questions about their statements. Further sworn oral evidence was also heard from sound operator Takirau Williams and technical director Ariki Spooner. The parties' representatives had the opportunity to ask additional questions of each witness and make closing submissions.

Determination

[14] For the reasons set out below I find the decision of MTS to dismiss Mr Mercer, and the way it was made, was what a fair and reasonable employer would have done in all the circumstances at the time it was made. The decision was not unjustified. Mr Mercer's personal grievance application is dismissed.

No requirement to wait entire potential performance management period

[15] Mr Mercer submits that having been put, as part of a mediated settlement agreement, on a performance management programme for eight months he could not – expect for some serious misconduct such as drunkenness or violence at work – be dismissed until the end of that period.

[16] I prefer MTS's submission that it would be illogical – in the circumstances of Mr Mercer's conduct having required a performance management programme and as agreed in the mediated settlement – for him to have what amounted to an employment guarantee throughout that period even where his conduct fell below expected levels. Mr Mercer did not have, as he seemed to believe, eight months to reach satisfactory levels. Rather, as Mr Shazell put it in his oral evidence, Mr Mercer had to "*stay above the bar*" for the entire period.

No pre-determination

[17] Mr Mercer gave evidence that Mr Russ had "*told me in person that he was just*

waiting for an excuse to fire me". This comment was allegedly made during a meeting Mr Mercer sought and obtained with Mr Russ to discuss a concern over being rostered for days off on the Easter statutory holidays.

[18] I do not accept such a blunt threat was made by this experienced senior manager. Rather I consider the account of Mr Russ as being more likely to accurately reflect what was said in that meeting in April 2008. Mr Russ says that during the discussion about his roster Mr Mercer said he felt singled out for special negative treatment and questioned whether MTS was meeting the values of its kaupapa. Mr Russ accepts he was annoyed by that criticism and asked Mr Mercer to consider his own values as exhibited in the issues with his attendance.

[19] Mr Russ says that Mr Mercer said words to the effect that MTS managers were *"out to get him"*. He assured Mr Mercer that there was no conspiracy against him and urged Mr Mercer to review his work ethic, attendance and performance.

[20] I also accept the evidence of Mr Russ that Mr Shazell told him in late June 2008 of the decision to dismiss Mr Mercer but that Mr Russ was not required to approve or make that decision. The decision was made by Mr Shazell as the operational manager.

No significant flaws in disciplinary notice and conduct

[21] Mr Mercer has identified what he regards as significant flaws in how MTS conducted its performance review, disciplinary process and subsequent dismissal of him. I have summarised those alleged flaws under five headings following below. Having reviewed the detailed documentary and oral evidence on each aspect, I find no flaws of sufficient significance to render the process followed by MTS as unjustified. The reasons for this finding are given under the heading for each alleged flaw:

(i) not being told in advance of the 16 June performance review meeting which amounted in fact to a disciplinary meeting

[22] I accept as more likely than not Mr Shazell's evidence that Mr Mercer was told on 9 June that a third performance review meeting would be held on 16 June.

[23] The meeting was plainly a performance review meeting of a type held twice before (in February and April). Because the information and explanations given in the conversation during that meeting subsequently led to MTS formally calling Mr Mercer to a disciplinary meeting (for 26 June but held on 27 June) did not make the earlier performance meeting disciplinary in nature.

(ii) being suspended without his agreement on 26 June by being replaced for his shift on that day in order to attend the disciplinary meeting

[24] Having made arrangements for Mr Mercer to attend a disciplinary meeting on the afternoon of 26 June, it was not unreasonable for Mr Shazell to make administrative arrangements on the previous day for someone else to work Mr Mercer's shift on the evening of 26 June. Mr Mercer was not suspended from his duties, rather his duty was to attend the meeting required by his employer instead of attending a studio shift and his pay was unaffected. The fact that meeting did not go ahead on 26 June was not the fault of MTS. It was rescheduled to 27 June after Mr Mercer had not turned up at the scheduled time on 26 June and, when rung, said he would not get there before a further half-an-hour. Mr Mercer's representative had arrived for the time scheduled for the meeting on 26 June and could not stay due to another commitment elsewhere.

(iii) MTS not checking for security camera footage to confirm his time of arrival on the premises on 16 June

[25] Mr Mercer says MTS should have taken steps to check security camera footage to establish whether or not he was late arriving at work on 16 June as alleged by Ms Arago-Kemp during the performance review meeting held with him later that day.

[26] Following the performance review meeting Mr Mercer talked to an MTS security officer about security camera footage. He was told that the security cameras were not operating for the period between 6am and 10am on 16 June.

[27] Mr Mercer promptly conveyed that information to Mr Shazell who accepted

what he was told by Mr Mercer and made no further steps to check if such footage was in fact available.

[28] No valid criticism can be made of Mr Shazell for accepting Mr Mercer's word – rather it demonstrates fair-mindedness. There was also no evidence that what Mr Mercer reported being told about the lack of security footage was incorrect.

(iv) MTS not considering and choosing alternatives to dismissal

[29] I accept Mr Shazell's evidence that the prospect of alternatives to dismissal were, in fact, considered and discussed by him and Ms Arago-Kemp before the decision to dismiss Mr Mercer was made.

(v) giving Mr Mercer half-an-hour to leave the building following his dismissal was heavy-handed

[30] MTS was entitled to make arrangements for Mr Mercer to leave the workplace following his dismissal and there is no evidence that he was treated in what Ms Arago-Kemp called a "*militaristic fashion*". I accept Mr Shazell's evidence that Mr Mercer was not forbidden to speak to other staff but he was not allowed to send any emails. While Mr Mercer says he could not say goodbye to former workmates that day, there was nothing to stop him contacting them out of work hours if he wanted to and there is evidence that he did do so.

