

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 191
5442433**

BETWEEN TUREI PETERS
Applicant
AND BAY PACKERS (NZ) LTD
Respondent

Member of Authority: Eleanor Robinson
Representatives: David Hayes, Advocate for Applicant
Steven Meredith for Respondent
Investigation Meeting: 13 May 2014 at Tauranga
Submissions received: 13 May 2014 from Applicant and from Respondent
Determination: 15 May 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Turei Peters, claims that his employment was unjustifiably terminated by the Respondent, Bay Packers (NZ) Ltd (Bay Packers) on 28 December 2012.

[2] Bay Packers denies that Mr Peters was unjustifiably dismissed, and claims that he was justifiably dismissed for serious misconduct.

Issues

[3] The issue for determination is whether or not Mr Peters was unjustifiably dismissed by Bay Packers.

Background Facts

[4] Bay Packers is a fish processing facility employing approximately 30 employees. Mr Peters commenced employment initially on a casual basis, and as a permanent employee in the position of Knifehand Cutter/General Hand with effect from December 2009.

[5] Mr Peters was issued with an individual employment agreement (the Employment Agreement). Clause 11.2 of the Employment Agreement was headed 'Serious Misconduct' and stated:

Notwithstanding any other provision in this agreement, the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:

...

(vii) Reporting for work in such a condition that in the employer's opinion is due to the consumption of alcohol or other substance, or any other reason that in the employer's opinion affects the employee's ability to carry out their duties properly or safely

...

(ix) Unauthorised absence from work

Meeting on 2 November 2012

[6] On 2 November 2012 Mr Steven Meredith, General Manager, Tauranga, held a staff meeting with all the Bay Packer employees. Mr Meredith said he had advised the employees that some employees were taking advantage of the relaxed manner in which Bay Packers was operating at that time and that from that time onwards the employees had to adhere to the procedure for advising absences as set out in the individual employment agreements.

[7] The procedure explained to the employees was that they had to advise Bay Packers prior to starting work if they were unable to attend that day, and the method for leaving a message on the Bay Packers telephone system or a text message on the plant manager's telephone was explained. If an employee failed to adhere to the process Mr Meredith said he had explained that a disciplinary warning might result.

[8] Mr Meredith said he had also explained that if the employee's reason for absence was considered not to be justifiable by Bay Packers, despite the employee having left a message, the Bay Packer's disciplinary process would be followed.

[9] He had also discussed the implications of absence during the Christmas/New Year period which was the company's peak operational time and extremely busy. He explained that Bay Packers tried to accommodate employees who wanted to take annual leave at that time; however that placed an additional pressure on those employees who had not requested annual leave. Mr Meredith also warned the employees at the meeting that if they had not

requested annual leave over the Christmas/New Year period, but then did not attend for work as expected, the Bay Packer's disciplinary procedure would be followed.

[10] At the conclusion of the meeting Mr Meredith said he had provided an opportunity for questions in order to clarify any areas on which the employees had not been clear about what had been discussed.

[11] Mr Peters said he recalled the meeting, but not clearly, and that all he recalled was that he had to call or send a text message if he was unable to attend for work.

Events 26 – 28 December 2012

[12] Mr Peters said that there had been some personal issues between him and his partner on the morning of Boxing Day 2012 which resulted in him feeling stressed. There had also been unexpected family visitors during the day which had added to his stress.

[13] At approximately mid-day Mr Peters said his brother had offered him an alcoholic drink, the consumption of which had the effect of lessening his stress. Subsequent consumption of alcoholic drinks ensued as a result of family members pressing drinks on him.

[14] At midnight Mr Peters said he had advised his family members that he needed to stop drinking as he had to be at work the following day, however despite this, he had carried on drinking until approximately 3 a.m. when he went to bed.

