

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 66
5300503

BETWEEN

ROIHANA NURI
Applicant

AND

CHIEF EXECUTIVE OF TE
PUNI KOKIRI
Respondent

Member of Authority: G J Wood

Representatives: Roihana Nuri on his own behalf
Rachel Burt for the Respondent

Investigation Meeting: 30 November 2010 and 29 March 2011 at Wellington

Submissions Received By: 19 April 2011

Determination: 2 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Nuri claims that his dismissal by the respondent, Te Puni Kokiri, was unjustified, that Te Puni Kokiri breached his employment agreement and that he was also unjustifiably disadvantaged. In particular it is claimed that Mr Nuri never behaved dishonestly or fraudulently, but that he was genuinely on sick leave over the pre-Christmas period, that he did not deliberately smash his mobile phone, and that in any event Te Puni Kokiri did not abide by the process mandated by his employment agreement when coming to the decision to dismiss him. Te Puni Kokiri denies all of Mr Nuri's claims.

Factual discussion

[2] Mr Nuri was employed between July 2005 and February 2010 as editor of Te Puni Kokiri's journal *Kokiri*. He reported to Te Puni Kokiri's Communications

Manager, who had been employed full time at Te Puni Kokiri since September 2006. During the course of Mr Nuri's employment, the Communications Manager came to the view that Mr Nuri took a lot of sick leave and that this often took place at the beginning or end of a week. Others of her staff also fell into that category. She therefore instituted a policy for her staff that they had to phone her personally as soon as practicable on the day that they were to be away sick.

[3] On Tuesday 22 December 2009, Mr Nuri was away on sick leave. Rather than call in, he texted the Communications Manager, stating that he had a migraine. The Communications Manager then became aware that there had been a social function at Mr Nuri's residence the night before. The Communications Manager asked around and was told by a co-worker that Mr Nuri would not be coming back at all for the rest of the year, because he had been overheard saying so. That co-worker suggested that the Communications Manager check Mr Nuri's desk, which had been completely cleared. The office camera, which was meant to be locked away, was missing.

[4] The next day, the Communications Manager tried to ring Mr Nuri, but was unable to contact him on his work cellphone. She then, by email, required him to call her. He emailed her soon after stating that he was still ill, that he had a bad earache now and that he was hoping to get into the doctor's later that day, as he needed antibiotics. He noted that he had dropped his phone and the screen had smashed, so he could not call out from it. He also noted that he had the camera with him because he needed it over the Christmas break.

[5] The Communications Manager then tried to phone Mr Nuri without success. She then emailed him stating:

*I had heard that you were planning to take the rest of the week off on sick leave. I will require a doctor's certificate when you do return to put my mind at ease. If you are unable to present a doctor's certificate these three days will need to be taken as annual leave. Regarding the big camera I want it returned **today** along with your phone ... If you are too ill to make the journey to work I will arrange for both to be collected from your apartment. Please treat this email with some urgency and advise whether you will be dropping the camera and phone into the office or whether I need to arrange for them to be collected.*

[6] The Communications Manager then discovered from IT that Mr Nuri was still using the phone, despite him saying it was broken. She then texted Mr Nuri asking him to read the above email.

[7] Mr Nuri did not respond until some two weeks later, namely 7 January 2011. He noted that he had sent the phone back but he could not get to see the doctor until 5 January, but he had a perforated eardrum *since Tuesday 22 December 2009 with a serious infection being developed ... I currently have a doctor's certificate until Monday 11 January 2010.*

[8] Te Puni Kokiri's IT department was then able to provide copies of text messages Mr Nuri had sent while he was away. One showed that at 3am on 22 December he was on the road about 20 minutes out of Rotorua. Another stated that he was organising camping equipment the same morning. Finally, he sent a text on 4 January telling a friend that while he was supposed to be starting work on 18 January, this would not be the case until 25 January. He did not inform Te Puni Kokiri of this until 15 January, being only a couple of hours' working time before he was due to return, albeit a few days earlier in that it was on the Friday before a long weekend.

[9] Mr Nuri proposed working in Rotorua the next week. The Communications Manager required him to return to Wellington as planned. Mr Nuri then sent two responses, the first stating that he had important *whānau* things on and in the second one the reason why the *whānau* issues were so important. It was agreed that Mr Nuri take the week off as annual leave.

[10] I accept the Communications Manager's evidence, which was supported by documentation, that Mr Nuri's proposal that the Te Arawa region be profiled for *Kokiri* magazine was inappropriate, given that the area had been recently profiled and therefore there was no particular reason why Mr Nuri should be working in Rotorua.

[11] All of these matters were of great concern to the Communications Manager and her managers, who decided that they should be investigated in a disciplinary context. That investigative process was to be run by Te Puni Kokiri's deputy secretary for support services. As part of that investigation, Mr Nuri was sent a letter inviting him to a formal meeting, entitled an *explanatory meeting*. The letter set out many of the facts above and indicated a number of concerns, including that Mr Nuri:

- Had been instructed to telephone his manager rather than text or email;

- Had variously claimed to have a migraine and an earache, yet he had gone camping and had told other staff that he intended to have the week off as sick leave and he had cleared his desk;
- Had not provided any medical certificates;
- Had not returned his mobile phone and camera on time;
- Had never intended coming back to work on 18 January as planned on the basis of his annual leave application.

[12] He was told:

You may have lied to your manager in relation to the reason for your absences ... and further that you falsely claimed sick leave in relation to these days. In the event that these allegations are substantiated, your actions would constitute a fundamental breach of the trust and confidence in the employment relationship and would render you liable to summary dismissal.

[13] Mr Nuri did not take up the recommendation in the letter to bring a representative to the meeting. This was raised again at the commencement of the meeting, but Mr Nuri was happy to continue. Mr Nuri was told of the possible consequences should misconduct be found (including summary dismissal) and was asked to provide his explanation to the allegations in the letter.

[14] Mr Nuri explained that he had been sick and in particular had had a migraine. Despite Te Puni Kokiri's representatives asking Mr Nuri repeatedly for responses to its concerns, he simply repeated that he was sick. When asked about the damage to the cellphone and the fact that calls had continued to be made after he had told the Communications Manager that it was broken, he simply repeated that the phone was in fact broken, but that he had been able to use a few buttons for texting.

[15] When it was pointed out to Mr Nuri that his lack of responsiveness was not assisting him he said that he did not want to prolong the process and that the Deputy Secretary needed to get on and make a decision.

[16] In response to a direct question about whether, if he had not been sick could he have come into work before Christmas, Mr Nuri did not respond, despite the question being repeated.

[17] Te Puni Kokiri's representatives were so concerned about Mr Nuri's attitude that they called an adjournment to discuss how to progress the matter. Upon resumption, the Deputy Secretary told Mr Nuri that there would be a change from the usual process and that he would be required to provide an explanation in writing, in the hope that this would prompt a greater response, and that a further meeting would be held on 1 February. Mr Nuri can not have been under the misapprehension that this meant that the disciplinary process was not to continue.

[18] Following the first meeting, the chief executive of Te Puni Kokiri suggested to the Team Leader, Organisational Development involved in the disciplinary process that he should have a private chat with Mr Nuri, to make sure he understood what was going on and how serious the situation was. I accept that the team leader met Mr Nuri for coffee and told him that he ought to get a lawyer, and that it was looking pretty grim for him. Given Mr Nuri's lack of response he asked him whether he had another job to go to. Mr Nuri's reply was that he was not concerned about matters. It was impressed on Mr Nuri that he inform the Deputy Secretary of anything relevant and he replied that the Deputy Secretary was paid the *big bucks* and that he could make the *hard calls*.

[19] On their return to work, Mr Nuri was asked whether his holiday was worth it and he replied that it was; there had been great weather and the diving had been great, although he said that he did not dive. This reference to diving is important because Mr Nuri claimed to have perforated his eardrum while diving.

