

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 39  
5292148

BETWEEN ANTHONY MURRELL  
Applicant

AND CITY FITNESS GROUP  
LIMITED  
Respondent

Member of Authority: G J Wood

Representatives: M D Fennesy for the Applicant  
A D N Gallagher for the Respondent

Investigation Meeting: 29 January 2013 at Palmerston North

Submissions Received: By 13 February 2013

Determination: 26 March 2013

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] This employment relationship problem is about whether or not Mr Murrell was unjustifiably disadvantaged by the actions of the respondent (City Fitness) in determining to place him on special leave prior to a disciplinary meeting, and subsequently suspending him for the duration of the disciplinary process.

[2] Mr Murrell has argued that he was placed on special leave, a form of suspension, without consultation and that the decision to suspend him and confirm that suspension later was substantively unjustified. City Fitness deny Mr Murrell's claims and consider its actions were to protect City Fitness from the potential of being brought into disrupt.

[3] The issues for determination are:

- Were the actions of City Fitness in placing Mr Murrell on special leave a form of suspension?
- If so, was that action unjustified? and
- Was the action of City Fitness in suspending Mr Murrell justifiable on substantive grounds?

### **Factual discussion**

[4] The facts of this case were set out in 2012 NZERA Wellington 127 and need not be repeated. Mr Murrell was a floor consultant/personal trainer for City Fitness between July 2007 and December 2009. By the end of that period Mr Jason Burton-Brown was the General Manager of the Palmerston North office of City Fitness.

[5] I have accepted Mr Burton-Brown's evidence over that of Mr Murrell in the limited areas where there is a conflict, mainly because:

- Mr Burton-Brown's evidence that he was trying to keep matters as low key as possible with Mr Murrell makes sense from both parties' point of view;
- Mr Burton-Brown was very forthcoming as a witness, admitting to the disadvantage of City Fitness that the decision to place Mr Murrell on special leave was in part predetermined; and
- Mr Burton-Brown is no longer employed by City Fitness.

That is not to say that Mr Murrell's evidence was in any way unreliable - it is simply a matter of determining what happened on the balance of probabilities, i.e. what is more likely than not.

[6] In or around 11 December 2009 Mr Burton-Brown was first informed that Mr Murrell had appeared in Court facing serious criminal charges. In fact these criminal charges had been laid in late November. This was followed soon thereafter by Mr Murrell's appearance on another criminal charge, this time of a minor nature, which

City Fitness had not been told by him about either, it not being discovered until much later than 11 December.

[7] Mr Burton-Brown took advice, resulting in the preparation of a letter dated 11 December, but not given to Mr Murrell until 12 December. Mr Burton-Brown rang Mr Murrell late on 11 December asking for him to call back. Given that Mr Murrell had left work and was on his way out he decided he would leave the call back until the next morning when he was at work.

[8] City Fitness has set out in its letter of 11 December that it was concerned that Mr Murrell had not disclosed the existence of the criminal charges or the nature of them, and that those charges and the quite public nature of the criminal proceedings had the potential to bring City Fitness into disrepute. It was also concerned about health and safety issues.

[9] It was decided to place Mr Murrell on special leave pending a disciplinary investigation three days later, where amongst other things the issue of suspension would be discussed, if the charges were admitted to by him.

[10] Mr Burton-Brown relied on legal advice and conducted his preliminary process accordingly. However I note that the parties' employment agreement provided at clause 2.7:

*The employer's discipline and dismissal procedures are set out in the company's policies and procedures manual. All disciplinary and dismissal matters will be dealt with fairly, promptly, consistently and in conformity with the prescribed procedures.*

[11] Unfortunately these prescribed procedures did not appear to exist, which no doubt would have caused both parties some difficulties during the course of the disciplinary investigation.

[12] Mr Burton-Brown took Mr Murrell into his office at the end of a training session run by Mr Murrell on 12 December. Mr Burton-Brown told Mr Murrell that he believed that he had been charged with a serious criminal offence.

[13] Mr Murrell wanted to know where Mr Burton-Brown had heard this information (as there had been no publicity about him being charged). Mr Murrell had been informed by his criminal lawyer that he was not to talk to anyone about the

case as it would not be to his advantage. However Mr Murrell didn't tell City Fitness about this advice. Instead he initially denied the allegation.

[14] After Mr Burton-Brown informed Mr Murrell that if his information was wrong then he apologised, Mr Murrell informed him that he had in fact been charged, but that he was innocent and would be defending the charges vigorously.

[15] Mr Murrell was subsequently found not guilty of the charges at issue. He did however plead guilty to a separate minor charge, resulting in a moderate fine. He never informed City Fitness of even the existence of this charge at any point.

[16] After setting up the disciplinary meeting Mr Burton-Brown told Mr Murrell that he intended to place him on special leave during which time he would not be able to attend the workplace, but would still be paid. Mr Murrell objected to this, believing that there was no reason he could not continue to work. Mr Burton-Brown made it clear that he was being required to leave and that he should take his possessions with him. At that point Mr Murrell was given a copy of the letter dated 11 December, which highlighted the seriousness with which City Fitness was taking the matter and its reasons. Mr Burton-Brown also considered that special leave on pay would assist both Mr Murrell (who could then prepare for the meeting untroubled with work obligations) and City Fitness, which wanted time to consider matters and was concerned about its business reputation if word got out about the charges faced by Mr Murrell.

[17] Mr Murrell immediately obtained a representative, who attended the disciplinary meeting with him. At the meeting there was discussion about the suspension, as well as later matters not relevant to this investigation. On Mr Murrell's behalf it was submitted that:

- Mr Murrell was under no obligation to inform City Fitness about the charges as they occurred out of work and did not involve City Fitness;
- There had been no publicity on the charges and therefore no reason to connect City Fitness with them; and
- The company had health and safety obligations to Mr Murrell which were not being met by his suspension.

[18] At the meeting City Fitness made it clear that its concerns were not about Mr Murrell's guilt or innocence (in fact Mr Murrell was indeed found not guilty of the serious charges) but that the existence of the charges had potentially major implications for City Fitness, which it believed could bring it into disrepute if known, even though anyone charged with an offence is entitled to the presumption of innocence.

[19] City Fitness considered that part of Mr Murrell's duty of good faith was to keep it informed of important matters such as this, which could affect its business. Mr Murrell through his representative maintained that he had no duty to provide information about matters outside of work to his employer. No undertaking was given by Mr Murrell that he would keep City Fitness informed of the criminal charges he was facing, consistent with his failure to inform City Fitness of the subsequent minor charge.

[20] After the meeting Mr Murrell's then representative raised a personal grievance for unjustified action in regard to the suspension, claiming it was substantively and procedurally unjustified because he was required to take special leave on pay without being consulted over it, which was effectively a suspension.

[21] City Fitness determined to continue the suspension, for the reasons given above, for the full period of its investigation, which continued until 23 December.

[22] Particularly galling for Mr Murrell was that despite promises from City Fitness he was not fully paid for the period of his suspension, which has taken over three years to remedy and then only through the Authority's investigatory process, which is consistent with its payment of holiday pay three months late. The parties have however agreed on payment for that default on the part of City Fitness in the sum of \$65.25 gross. Leave is reserved to address this issue should it not be paid promptly.

[23] The parties have remained unable to resolve the issue over the justification for the special leave and suspension, which lasted for a total of 11 days. These matters remain unresolved despite mediation and it therefore falls to the Authority to make a determination.

## The law

[24] In *Singh v. Sherildee Holdings Ltd Trading as New World Opotiki* (unreported, Couch J, AC53/05, 22 September 2005) it was held at para.[91] that:

*In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.*

[25] It is clear that where an employer who seeks to place an employee on special leave against their wishes then this is in reality a suspension (*Faapito v. Chief Executive of the Department of Corrections* [2012] NZEmpC 206, at para. [92]). At para.[99] the Court also noted that:

*The initial period of suspension was imposed to enable Ms Faapito to prepare a response to serious allegations against her. It provided her with additional paid time away from work to do so more comprehensively than if she had had to be at work as well.*

[26] In determining whether any suspension was an unjustifiable action to an employee's disadvantage the Authority must objectively consider whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the suspension occurred.

## Determination

[27] Mr Murrell was placed on special leave without his agreement. I do not accept that this placement on paid leave was pre-determined, because if Mr Murrell had satisfied Mr Burton-Brown that he was not facing serious criminal charges then he would not have been placed on this special leave.

[28] The purpose of the special leave was to allow Mr Murrell to prepare for a meeting to discuss suspension, as well as to allow City Fitness to do the same. Mr Murrell was right to say that the charges did not involve anything related to work, however I conclude that a fair and reasonable employer would have been sufficiently concerned about its reputation and risks to it should its customers find out about the

charges faced by Mr Murrell, and that for the short period of three days both parties gained a benefit.

[29] At the meeting on 12 December, Mr Burton-Brown declined to tell Mr Murrell who had told him about the charges. There is no unjustifiable action here. That issue is not relevant to Mr Murrell's employment. The fact was that he was facing serious criminal charges and it did not really matter how City Fitness came to learn of this as no non-publication orders were in existence.

[30] Finally, given the short period of time of the special leave, the alternative to suspension simply would not have been as useful to both parties. City Fitness did have to make a decision quickly, given the information they had just received, and did so in a way that was fair to both parties. City Fitness' decision on special leave was therefore what a fair and reasonable employer would have done in all the circumstances.

[31] The meeting on 15 December was Mr Murrell's opportunity to formally make submissions as to why he should not be suspended during the course of the investigatory process, which lasted for another eight days. City Fitness had three legitimate concerns about Mr Murrell's behaviour that needed to be addressed should there not be a suspension. The first related to his duty to be responsive and communicative in order to maintain a productive employment relationship between the parties. Mr Murrell was unwilling to provide City Fitness with information about the charges that he was facing and the trial process that was to follow, on the grounds that it was none of City Fitness's business. Mr Murrell was naive to argue that, because the potential publicity involving a criminal trial could have impacted negatively on City Fitness as his employer. Mr Murrell's response gave City Fitness no comfort that he would be co-operative in informing it about the criminal trial. It was entitled at the very minimum to know about the progress of the trial – for instance it would have been required to provide cover for Mr Murrell during the trial. Nor would it have meant he put himself at any more risk at trial – which was no doubt the reason his criminal lawyer advised him not to talk to anyone about the case.

[32] Second, City Fitness was concerned about the impact on its reputation should members become aware of the charges being faced by Mr Murrell. I accept that such publicity could have negatively impacted on City Fitness' business.

[33] City Fitness was also concerned about whether it needed to more closely supervise Mr Murrell at work. However, I am satisfied that Mr Murrell's suggestions that such issues could be dealt with, including whether any supervision was needed, would have been accepted by a fair and reasonable employer. However, City Fitness had two good grounds, set out above, for continuing Mr Murrell's suspension between 15 and 23 December, while it investigated matters. I conclude that these grounds are sufficient that a fair and reasonable employer would have continued Mr Murrell's suspension during this period.

[34] It therefore follows that Mr Murrell's claims must be dismissed.

### **Costs**

[35] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**