

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Carolyn Ngaropo (Applicant)  
**AND** Boise Office Solutions (Respondent)  
**REPRESENTATIVES** Samuel Cuddon, Advocate for Applicant  
Paul Tremewan, Advocate for Respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 23 November 2004  
**DATE OF DETERMINATION** 3 February 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

The applicant submits she was unjustifiably dismissed from her employment with the respondent company. To remedy her alleged grievance she seeks lost remuneration, compensation under s.123 (c) (i) of the Act and costs.

It is the respondent's position that the applicant was justifiably dismissed for gross misconduct.

**Background**

Ms Ngaropo commenced employment with the respondent in September 2002. She was employed as a Customer Service Representative (CSR) in the respondent's contact centre. Shortly before the events which led to her dismissal she had been promoted to the position of Lead CSR.

In May 2004 Ms Ngaropo was facing a mortgagee auction of her home and took several days off work to arrange the refinancing of her home. Among other days taken off by her over during May and June she did not attend work on 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> June. The company saw her absence as being a serious breach of Boise's House Rules. Managers met with Ms Ngaropo on 10 June to discuss their concerns and hear her explanation for her absence. Her explanation did not satisfy Boise's managers and she was dismissed for gross misconduct.

## Relevant House Rules

It is very clear that the company places a great deal of emphasis on punctuality and attendance at work and this is reflected in Boise's House Rules.

The Company Code of Conduct (set out in the House Rules) describes an employee's obligations when they are planning to be absent from work.

"3. *Absence from work*

*A staff member who is sick or absent from work for some other reason, must arrange for a message or explanation to be sent to his/her supervisor/manager on the first day of absence within at least two hours of normal stating time".*

.....

The House Rules also set out the Company's Disciplinary (Warning Procedures).

Misconduct is defined:

*"Misconduct refers to unacceptable actions that warrant written warnings. The dismissal of an employee for misconduct may occur where he/she exhibits persistent unsatisfactory behaviour which, despite warnings, does not improve"*

Without limiting the conduct which could amount to misconduct it is described as including:

*"Failure, without good reason, to inform your manager/supervisor within two hours of normal starting time if you are unable to start work".*

Gross misconduct is defined:

*"As actions of sufficient seriousness and consequences to warrant summary dismissal".*

Included as an example of gross misconduct is the following:

*"Being absent three consecutive working days without reporting to the company office or your manager/supervisor – except in exceptional circumstances e.g. hospitalisation".*

A procedure to be followed in investigating allegations of serious misconduct is set out in the house rules following the definition and examples of gross misconduct.

## Legal Principles

The time honoured test to be applied in consideration of a decision to dismiss summarily is that set out in *Northern Distribution Union v BP Oil* [1992] 3 383 CA.

*"For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court's judgement in BP Oil NZ Ltd v Northern Distribution Workers Union [1989] NZLR 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.....In the end, the*

*question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances”*

The Court of Appeal in *W & H Newspapers v Oram* [2000] 2 ERNZ modified its thinking in respect to the test above<sup>1</sup> stating:

*“Bearing in mind there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of “could” rather than “would”, used in the formulation expressed in the second BP oil case.”*

In *Petersen v Board of Trustees of Buller High School CC 7/02* the Chief Judge described the following essential elements of procedural fairness.

“.....

*The minimum requirements can be said to be –*

- (a) notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;*
- (b) a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and*
- (c) an unbiased consideration of the employee’s explanation, free from predetermination and uninfluenced by irrelevant considerations.*

This needs however, to be considered in light of other guidance contained in the above decision.

*“However, the employer’s conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person”. NZ Food Processing IOUW vUnilever NZ Ltd [1990] 1 NZILR 35,46 & ERNZ [1990] Sel Cas 582, 595.*

## **Credibility and Findings of Fact**

### **Credibility**

There are few disputes between the parties in regards to the facts of this matter. Ms Ngaropo submitted to me that she believed, after speaking with Mr Midgley, on 1 June that she had permission to stay away from work for as long as it took to arrange the refinancing of her home. She amended that position in her oral evidence and it is clear she knew she was required to be back at work on 2 June and that she did not come to work or contact her supervisor in accordance with the company house rules which, I find, she also knew and understood.

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<sup>1</sup> Ms Ngaropo’s dismissal stands to be tested in accordance with precedent cases which had application prior to the law change which came into effect on 1 December 2004.

The only other major point of difference between the parties is the extent to which Ms Ngaropo was appropriately advised of the company's concerns, the seriousness with which the company considered those concerns and the potential which existed for dismissal if Ms Ngaropo did not provide a satisfactory explanation. I find that the company representatives involved in this matter did advise Ms Ngaropo of these things both on 9 June when she was advised of the time for the disciplinary meeting and again at the commencement of the meeting on 10 June. There is no dispute between the parties that Ms Ngaropo was advised on 9 June and again on 10 June of her right to representation.

In any other matters where the parties are in dispute on the evidence it is the evidence of the company's witnesses which I prefer.

## Findings

Ms Ngaropo had a history of absence from her employment. I accept this had been discussed with her by her team leader Mr Midgely. However, no formal disciplinary action had been taken in respect to this pattern of absence and certainly Ms Ngaropo had never been put on notice that a continued pattern of absence could jeopardise her continued employment.

It is important to note that Ms Ngaropo had such positive qualities that she had, shortly before the events, which led to her dismissal been promoted to the position of Lead CSR.

In May 2004 Ms Ngaropo faced difficulties regarding the refinancing of her home. I understand she faced the prospect of a mortgagee auction. This caused her extreme stress. On 31 May Ms Ngaropo rang her team leader Mr Midgely to say she needed time off to arrange the refinancing of her home. She was given permission to take that day off but was told she must be at work on 1 June (the 1<sup>st</sup> being the busiest day of the month).

Ms Ngaropo did come to work on the 1<sup>st</sup>. She was not in a good space for work and after discussion with Mr Midgely and approval from HR she was allowed to take the day off (on pay) in order to pursue refinancing options for her home which was apparently up for auction on 9 June. There is some dispute in the evidence on the matter as to when Ms Ngaropo was expected back to work. I find she was expected back to work on 2<sup>nd</sup> June and that she knew that.

Ms Ngaropo did not turn up for work on the 2<sup>nd</sup>. Neither did she turn up for work on the 3<sup>rd</sup> or 4<sup>th</sup>. She made no contact with Boise to explain her absence and this was in breach of the company's house rules.

When Ms Ngaropo did not turn up for work on 3 June, Mr Rollins (Call Centre Manager), attempted to contact her by telephone. The company says that it found it did not have a current telephone number for Ms Ngaropo (despite having recently requested staff to update their contact details). Neither did Telecom Directory Service have a number for her.

On 4 June<sup>2</sup> the company – having been unable to make telephone contact with Ms Ngaropo – wrote to her and had the letter delivered by courier. The background to Ms Ngaropo's absence was outlined and the company outlined its current concerns regards her failure to make contact:

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<sup>2</sup> The letter was dated 3 June. I accept the respondent's evidence it was written and sent on 4 June and that it was a mistake that the letter was dated 3 June. No predetermination of the dismissal exists in this regard.

*“Dear Carolyn*

.....

*It is clearly stated in the House Rules that you are responsible for making contact with your Team Leader within 2 hours of your start time on each day, and that you must give both the reason for your absence and an indication of the time and day when you may be available for work again. It also states that if you are absent without notification for three days or more without due cause, you are liable to lose your job on the grounds of abandonment of employment.*

*You have now been absent without notification for 3 days. This constitutes gross misconduct, which can result in dismissal.*

*Unless we hear from you immediately upon receipt of this letter, you will be deemed to have abandoned your employment and accordingly, your employment will be summarily terminated.*

*Please contact me immediately to discuss this.*

*Yours sincerely*

*Chris Rollins*

*Contact Centre Manager”*

Ms Ngaropo received this letter on the afternoon of 4 June and immediately contacted Mr Rollins. She could not reach him in person but left a voice mail message for him advising that she would be back at work the following Tuesday (the Monday being a public holiday for Queen’s Birthday weekend).

Ms Ngaropo was at work on Tuesday 8 June. Both Mr Midgley and Mr Rollins were absent that day. On the 9th Mr Midgley, who had returned to work, had a meeting with Kerryn Turnbull (HR Coach) and they decided that Ms Ngaropo’s absence for 3 days without notification needed to be taken up with her in a disciplinary setting. Ms Ngaropo was given advice that the company was treating her absence for three days without notification very seriously (it was viewed as potential gross misconduct and notified the most serious disciplinary action that could be taken would be dismissal). She was advised that a meeting was set for 10 June at 2pm to discuss the company’s concerns and that Ms Ngaropo would be required to provide an explanation for her absence.

Ms Ngaropo attended the 10 June meeting without representation. When she was reminded of her right to representation she declined to have a representative. Present at the meeting were Ms Ngaropo, Ms Turnbull and Mr Midgley. (Mr Rollins was about to end his employment with Boise and decided that it would be in the best interests of the organisation if he did not take part in the meeting).

I find the allegations were explained to Ms Ngaropo once more at the meeting together with the seriousness with which the company viewed her absence. The process was again explained and Mr Midgley expressed his disappointment with Ms Ngaropo’s conduct and his view that she well knew her obligations to make contact with the company when she would be absent.

Ms Ngaropo put her explanation. She repeated her need to sort out the financing of her house. I find she stated that she knew of her obligation to contact the company and that she knew she should have done so.

After hearing Ms Ngaropo's explanation Ms Turnbull and Mr Midgley considered all the information before them. They did not accept Ms Ngaropo's explanation that while she knew she should have contacted the company she did not do so because she was too busy. They also reflected that Ms Ngaropo had not demonstrated any remorse in the matter and decided her conduct amounted to gross misconduct within the company's house rules. The decision was taken to dismiss her. The decision was communicated accordingly.

## Discussion and Determination

Ms Ngaropo was unjustifiably dismissed. My reasoning follows.

Mr Leathley is the General Manager for HR with Boise. He advised that in situations where abandonment of employment might become a possibility the company takes positive steps on the second day of absence without notice to contact the employee concerned. This is to avoid (if possible) the situation arising where employment might be terminated on the grounds of abandonment. Where an employee contacts the company there will still be a disciplinary inquiry to determine if some disciplinary action is warranted and the inquiry undertaken by Ms Turnbull and Mr Midgley proceeded in accordance with company policy.

I find that the company's policy to contact an employee who is absent without notice on the second day of absence is commendable. However, in this case the company could not make contact by telephone and decided to write to Ms Ngaropo on the 3<sup>rd</sup> day of her absence (4 June). What the respondent company has lost sight of here is that the purpose of writing to Ms Ngaropo on 4 June was to prevent the situation arising whereby she put herself in the position of possibly losing her job. When Ms Ngaropo got the letter on 6 June she immediately made contact with her manager. It is not possible, therefore, for the respondent to have come to the conclusion that Ms Ngaropo was in guilty of gross misconduct in accordance with the house rule relied on "*being absent three consecutive working days without reporting to the company office or to your manager/supervisor – except in exceptional circumstances e.g. hospitalisation.*" Ms Ngaropo did contact the respondent during the 3 day absence in question albeit it was on the third day.

The respondent's position is that the reference to *reporting to a manager/supervisor* in the above rule is a reference to the contact required when an employee is going to be absent *i.e. that employee is to contact their manager/supervisor within two hours of normal start time.* The respondent's position was therefore that given Ms Ngaropo had not made contact with her manager until very late in the day of the third day of her absence then her conduct put her in breach of the rule regarding absence for three days without notice and that amounted to gross misconduct in respect of which if no satisfactory explanation was forthcoming then dismissal would be warranted.

There are a number of problems with the employer's thinking in this regard.

Firstly, the clause in question only refers to an absence for three days without making contact. It does not specify that contact is to be in accordance with Rule 3 of the company's Code of Conduct.

Secondly, if one accepts the company's interpretation then it would serve no earthly purpose (in avoiding a situation where a worker might put themselves in jeopardy of being in breach of the three day absence/gross misconduct rule) for the employer to write to that employee late on the third day and after any chance had passed of the employee in question contacting his/her manager in accordance with the "*2 hours after start time rule*".

After Ms Ngaropo contacted her manager on the afternoon she got the letter the only rule the respondent could reasonably have been considered to have been broken was the rule that Ms

Ngaropo contact her manager within 2 hours of her start time if she was unable to attend work. That would at most have warranted a written warning albeit Ms Ngaropo's actions were, I find, serious and she could well have been put on notice that further breaches of the company's policies on attendance/notification could lead to the loss of her job.

Other matters that should have been considered in Ms Ngaropo's *favour* by the company's decision makers in this matter include:

- The fact Ms Ngaropo made immediate contact with her manager on receipt of the company's letter. In fact this does seem to have been weighed by the company - but to Ms Ngaropo's disadvantage i.e. "*that the only reason Ms Ngaropo contacted the company was because she had got the letter*". Taking this view of Ms Ngaropo's contact completely defeats the thinking behind writing to Ms Ngaropo in the first place which was to take proactive steps to remind her of her obligations and to help her avoid putting herself in the position of being in serious breach of the company's House Rules.
- Ms Ngaropo had a history of less than satisfactory attendance. For an employer who put great stock on punctuality and attendance it is unacceptable that it had taken no steps to counsel/warn Ms Ngaropo that her pattern of absences was unacceptable – only to leap in and take the hardest line possible when it was not warranted on a proper interpretation of the company's house rules and philosophy.
- Even if the employer had been correct in its interpretation of its rules (which I find it was not) the decision makers did not properly weigh the exceptional circumstances which prevailed – that Ms Ngaropo was facing a mortgagee auction of her home and needed to make urgent refinancing arrangements.
- Ms Ngaropo was an otherwise good employee.

## **Determination**

For all the reasons given I find that Ms Ngaropo's dismissal was unjustified and she has a personal grievance against her former employer.

## **Remedies**

In the circumstances of this case I am required in accordance with s.124 of the Act to consider Ms Ngaropo's contribution to the situation that gave rise to the grievance.

Ms Ngaropo's contribution to the events that led to her dismissal was substantial. She was a Lead CSR. In other words she held a position of responsibility. I have found she knew she only had permission to be away from work on 1 June. She made no contact with her employer on the 2<sup>nd</sup> or 3<sup>rd</sup> of June and neither did she make contact on the 4<sup>th</sup> until after she had received the respondent's letter late in the afternoon of that day. I have found Ms Ngaropo knew of her responsibility to contact the respondent if she would not be attending work. She simply chose not to do so.

For these reasons I am setting Ms Ngaropo's contribution at 50%.

### **Lost Remuneration**

The employer is directed to pay to the applicant the sum of \$4,312.50 gross being 3 months lost remuneration reduced by 50%.

### **Compensation under s.123 (c)(i)**

If Ms Ngaropo had not contributed to the situation which gave rise to her grievance I would have directed that the respondent pay to her the sum of \$3000 net to compensate her under this head.

In all the circumstances of this case I direct the employer to pay to Ms Ngaropo the sum of \$1500 to compensate her for the effect this dismissal has had on her.

### **Costs**

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott  
Member of Employment Relations Authority