[20] At the next disciplinary meeting, Mr Nuri told the representatives of Te Puni Kokiri that he had taken advice and that he did not have any written explanation to give, but rather relied on what he had said before. He was again asked questions about the matters in issue such as him going camping and the broken phone, but he declined to respond.

[21] Te Puni Kokiri then adjourned to determine what to do. It was decided that Mr Nuri had breached his employment agreement by falsely claiming sick leave and that he may have deliberately broken the phone, and that trust and confidence in him had been lost. It was therefore decided to dismiss Mr Nuri.

[22] After the adjournment Mr Nuri was given another chance to add anything further, which he did not do. He was then informed that he was dismissed with summary effect.

[23] A letter confirming this was subsequently sent by the Deputy Secretary, which stated:

I have decided to terminate your employment, as you have behaved dishonestly/fraudulently. Given your actions and a lack of a satisfactory explanation I can no longer trust you. You have been given the full allegations in detail, but have declined to either offer an explanation, or give any information that might mitigate your actions...

The evidence that you planned to take sick leave and were in or near Rotorua (packing your camping equipment) when you e-mailed in sick, is damning and I cannot reach any other conclusion that you had never intended to be at work on the three days before Christmas. Your claim to have a migraine when your text records show that you were driving to Rotorua further demonstrates your dishonesty. That you claimed these days as sick leave, you didn't get a medical certificate for those days, even though you were instructed to do so and gave no explanation (other than that you had a migraine and then a sore ear) as to your whereabouts on those days, makes it clear to me that you never intended to be at work on those days and you made a false claim for sick leave. The evidence that you were dishonest about when you were going to return to work is also compelling and your continued use of the phone after you informed your manager that it was broken and calls couldn't be used to contact her, also lead me to believe that you may have deliberately smashed the phone.

Based on all this and your refusal to provide any information to the contrary, I do not see any reason that your employment with us could continue. However, if you believe I have made a mistake, please write to me and let me know if there is anything I did not know, when I reached my decision.

[24] Mr Nuri then sought legal assistance, who asked for all relevant documentation. In Te Puni Kokiri's response, the Deputy Secretary noted the offer to review the decision and repeated the offer. I accept the evidence of Te Puni Kokiri's management that had Mr Nuri admitted that he had wrongfully claimed the sick leave; his employment would probably not have been terminated, as this is consistent with its decision to offer him further chances to explain.

[25] Mr Nuri responded by raising a personal grievance and noting that any opportunity to review the dismissal decision was now too late. Mr Nuri did not seek

reinstatement in his claim for personal grievance and relied particularly on what he claims were Te Puni Kokiri's failures to follow the parties' employment agreement.

[26] Clause 11.2 of the parties' employment agreement provides that:

The employer may terminate the agreement in accordance with its policies on discipline and dismissal procedures.

[27] Te Puni Kokiri's misconduct and poor performance policy has the objective of dealing with cases of misconduct in a procedurally fair and transparent manner, and in accordance with employment law. The procedure is to be used when alleged cases of misconduct exist. The disciplinary process provides for an investigation and the policy states (amongst other things):

Investigation

An investigation may not be required in some instances of poor performance or misconduct when all parties agree on the facts of the situation.

However, in most situations an investigation will be required to determine the actual facts and assess evidence.

... The investigator's role will be to:

- *gather information by interviewing any witness and reviewing any relevant documentation*
- *evaluate and resolve any disparities in evidence or viewpoint*
- *put the evidence to the employee for explanation or rebuttal*
- *determine the facts*
- *Produce a written report summarising evidence and providing a view on whether the allegations have been upheld.*

When an investigation occurs the employee will be advised in writing. This will include the allegation(s), any relevant information and they will be notified of their right to representation and/or support.

When an investigation has concluded, a Manager with the appropriate delegation will consider the report. They will then write to the employee enclosing the report and advise them on their preliminary view and potential disciplinary action. They will give the employee the opportunity to comment on the preliminary view. The manager will consider this before making a final decision.

...

Dismissal

... Where dismissal is being considered, written advice will be given to the employee outlining that dismissal is being considered and the reasons why. The employee will be given the opportunity to respond and make any necessary representations on the consideration to dismiss. When the employee has responded, or the specified

timeframe for response has expired, the manager with the relevant delegation will consider and assess the material including any response and make a final decision.

[28] Mr Nuri subsequently obtained, in September 2010, a retrospective medical certificate from his family doctor for the dates 20-24 December 2009. At the same time he was referred to a specialist, who applied for surgery under ACC. The doctor's evidence was challenged at the investigation meeting by a specialist called by Te Puni Kokiri. The doctor stood by his diagnosis, although he accepted that he was relying largely on what Mr Nuri told him, and that he was unaware that Mr Nuri had attended work on the Monday, having told him he had suffered the injury on Saturday. The specialist's evidence was, by contrast, that the injury was not particularly serious and would not have led to Mr Nuri being unfit for work, particularly as he was able to travel by bus to Rotorua from Wellington.

[29] The specialist was clear that if the condition did cause such pain, immediate medical treatment would have had to have been sought. He also indicated that few if any people would be incapable of work with those sorts of injuries.

[30] Mr Nuri has subsequently claimed that he was dismissed so that his job could be contracted out to an associate of the Communications Manager. There was no supporting evidence to this claim provided, other than Mr Nuri's opinion. In the absence of any such information, I dismiss this claim and do not refer to it further.

[31] The parties have been unable to resolve the matter, including through mediation, and it therefore falls to the Authority to make a determination.

The law

[32] Section 103A of the Employment Relations Act 2000 provides for the Authority to determine, on an objective basis, whether the dismissal was unjustified. The authority does so by considering 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 dismissal occurred. As was made clear in *X v. Auckland District Health Board* [2007] ERNZ 66 two separate considerations are required, namely *what the employer did (the substantive dismissal or justification and the grounds for it) and how the employer acted (the process leading to those outcomes)*. The two types of assessment often overlap, see for example *Madden v. NZ Railways Corporation* [1991] 2 ERNZ 690.

[33] The focus on procedural fairness (how the employer acted) is explained in *John v. Rees* [1970] Ch 345 at 402:

It may be that there are some who decry the importance which the Courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which in the event, were completely answered; of inexplicable conduct which was fully explained; are fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

[34] Where the parties agree that the employment will be subject to the employer's policy, these then contractually bind both parties - see for example *Purchase v. John Sands NZ Ltd* (unreported, Colgan J, AEC57/96, 13 September 1996). It was also held at page 11:

Even had they not had contractual effect, as a matter of equity and good conscience the Court should be reluctant to sanction the breach by an employer of either the letter or spirit of unilaterally imposed procedures for the orderly and fair inquiry into, and determination of, allegations of misconduct that might lead to dismissal.

[35] Furthermore, in *Alofa v. Aotea Centre Board of Management* (unreported, Travis J, AC50/01, 30 July 2001), the issue of an employment agreement requiring an employee to comply with the employer's staff policies was addressed. The Court held at para.[32]:

... that the manual was binding upon both the parties and ought to have been followed. Mr Alofa ... was entitled to assume his managers would use it when dealing with him.

[36] In this case, the grounds for dismissal were based on alleged dishonesty by Mr Nuri in abusing his sick leave. The key question is whether or not the employer's actions were fair in all the circumstances at the time. In *Griffith v. Sunbeam Corporation Ltd* (unreported, Couch J, WC13/06, 28 July 2006), it was held at para.[145]:

The use of sick leave is, by its nature, a matter requiring a significant degree of trust of the employee by the employer. In most instances,

the employer must trust the employee to exercise the right to take sick leave honestly because it is impractical to do otherwise. It may also be said that, in general, abuse of the right to paid sick leave will be serious because it involves obtaining payment by a false pretence or, at least, attempting to do so. Having said that, not every case of misuse of the right to sick leave will necessarily be capable of amounting to serious misconduct. In some cases there may be special factors suggesting that it ought not to be regarded in this way, either generally or in a particular case. It follows that each case must be determined on the facts.

[37] The standard of proof in cases involving alleged dishonesty must be consistent with the gravity of the allegation. Thus the degree of gravity will be influenced by the potential consequences for all concerned should the allegation be proved, and that is why the civil standard of proof is flexible (*Managh (t/a Managh & Associates) and Café Down Under Ltd v. Wallington* [1998] 2 ERNZ 337 (CA)).

Determination

[38] Te Puni Kokiri did not investigate the allegations into Mr Nuri's behaviour and determine the outcome in the way its policies and thus the parties' employment agreement required. Clause 11 of the employment agreement provides for termination *in accordance with* [Te Puni Kokiri's] *policies on discipline and dismissal procedures*. While slight deviations from procedural perfection may be excused, here Te Puni Kokiri varied significantly from its own processes.

[39] In particular, there were three main failings in its investigation. First, it failed to follow its misconduct and poor performance policies by not producing a written report summarising evidence and providing a view on whether the allegations had been upheld. The exception provided for in the policy is where all parties agree on the facts of the situation. Whatever the Deputy Secretary may consider, there was no agreement on the fundamental issue of whether or not Mr Nuri was genuinely too sick to work before Christmas.

[40] Second, the process provides for a letter to be sent to the employee enclosing the report and advising them on the preliminary view and potential disciplinary actions. The employer will give the employee an opportunity to comment on their preliminary view. The manager will consider this before making a final decision. While this might have been done on an informal basis, it was certainly not done formally (as required), which would have left Mr Nuri under no misapprehension of

his position, especially when he considered that he did not think he could be sacked for just taking three days off. I will comment further on this misapprehension on Mr Nuri's part later.

[41] Finally and even more fundamentally, written advice is to be given to an employee outlining that dismissal is being considered and the reasons why. The employee will be given the opportunity to respond and make any necessary representations on the consideration to dismiss. Again, this is a safeguard to ensure that employees like Mr Nuri are very clear about the risk of them losing their jobs. Its failure cannot simply be ignored.

[42] I do not accept that Te Puni Kokiri was precluded from pursuing the issue of sick leave because Mr Nuri was told that he would have to take annual leave if he did not provide a medical certificate. That would be to take one sentence in a series of communications quite out of context. Rather I accept that the Communications Manager had to categorise the leave in some way and that was the most logical one open to her. Nor do I accept that Mr Nuri was unaware of the seriousness of the disciplinary process – he was informed so by letter and at the meetings. However Mr Nuri was simply not offered a full opportunity to comment during the disciplinary process, as required of the employer. He can not be held responsible for that. I accept that he may have taken matters more seriously had the process been more formalised, as required.

[43] Te Puni Kokiri's offers after dismissal to reconsider its decision were too late. At that point an employee is entitled to accept that he has been dismissed and pursue any claim accordingly, particularly as reinstatement was not offered.

[44] Given the evidence that Te Puni Kokiri is a caring and forgiving organisation and that had Mr Nuri admitted fault he may well have not been dismissed, it can be argued that, had he been made aware pursuant to the contractually mandated process of the likelihood of dismissal, he may have been able to rescue his job. Thus it can not be said with any certainty that his dismissal was inevitable. Given the procedural defects outlined above, his dismissal must be found to be unjustifiable.

Contribution

[45] Here the Authority must determine whether there was any blameworthy behaviour on the part of Mr Nuri that should reduce remedies that would otherwise be

awarded. The important issue is whether or not Mr Nuri misused his sick leave and then maintained an incorrect position during the disciplinary process.

[46] I am cognisant of the fact that this is a serious allegation and that therefore the evidence in support of it must be sufficiently strong as the allegations are grave. It is for this reason that I make no conclusion about whether or not Mr Nuri intentionally damaged his cellphone. The other area of potential contributory fault is Mr Nuri's apparent failure to take the disciplinary process seriously enough, but that need not be addressed, for reasons given below.

[47] It is clear that Mr Nuri did suffer an ear injury, presumably while diving. The issues are when that injury occurred and to what extent it affected his ability to attend work. Clearly, it had occurred by 5 January 2010 because that is when he first saw his doctor. However, I accept that the injury had manifested itself as causing discomfort to Mr Nuri by 23 December, which is the first day he mentioned earache to his employer. I also accept that the most likely cause of this was when diving and that that had happened the prior weekend as Mr Nuri stated.

[48] The clear issue for determination then is whether or not Mr Nuri's claim for sick leave for the period before Christmas was genuine or not. Despite Mr Nuri's belief that misuse of sick leave could not justify dismissal, nothing could be further from the truth. An employee who takes sick leave when it is not genuine sick leave potentially commits serious misconduct. The reason for this is as set out in *Sunbeam*, namely that an employer has to have trust and confidence that an employee is genuinely sick and unable to work when claiming sick leave.

[49] In this case, Mr Nuri's evidence was that he was unable to work and this is supported by his family doctor. However, the family doctor was relying entirely on Mr Nuri's account of his level of illness for the period before Christmas as he did not see him until 5 January. The specialist contracted by Te Puni Kokiri was clear, by contrast, that any injury of the sort claimed by Mr Nuri would not have meant that he was unable to work and that he would never authorise sick leave in such circumstances.

[50] On the balance of probabilities, I prefer the evidence of the specialist over the family doctor, despite the specialist never having treated Mr Nuri. My reasons for this include the greater expertise of the specialist in the field, but more importantly are

based on Mr Nuri's own actions before and during the investigatory process and his subsequent evidence to the Authority.

- First, Mr Nuri failed to advise his manager that he was ill on the Monday, even though he was at work and later said that he felt progressively worse.
- Second, he left Wellington and took the camera with him on the Monday, even though he could not have known on that day that he would still be ill by the Thursday, the last day of work for the year.
- Third, if his ear was so painful then why did he not seek treatment immediately in Wellington?
- Fourth, if his ear was so painful to the extent that he compared it with a migraine, then how was it possible that he could undertake a long bus journey between Wellington and Rotorua on the Monday evening? Such a journey would have potentially created a worsening of his condition and would certainly be far more painful than staying at home in bed.
- Fifth, despite claiming to have an extremely sore ear and head, he had considered and looked at the cost of flights to Rotorua. No one with an ear infection of the sort described by the family doctor could have flown on a plane.
- Sixth, despite his medical condition, Mr Nuri took no steps to make a medical appointment until after Te Puni Kokiri required a medical certificate.
- Seventh, he failed to advise his manager directly of his illness, even though he knew of his responsibility to do so.
- Eighth, he was able to phone or text some people, but unable to phone or text his manager. Similarly, he could have utilised another phone to ring his manager.
- Ninth, he did not seek medical attention immediately on arriving in Rotorua.

- Tenth, Mr Nuri did not inform his doctor that although he had injured his ear on the weekend, he had been able to attend work on the Monday.
- Eleventh, he did not disclose that he had left Wellington, even after he had been asked to return the camera, which he had with him.
- Twelfth, he did not want to respond to Te Puni Kokiri over the period of his absence.
- Thirteenth, he had pressing family reasons to be in Rotorua rather than at work before Christmas.
- Fourteenth, he was not honest originally about his intention to stay in Rotorua for the same family reasons for a week longer than his approved leave, at least initially.
- Fifteenth, he did not obtain a medical certificate for the period before Christmas until months after his dismissal.
- Sixteenth, he gave inconsistent evidence over whether he attended a drinks function at his flat the night he left for Rotorua.

[51] I therefore determine that Mr Nuri was able to attend work on the three days before Christmas, but chose not to do so for pressing family reasons. Such deception is at the higher end of the categories referred to in *Sunbeam*, because of the breach of trust and confidence involved, particularly as he maintained that position throughout the investigatory process.

[52] In these circumstances I conclude that Mr Nuri contributed entirely to the situation that gave rise to his grievance. He therefore must suffer a 100% reduction in remedies that would otherwise be awarded to him. I therefore award him no remedies for his unjustifiable dismissal.

Costs

[53] Costs are reserved.

G J Wood
Member of the Employment Relations Authority