[15] Mr Peters said he had woken up about an hour later on 27 December 2012 and realised that he had been too intoxicated to drive or attend for work. He sent a text message to his supervisor, Ray Beattie, stating that: "*Apologies ray 2 crook to mke it in. Turei.*"

[16] The next morning, 28 December 2012, Mr Peters said he had not heard from Mr Beattie and he attended for work as usual at 5 a.m. At approximately 7 a.m. Mr Beattie had called him into his office and asked why he had not attended for work on the previous day. Mr Peters explained that he had been too drunk to attend for work, whereupon Mr Beattie had said that he would see him later about the matter.

[17] Mr Meredith said that Mr Beattie had discussed with him the reason Mr Peters had given for being absent on 27 December 2012 and he had decided to hold a disciplinary meeting with him.

[18] Later during the morning, at approximately 10.00 a.m. Mr Peters said Mr Beattie had told him there would be a meeting with Mr Meredith at 10.30 a.m. and that he was entitled to

bring a representative with him to the meeting. Mr Peters said he had been unable to think of a representative at such short notice.

[19] Just prior to the commencement of the meeting Mr Meredith said that Mr Beattie had informed him that Mr Peters had said that he did not require a representative. Upon starting the meeting Mr Meredith said that he had told Mr Peters that the matter was serious, and asked if he wanted a representative with him, however Mr Peters had said he did not.

[20] Mr Meredith said he had given Mr Peters a form headed “*Your Rights*” which explained the rights of an employee involved in a disciplinary action. The form explained at point 1 that an employee had a right to be represented, and at point 5 it stated:

If you are to be dismissed, then generally you should have had two warnings (these need not be about the same thing). However, if you are being dismissed for serious misconduct then no warning is required. Examples of serious and less serious misconduct are in the company’s standard contract.

[21] As Mr Peters handed the form back after 2 or 3 seconds, Mr Meredith said he again explained that the matter was serious, and told him to read it through carefully and then to sign it. Mr Peters said he had re-read the form, but claimed that he had not been able to take in what it said.

[22] Mr Meredith had asked Mr Peters if he had understood what was on the form and when he confirmed that he did, Mr Meredith asked him to sign it which he did. Mr Meredith said he had again told Mr Peters that the matter was serious and asked him again if he wanted representation, however he had again declined to have representation.

[23] Mr Meredith began by asking Mr Peters for an explanation for his absenteeism on the previous day stating that Mr Beattie had advised him that he (Mr Peters) had been too drunk to come to work. Mr Peters said he had confirmed that that was correct, however he had not had the opportunity to provide an explanation for the reasons he had become intoxicated.

[24] Mr Meredith agreed that Mr Peters had said he had been sorry for having let Bay Packers down and he (Mr Meredith) stated that Mr Peters’ actions had placed Bay Packers in a difficult position. He said he had asked Mr Peters if there had been anything further he had wanted to say before the meeting was adjourned, however there had not been.

[25] During the adjournment Mr Peters said he had spoken to Mr Cooney Williams, a Supervisor, and told him that he thought he might be dismissed, however Mr Williams had assured him that he would only receive a warning.

[26] Mr Meredith said that both he and Mr Beattie had given the matter consideration during the adjournment and he had reached the decision to dismiss Mr Peters on the following basis:

- Following the staff meeting held on 2 November 2012, all employees had been made aware of their responsibilities, specifically in the area of attendance for work;
- Mr Peters' only explanation had been that he had become carried away by the festive season, and therefore it had been a personal choice to continue drinking knowing that he had work the next day;
- The incident in itself was sufficient to justify '*Unauthorised absenteeism from work*' however this was not the first occasion in that Mr Peters had been too intoxicated to attend for work, this being at the commencement of his shift on a previous Christmas period;

[27] Mr Meredith said he had given consideration to a lesser penalty, however he had considered this inappropriate in light of Mr Peters' stated reason for the absence, the specific meetings and discussions held with the employees regarding their obligations, the fact that all the other employees had met their obligations, and finally that this was not the first occasion when this had occurred with Mr Peters.

[28] When the meeting resumed Mr Peters said he had been shocked upon being informed that his employment was being terminated summarily for serious misconduct.

Determination

[29] Mr Peters was dismissed on 28 December 2012. The test of justification in s103A of the Act states:

S103A Test of Justification

- For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[30] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Bay Packers must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[31] In accordance with s 103A (3) of the Employment Relations Act (the Act) the Authority must also consider whether:

(a) ... *the employer sufficiently investigated the allegations against the employee ...*

(b) ... *the employer raised the concerns that the employer had with the employee ...*

(c) ...*the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*

(d) ... *the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[32] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[33] Mr Peters was dismissed for serious misconduct, specifically for unauthorised absenteeism. Whilst unauthorised absenteeism constitutes a serious misconduct offence in accordance with clause 11.2(ix) of the Employment Agreement, there must also be procedural fairness involved in reaching the decision which includes consideration of the appropriate outcome.

[34] Mr Peters was invited to attend a disciplinary meeting without having the opportunity to consider the allegation against him and prepare a response or to obtain representation given the short time between being advised of the meeting and its taking place. I find that the fair

¹ [2011] NZEmpC 160

² *Angus at para [23]*

and reasonable employer would have provided more time between the notice of meeting and the holding of it in order to allow Mr Peters time to consider his response and to obtain representation.

[35] Mr Peters said he had not been made aware of the possible outcomes, specifically dismissal; however it was accepted by him during the Investigation Meeting that Mr Meredith made it clear that the matter was serious. Given that Mr Peters had voiced his concern to Mr Williams that he might be dismissed, I consider that he understood that dismissal was a possible outcome.

[36] I further accept Mr Meredith's evidence that Mr Peters had been provided with a full opportunity to provide an explanation, although had he had more time to prepare for the meeting, his explanation may have been more expansive.

[37] However Mr Meredith agreed when questioned at the Investigation Meeting that the first incidence of Mr Peters having been intoxicated such that he had not attended for work as expected one festive season, may have taken place more than one year earlier.

[38] I do not consider that the fair and reasonable employer would have taken an incidence which had taken place some significant time earlier, and which had moreover not resulted in any disciplinary action being taken against him, would have taken that matter into consideration when considering the appropriate penalty for the offence.

[39] Further I consider that the fair and reasonable employer would have taken into consideration the fact that Mr Peters, who had four years' service, had a previously clear disciplinary record.

[40] Although Mr Meredith said at the Investigation Meeting that Mr Peters had shown no remorse for his actions, I find that this statement is at variance with Mr Peters' evidence, and Mr Meredith's own witness statement in which he states that Mr Peters had said during the disciplinary meeting that he was "*sorry he had let himself and the company down.*"

[41] I further consider that a fair and reasonable employer would have taken into consideration the fact that Mr Peters had acted responsibly rather than attending for work in an intoxicated state and thus constituting a health and safety risk in the Bay Packers workplace.

[42] I determine that Mr Peters was unjustifiably dismissed by Bay Packers.

Remedies

[43] I have found that Mr Peters was unjustifiably dismissed by Bay Packers. He was unable to obtain alternative employment for a period of some 15 weeks.

[44] Mr Peters is to be reimbursed for lost earnings for a period of 3 months pursuant to s 128(2) of the Act.

[45] I order that Bay Packers pay to Mr Peters the sum of \$8,528.00 gross (calculated as \$16.40 per hour x 40 hours x 13 weeks).

Contribution

[46] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[47] I find significant contribution by Mr Peters to the situation in which he found himself. Mr Peters voluntarily became intoxicated and kept on drinking until 3.00 a.m. knowing that he had a responsibility to attend for work at 5.00 a.m. that day, and that by failing to do so he would not only place additional pressure on his colleagues, but face disciplinary action, both situations of which he was well aware given his attendance at the staff meeting held on 2 November 2012.

[48] In these circumstances, I assess the level of contribution by Mr Peters as 100% and accordingly award no remedies in respect of the unjustifiable dismissal, other than the reimbursement for lost wages which amounts to the sum of \$8,528.00 gross to be paid to Mr Peters.

Costs

[49] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority