

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 518
5343123

BETWEEN ROBIN MURU
 Applicant

A N D AUCKLAND COUNCIL
 Respondent

Member of Authority: James Crichton

Representatives: Stuart Ramsay, Counsel for Applicant
 André Lubbe, Counsel for Respondent

Investigation Meeting: 7 December 2012 and 23 March 2013 at Auckland

Date of Determination: 14 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Muru) alleges that he was unjustifiably dismissed from his employment by the respondent (Auckland Council). Auckland Council resist Mr Muru's allegation.

[2] The statement of problem was filed in the Authority on 17 February 2012, statement in reply on 9 March 2012 and after an unsuccessful mediation, the matter was set down for a telephone conference with the Authority.

[3] That took place on 18 April 2012 and an investigation meeting was set down for 12 July 2012. That date was vacated because of the unavailability of two witnesses for the Council and a new date of 3 August 2012 set.

[4] That fixture was also adjourned this time at the request of the applicant's representative and a fresh date allocated of 7 December 2012. In the result, Mr Muru

did not make himself available for that date but because of the continuing delays in getting the matter heard, the Authority felt obliged to proceed and by agreement with the parties, the evidence of the Council's witnesses was taken. A date was eventually scheduled for Mr Muru's evidence to be taken and this happened on 25 March 2013.

[5] That portion of the Authority's investigation was also adjourned without conclusion because of claims made by Mr Muru that he had called his supervisor during the period in dispute. Because it was not possible to ascertain whether such a call had been made from the evidence then available, the Authority was persuaded to adjourn the matter to enable the parties to access the telephone records available to ascertain whether in fact Mr Muru had called his supervisor.

[6] That process took almost another five months and culminated in a reconciliation schedule prepared by the Auckland Council which analysed the telephone records available.

[7] In the absence of any request for the investigation meeting to be reopened for any purpose, the Authority timetabled closing submissions and the matter now falls for determination by the Authority.

[8] Mr Muru commenced his employment with the Auckland Council on 1 July 2010 and was dismissed from the employment on 2 December 2010. Previously, Mr Muru had worked for many years for another employer doing the same work as a night worker at Auckland International Airport. His role principally involved driving a sweeper truck including maintaining the airport grounds and stand areas clear of debris so that aircraft could arrive and depart safely.

[9] Mr Muru was rostered to work on Saturday 13 November 2010 commencing work at 10.30pm and working through until 7am the following morning.

[10] At the commencement of his shift, Mr Muru received a call on his radio telephone from what is called the Apron Tower requesting that he remove loose material air side which could impact on aircraft movements. Mr Muru undertook to do that but did not.

[11] There were then various attempts by the Apron Tower to contact Mr Muru without success. An Apron Tower operator even physically went looking for Mr Muru but was unable to find him. Mr Muru's sweeper truck was found but there was

nobody with it. Because the swirling litter had not been removed, an aircraft was prevented from taxiing over the area and had to be towed. This resulted in a serious complaint to the Auckland Council from Auckland International Airport Limited.

[12] Auckland Council's manager of the airport business, Mr Darryn Commerer, having received the complaint from the airport, raised the matter with Mr Muru's immediate supervisor, Mr Alf Motu. Mr Motu who was on standby overnight but not contacted, was unaware of any difficulty. Mr Motu undertook to contact Mr Muru who was the operator on duty overnight.

[13] As a consequence of that contact, Mr Muru contacted Mr Commerer directly, confirmed that he had received the request from the Apron Tower but had not attended to it because it was too difficult to do.

[14] In that conversation, Mr Muru denied receiving follow up calls from the Apron Tower and Mr Commerer's evidence is that Mr Muru told him that he (Mr Muru) was picking up litter during the night, that is, that he was working as expected. Mr Muru said that he had his company cell phone with him. Mr Commerer indicated that he would need to have a further formal discussion with Mr Muru in order to formulate a response to the airport in relation to the complaint.

[15] That discussion took place on 18 November 2010 between Mr Muru, Mr Commerer and Mr Alan Pope who was the day supervisor. In this discussion, it is common ground that Mr Muru indicated at the outset that he wanted to be "up front and honest" and that he had sat watching a rugby league game, some golf, and an All Blacks game back to back for some six hours on a television set located in a part of the airport which was not served by Auckland Council's contract.

[16] Mr Muru also admitted that the reason he could not be contacted by Apron Tower throughout the night was because he had left his radio telephone in the sweeper truck prior to going to watch television.

[17] With those revelations having been made, the Auckland Council staff immediately terminated the meeting and indicated to Mr Muru that his admissions constituted potentially serious breaches of his employment agreement and that there would need to be a disciplinary process undertaken which might result in disciplinary action against him.

[18] There were disciplinary meetings held between the parties on 1 December 2010 and on 2 December 2010. At the first meeting, on 1 December 2010, Mr Muru claimed for the first time that the battery was flat in the sweeper truck that he normally used but that he took no steps to either remedy the defect or use an alternative vehicle.

[19] Subsequently, Mr Muru was dismissed from the Council's service and a personal grievance was filed on Mr Muru's behalf.

[20] The matter was pursued by Mr Muru through his Union after the dismissal took effect and there was then a lengthy gap before the present proceedings were filed in the Authority.

Issues

[21] It will be convenient if the Authority evaluates the following issues:

- (a) What happened on shift?
- (b) What did Mr Muru tell the Council afterwards?
- (c) Was it open to the Council to dismiss?

What happened on shift?

[22] The Authority is satisfied on the evidence it heard that in an eight hour shift commencing at 10.30pm on 13 November 2010, Mr Muru spent approximately six hours watching television while completely un-accessible to his employer's client and that he subsequently claimed payment for the totality of the hours that he was in attendance on that shift, as if he had been working.

[23] It is common ground that he was requested to clear an area of air side hard standing to facilitate aircraft movements and that he did not do that. Although he received the request and acknowledged as much to his employer, he neither actioned the request for service nor told the airport authorities that he was unable to provide the service nor indeed responded to them in any way.

[24] Nor is the evidence strong that Mr Muru, as he claimed, took steps to notify his employer of the alleged difficulties that he had in fulfilling his role that night. Mr Muru says that he rang Mr Motu, his supervisor. Mr Motu was on standby that

night. Mr Motu told the Auckland Council that he did not hear from Mr Muru and while the Authority did not hear from Mr Motu himself, the Authority has no reason to doubt that evidence.

[25] That is particularly so because the telephone records which were eventually extracted from the telecommunications provider failed to disclose that such a telephone call was made. It is difficult to understand how Mr Muru could have telephoned Mr Motu without there being a record of that call in the documents provided by the telecommunications provider.

What did Mr Muru tell the employer?

[26] For reasons the Authority has already traversed, the failure of Mr Muru to provide service on behalf of his employer, resulted in a complaint to his employer from Auckland International Airport Limited. That resulted in an inquiry being undertaken which, as the Authority has already described, was led by Mr Darryn Commerer. He had two discussions with Mr Muru, the first by telephone on 15 November 2010 and the second three days later in a face to face discussion that Mr Pope was also present at.

[27] In the telephone discussion, Mr Muru acknowledged that he had received a request from the Apron Tower to remove debris but had failed to do so and he denied that there had been any further calls from the Apron Tower. In that same discussion, Mr Muru acknowledged that he had seen an airport employee trying to pick up the litter that he had refused to pick up air side and that he did not go to her assistance and he claimed that he had been working elsewhere at the airport.

[28] When the parties met again on 18 November 2010, Mr Muru's story changed. He admitted that he had spent six of the eight hours of the shift watching television and that he had left the radio telephone in the sweeper truck prior to going off to watch television. The effect of that of course was to ensure that no one could get hold of him using that device, apparently the principal means of communication between the Auckland Council staff member and the client, Auckland Airport.

[29] As soon as that admission was made, the Auckland Council management promptly terminated the discussion, indicated that a disciplinary investigation would likely be required and that there might be disciplinary consequences for Mr Muru.

[30] Mr Muru protests that he should have been alerted to the need to bring a support person to the 18 November 2010 meeting. The Authority does not agree. That meeting was an investigation meeting designed, on Mr Commerer's evidence, which the Authority accepts, to establish what had happened. Nothing that Mr Muru had said to Mr Commerer prior to the 18 November 2010 meeting would have led Mr Commerer to suspect that Mr Muru was going to commence the 18 November 2010 meeting with a major admission of wrongdoing. Auckland Council was simply trying to get to the bottom of what had happened so that they could respond appropriately to the serious complaint they had received from their client the Auckland International Airport Limited.

[31] At the two disciplinary meetings that followed, Mr Muru's story changed again. In the first meeting the one that was held on 1 December 2010, Mr Muru announced that the sweeper truck which he usually operated was out of commission on 13 November 2010 because it had a flat battery and that information was advanced to mitigate his behaviour. The Authority is satisfied that this intelligence was provided for the first time at the meeting on 1 December 2010; by this stage, Mr Muru had had one telephone discussion with Mr Commerer, and a meeting with Mr Commerer on 18 November 2010 and on neither of those earlier occasions had he disclosed that the sweeper truck was not operational.

[32] It became clear that Mr Muru had his company cell phone with him throughout the night. It was this cell phone which Mr Muru claimed he had used to try to contact Mr Motu his supervisor to advise him of the position. But this information was not provided to Auckland Council and was only advanced at the eleventh hour during the Authority's investigation. What is more, as the Authority has already noted, there is no evidence from the records of the telecommunications provider, that Mr Muru did attempt to contact Mr Motu at the relevant time. And that is consistent of course with Mr Motu's own advices to Auckland Council.

[33] In summary then, the Authority notes that Mr Muru has adopted a policy of drip feeding information about his activities to Auckland Council during the course of its disciplinary investigation. It can be of little surprise to anyone that Auckland Council would take a jaundiced view of that approach. Not only does it suggest a desire to cover up wrong doing but it also suggests an enthusiasm for trying to confuse rather than elucidate.

Was it open to Auckland Council to dismiss?

[34] The Authority is satisfied that an employer in Auckland Council's position after conducting a proper investigation would have dismissed in the particular circumstances of this case: s.103A of the Employment Relations Act 2000 applied (the old test). The old test applies of course because of the date of the dismissal which pre-dates the most recent amendment to the law which took effect on 1 April 2011.

[35] Mr Muru, on the day in question, elected to watch television for six hours of an eight hour shift, on his own admission, allegedly because the plant that he was destined to work on was not operational. He had been fulfilling this particular role for fully two decades having worked previously for Auckland Council's predecessor, and so he knew perfectly well what was required of him. Not only did he have extensive experience in the role but he had received training since Auckland Council took over responsibilities for the contract and amongst other things had signed an acknowledgement declaring that he understood the Council's Code of Conduct which identified leaving an assigned workplace without authority and bringing the Council into disrepute as potentially dismissible offences.

[36] In addition, the Council's asset policy, which again Mr Muru had signed as having received and understood, contained a provision which required staff to maintain radio telephone and other forms of communication operational during the working day.

[37] It is plain on the facts that Mr Muru left his assigned work area in order to watch television. Mr Muru seeks to split hairs by saying that he was still within the precincts of the Auckland airport while he was watching television but the fact remains that he was not paid to watch television. He was paid to do a job of work which he was not doing.

[38] He did not maintain contact with his employer's client as he was absolutely fsrequired to do. On his own evidence, he left most of his communications equipment in the sweeper truck (although he admitted that he still had his company cell phone with him).

[39] As a consequence of his failure to maintain contact with his employer's client, he was unable to be summoned to attend to his duties which necessitated Auckland

Airport making a complaint to Auckland Council. As well as failing to attend to air side sweeper duties, Mr Muru also ignored all his other responsibilities while he was watching television.

[40] Even if Mr Muru's claim that he could not work because the sweeper truck had a flat battery is accepted at face value, it is difficult to understand why Mr Muru thought the appropriate response to that situation was to sit and watch television for six hours of an eight hour shift. On his own evidence, the Auckland Airport Fire Rescue staff had willingly provided jump starting for the sweeper truck in the past and while Mr Muru maintained that that privilege had been withdrawn, Auckland Council's evidence is that that was not the case at all. Whatever the position in respect to fire rescue, there was no evidence that Mr Muru even made the inquiry to see whether they were prepared to assist.

[41] Nor did Mr Muru take any steps to notify anybody in his employer that there was a problem. The evidence that he rang Mr Motu is based exclusively on his recollection, a recollection which he advanced to the Authority but did not bother to advance to the employer at the time. Further, as the Authority has already noted, there is no evidence from the telecommunications provider that that call was made and Mr Motu certainly denies having received it.

[42] Nor did Mr Muru ring anybody else at Auckland Council although he had Mr Commerer's number for instance and had rung Mr Commerer before on occasions.

[43] Nor did he communicate with Apron Tower and indicate to them that he had a problem with the sweeper truck; it is conceivable that even if Mr Muru could not contact people to assist him, Apron Tower may have been able to oblige and in any event Apron Tower receiving a call from Mr Muru to indicate he had a breakdown would have militated against their subsequent complaint.

[44] Nor did Mr Muru use his initiative to operate any of the other plant that was available to him on that night. There was a back up sweeper truck which had different brushes and the evidence the Authority heard suggested that the nylon brushes which were required for the apron could have been changed over on to the back-up truck; but Mr Muru told the Authority in his oral evidence that the only plant he had been inducted into was the machine that had broken down. That evidence frankly seems inherently unlikely given Mr Muru's experience in the role.

[45] Similarly, Mr Muru's claim that he did not know that the brushes were interchangeable also seems difficult to accept given his length of service.

[46] Moreover, even if Mr Muru was unable to fulfil any of his mechanical obligations, that did not obviate his obligation to perform the other requirements of the role and the failure of the machine, even assuming that no steps could be taken to address that, did not excuse his wanton failure to remain in contact with his employer's customer.

[47] In summary then, the Authority is persuaded that Mr Muru was a very senior and experienced operator in this role, had been properly inducted into the Council's service when it took over the contract and was aware of the obligations imposed upon him both by his length of service and by the recent documentation provided to him by the Council.

[48] Despite knowing what was required of him or being in the position where he ought to have known what was required of him, Mr Muru chose to take no steps at all to address the failure of a piece of plant that he would normally operate during a whole shift, made no attempt to do any of the other work that would normally be required of him for six of the eight hours that he claimed payment for, took no steps to maintain contact with his employer's client despite that being a requirement of the role, and simply chose to sit watching television for six hours of the eight hour shift.

[49] The Authority is satisfied that the procedure adopted by Auckland Council was a fair and reasonable one. The Authority has already dealt with Mr Muru's claim that he should have been advised to bring a support person to the 18 November 2010 meeting.

[50] The disciplinary meetings that followed were preceded by a full statement of the allegations Mr Muru faced and throughout the proceeding, Mr Muru was advised by his Union official.

[51] The process the employer adopted was a measured one; there were two disciplinary meetings to ensure that each of the parties had an opportunity of reflecting on the material before them.

[52] There is nothing in the evidence before the Authority to suggest that Auckland Council failed to give proper consideration to the various explanations tendered by

Mr Muru. Moreover, as the Authority has already indicated, given Mr Muru's "drip feed" approach to providing the information about what actually happened on the night in question, Auckland Council would be forgiven for taking a somewhat jaundiced view of Mr Muru's representations.

Determination

[53] In all the circumstances, the Authority is not persuaded that Mr Muru has a personal grievance. The Authority is satisfied that it was available to a fair and reasonable employer in the position Auckland Council found itself in to reach a conclusion that Mr Muru would be dismissed from his employment having been found to have committed serious misconduct in the performance of his duties.

[54] Mr Muru's claim therefore fails in its entirety.

Costs

[55] Cost are reserved.

James Crichton
Member of the Employment Relations Authority