Lateness incidents sufficiently serious to warrant dismissal

[31] The record of settlement reached in December 2007 required Mr Mercer to advise either Mr Shazell or Ms Torrance at least one hour before his start time if he was going to be absent or late that day. His agreed performance review form included the following expectation on timekeeping:

No examples of lateness and provide [Ms Torrance] or [Mr Shazell] with communication in advance if lateness is going to occur. Arrive 15 minutes before shift to prep for the day. ...

[32] A further agreed term was that there be "*no further incidences of misconduct*

as set out in the code of conduct and your employment agreement". That code included the following example of misconduct: *"Unauthorised absence from duty without proper notice and without sufficient explanation."*

[33] Mr Mercer asserts the specific incidents of lateness identified by MTS as justifying its decision to dismiss him were isolated and explicable incidents. However I find that MTS was justified, after considering Mr Mercer's explanations, in reaching the decision to dismiss him in the circumstances – specifically that he was on a final written warning and had breached the performance expectations arising from settlement agreement reached in mediation.

[34] The evidence of Mr Spooner and Mr Williams suggested some disparity of treatment between staff. They spoke of some incidents of lateness by other staff (including themselves) not attracting such severe consequences. However I find this did not amount to an unjustified disparity. None of the examples they gave related to an employee on a final written warning and working under a performance review programme. MTS was entitled to hold Mr Mercer to the standards agreed in the earlier mediated settlement.

[35] I have concluded that Mr Shazell's decision to dismiss Mr Mercer, made after a disciplinary inquiry focussing on four specific incidents, was one that a fair and reasonable employer would have reached in all the circumstances at the time. My conclusion relies on the following findings about those four incidents.

(i) 26 May 2008 (delay by motorway accident)

[36] Mr Shazell accepted Mr Mercer's explanation on this particular incident of lateness. He accepted that the delay was from a factor beyond Mr Mercer's control and that Mr Mercer had promptly phoned in to work to advise of the delay. It was, properly, not relied on as justifying his dismissal.

(ii) 27 May 2008 (mistake reading roster)

[37] Mr Mercer said he had misread the roster for that day – believing he was due to start later to work on a different programme – because he was tired from working

on the seventh straight day in a ten-day roster. While at first blush this seems a situation created by MTS's work demands, it emerged in evidence that Mr Mercer was working that roster because it was necessary to accommodate a request he had made for certain days of leave. The responsibility to correctly identify his times and days of work remained his and I accept Mr Shazell was not unreasonable in rejecting Mr Mercer's explanation.

(iii) 13 June 2008 (late sick call)

[38] Mr Mercer says that he delayed calling in sick on this day – leaving a voice mail message at 7.56 am when he was due to start work at 8.15am – because he had thought until that point that he might have been able to make it to work.

[39] He says he was suffering vomiting and diarrhoea, probably from food that he had eaten at an album launch party he attended the previous night and at which he was helping with technical requirements.

[40] I accept Mr Shazell was entitled to come to the conclusion that he did not believe or accept Mr Mercer's explanation. As Mr Shazell said in his evidence, "*it looked dodgy*" that Mr Mercer claimed to be sick after being out so late. Mr Mercer confirmed that he had not returned home until after 2am that morning when he was due to be at work by 8.15am. In any event the time of his telephone call was well outside the required standard of at least one hour before. I note too that Mr Mercer's home was around one hour's drive (in Auckland morning traffic) away from the MTS workplace. He would have had to make the decision about trying to get to work on time by around 7.15am – and he did not actually call until just before 8am.

(iv) 16 June 2008 (disputed lateness)

[41] Mr Mercer denies he arrived late to work on this day. He says he arrived at a nearby carpark building around 8.50am in time for his 9am start. He then walked to the MTS offices with two women who were also visiting the premises and entered the building at the same time as them. He then went to the studio where he was due to work and "*peeked in*" seeing a colleague who was at work there and then went elsewhere in the building.

[42] He criticises MTS for relying on the evidence of Ms Arago-Kemp that she had walked into the building behind him that day and had noted the time as being 9.15am. He says MTS should also have checked his time of arrival with the two women with whom he had walked into the building.

[43] Mr Shazell was entitled to rely on Ms Arago-Kemp's information about the time that she arrived at work and when she saw Mr Mercer. She was due to be involved in a performance review meeting with Mr Mercer that very day and had the issues around his punctuality in mind. Her evidence around times on that day is supported by an email she sent from her office at 9.21am – after having taken the lift from the reception area and checked Mr Mercer's roster – some six minutes after she says she arrived at work. It reads: "*I have just arrived at work, 5 minutes ago at 9.15am this morning. David was walking in with me.*"

[44] This conclusion is also supported by the evidence of Mr Richards, given for the first time at the Authority's investigation meeting and not told to Mr Shazell before Mr Mercer's dismissal. Mr Richards said he had checked the studio at 9am and Mr Mercer was not there as scheduled. Mr Richards had left the other camera operator there and went to send a text to Mr Mercer before going "*out the back*" of the premises to have a cigarette. Mr Mercer joined him there around 10 minutes later.

Costs

[45] The parties are encouraged to agree any issue of costs between themselves. If they are not able to do so and the parties require the Authority to determine costs between them, MTS may lodge a memorandum as to costs within 28 days of the date of this determination. Mr Mercer may then lodge a reply memorandum as to costs within 14 days of MTS lodging its memorandum. No application will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority