IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 446/09
5280361

	BETWEEN	STEVEN PHILLIPS Applicant
	AND	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Simon Mitchell, Counsel for applicant Kylie Dunn, Counsel for Respondent
Investigation Meeting:	11 November 2009
Submissions Received:	13 and 17 November 2009
Determination:	10 December 2009

DETERMINATION OF THE AUTHORITY

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[1] In late 2008, during the course of his duties, Mr Phillips slipped while descending a straddle crane and injured his shoulder. After a period of time off he returned to work on light duties. Following a disciplinary process Mr Phillips was dismissed from his employment on 25 March 2009. He was dismissed for failing to notify of non-attendance at work.

[2] Mr Phillips says his dismissal was unjustified. He says he was unwell preceding his dismissal and this was not properly considered by Ports of Auckland. He seeks reinstatement to the position from which he was dismissed and compensation for injury to feeling consequent to his dismissal.

[3] Ports of Auckland say Mr Phillips attendance after his return to work was patchy and that he failed to advise when he would not be attending work despite this specific concern being drawn to his attention. It says this was consistent with Mr

Phillips' conduct prior to his injury, conduct which was the subject of a disciplinary warning issued on 30 October 2008. Ports of Auckland say Mr Phillips' dismissal was justified in all the circumstances and that it fairly and reasonably considered all the information before it reached the decision to dismiss.

Issues

[4] To determine this employment relationship problem the Authority must consider whether this dismissal was fair and reasonable read against the statutory test:

> **103A test for 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 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 ro action occurred.

[5] Section 103A imposes an obligation on the Authority to judge the decision of the employer, in this case to dismiss, against the objective standard of a fair and reasonable employer[1].

Was Mr Phillips' dismissal unjustified?

[6] The decision to dismiss Mr Phillips was confirmed in a letter dated 26 March 2009. It is worth setting this letter out in full - it summarises the allegations put to Mr Phillips, his response and Ports of Auckland's deliberations and conclusions as to those allegations and appropriate disciplinary outcome:

> Dear Steven
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> **Re: Notice of Dismissal**
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> This letter confirms the decision you were advised of at our meeting on 25 March 2009 to terminate your employment due to repeated misconduct effective from Wednesday 25 March. This decision was reached following meetings with yourself and your representatives on the 13th, 16th and 23rd of March.
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> The recent incidents of misconduct related to the following:
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> 1. Your failure to attend work on 23 January 2009, and the failure to notify the Company that you would not be attending work that day without a valid or acceptable reason.

[1] *Air NZ v V* 3/6/09, Colgan CJ, Travis, Shaw and Couch JJ, AC15/09

2. Your failure to attend work on 27 January 2009 after contacting the allocations office and informing them that you had a physio appointment and would come to work after you had been to this appointment.

Your explanation for your failure to attend work and failure to notify the Company that you would not be attending work on 23rd of January was that you had called the allocators office and they must not have passed the message on. Also you believe that the medication you were prescribed at the time resulted on you being "fuzzy" at the time.

Your explanation for your failure to attend work on the 27th of January was that you went to see a number of medical practitioners with whom you did not have appointments, (GI Physio, Adidas Clinic and Remuera Radiology). You told us that you did not go to Queen St Physio with whom you did have an appointment on that day as part of your rehabilitation plan as advise (sic) to the allocators, prior to your shift starting that morning. You decided not to contact the Company to inform them you would not be attending work that day due to the time that it had taken you to visit the medical practitioners that day and you were feeling tired and drowsy which you assumed was an effect of the medication.

You have provided information to us that shows that the medication you were prescribed at the time was 1x 100msg of voltaren once a day during the days in question.

In relation to your explanation for your failure to attend work or notify the Company on the 23rd of January we do not accept that allocations may not have passed any message from you that you would not be at work. You had also been given previous notice of the requirement by me to contact me directly which you did not do. Therefore in our view misconduct has occurred as you have not provided a reasonable or valid explanation for your failure to attend work.

In relation to your explanation for your failure to attend work or provide further notification that you would not be attending work after your physio appointment on the 27th of January, is also not accepted as being a valid or reasonable excuse. You did not attend the physio appointment that you had, and chose not to contact the Company to inform them you would not be returning to work as indicated in your earlier message to the allocators. Again this is viewed as another incident of misconduct without reasonable or valid excuse.

In determining what disciplinary action was appropriate we took into account your previous history and the fact that you were currently on a final written warning for previous incidents of misconduct. Therefore we have reached a decision that you would be dismissed for repeated misconduct.

Your representatives asked the Company to hold off making a decision on your employment pending the outcome of a complaint you informed us that you had made to the Health and Disability Commissioner in relation to the treatment from Ascot Healthcare. After an adjournment to consider this request the Company considers that it was not a reasonable request of the Company as this is a dispute between yourself and Ascot Healthcare not Ports of Auckland.

Therefore it was the Company's view that the decision to dismiss would stand. In reaching this decision I have taken into account your work history and performance and all mitigating circumstances presented to us by yourself and your representatives.

Your final day at work will be Wednesday the 25th of March 2009. You will be paid two weeks notice in lieu and you will receive your final wages and any outstanding leave or amounts owing to you will be credited to your nominated bank account less any authorised deductions.

Regards,

Mike Kirwan
Senior Shift Manager

[7] What findings did Ports of Auckland make in relation to the allegations?

(i) 23 January – failure to notify of non-attendance without valid or acceptable reasons amounts to serious misconduct:

- Ports of Auckland did not accept allocators would not have passed on a message that had been left with them; and
- Mr Phillips had been directed to contact Mr Kirwan directly if absent and had not.

(ii) 27 January – failure to attend work on 27 January having advised allocators would after physiotherapy appointment amounts to serious misconduct:

- There was no reasonable explanation why Mr Phillips had not attended the physiotherapy appointment that had been made for him; and
- Mr Phillips chose not to advise the Company that he would not be attending work as per his earlier message.

[8] Were these findings ones a fair and reasonable employer would have made given all the circumstances of this case?

[9] Mr Phillips key response to the allegations was that he was struggling to adjust to his medications and was de-motivated by the light duties regime.

[10] It is implicit from the dismissal letter and clear from Mr Kirwan's evidence to the Authority that Ports of Auckland did not accept Mr Phillips was experiencing any effects from his medication which would adversely impact on his ability to advise his employer of his attendance. There was no reasonable basis for this finding – there was no medical or other relevant expert evidence to support such a finding. A fair and reasonable employer would have sought further information to better understand this issue.

[11] It is also implicit from the dismissal letter that Ports of Auckland concluded Mr Phillips had deliberately missed a scheduled physiotherapy appointment, unreasonably set out to find alternative treatment and failed to update the allocators of his attendance at work for the day.

[12] Mr Phillips explanation that he was tired and drowsy by the end of a day driving around Auckland looking for appropriate treatment was a reasonable explanation as to why he would not have updated the allocators. Given the nature of Mr Phillips injury, the associated pain, his response to his medication and his de-motivation with the light duties regime this was a plausible explanation as to why he failed to update the allocators. I find a fair and reasonable employer would have accepted such an explanation.

[13] How did Ports of Auckland decide dismissal was an appropriate disciplinary sanction? The following factors were taken into account:

- Previous work history;
- Current final warning for misconduct; and
- All other mitigating circumstances presented.

[14] The evidence given to the Authority about Mr Phillips' previous work history established Ports of Auckland had formed a view Mr Phillips was frequently absent from work, that those absences were not entirely justified and that Mr Phillips was not a reliable employee. When I questioned those witnesses as to the basis for their views it became clear they had no cogent basis. It follows that these conclusions were not fairly or reasonably put to Mr Phillips to comment on. An employer acting fairly and reasonably would have done so.

[15] There was no evidence the weight put on the existing final written warning took into account the intervening event of Mr Phillips' work place injury. An employer acting fairly and reasonably would have considered this factor in its assessment of all the relevant circumstances.

[16] It was unclear from the evidence what and how other mitigating factors had been considered. For the Authority to make an assessment of the fairness and reasonableness of a disciplinary process the important element of considering and weighing mitigating factors needs to be apparent and transparent.

[17] For the foregoing reasons I find Mr Phillips dismissal was not justified.

Remedies

[18] Mr Phillips seeks to be reinstated to the position he held at Ports of Auckland at date of dismissal. Reinstatement is a primary remedy[2] and is to be ordered where it is practicable to do so[3].

[19] Mr Mitchell submits reinstatement should be ordered:

- The final written warning is the only evidence of misconduct during Mr Phillips' employment with Ports of Auckland;
- There is no evidence of systematic failure to attend work;
- Reinstatement will not create disharmony, disruption or difficulty for Ports of Auckland; and
- Reinstatement is the only remedy which can effectively address Mr Phillips concerns arising from his dismissal.

[20] Ms Dunn submits it is not practicable to reinstate Mr Phillips:

- There is no evidence Mr Phillips is fit to return to work;
- Mr Phillips conduct on 23 and 27 January contributed to the circumstances which gave rise to his dismissal; and
- Ports of Auckland have no trust Mr Phillips will attend work when he is rostered if he is reinstated.

[21] Ports of Auckland are ordered to reinstate Mr Phillips to the position he held at date of dismissal[4]. He suffered a work injury and the consequences of that injury have given rise to the circumstances which resulted in his dismissal. Mr Phillips has not contributed to that situation in a blameworthy manner. He is recovering from that injury and reinstatement poses no practical difficulty if he is still in recovery given Ports of Auckland's light duty regime. I record that Ports of Auckland have altered the light duties regime consequent, at least in part, to issues raised by this matter. The objection on the grounds of loss of trust and confidence is rejected. For the reasons

[2] Section 125 Employment Relations Act 2000
[3] Section 125(2) Employment Relations Act 2000
[4] Or a position no less advantageous

set out above there is no reasonable basis for Ports of Auckland's view that Mr Phillips was unreliable or he systematically failed to attend work. The final written warning (now expired) is a significant feature of this employment relationship, however, it is no barrier to reinstatement given the events giving rise to dismissal arose from events after Mr Phillips sustained an injury at work.

[22] Mr Phillips seeks a substantial award pursuant to section 123(1)(c)(i) of the Act. In support Mr Phillips gave evidence that he has been distressed and upset by his dismissal, unable to sleep and that these circumstances have had a negative impact on his family. Mr Phillips is entitled to an award of $5000 pursuant to section 123(1)(c)(i) of the Act.

[23] I have addressed the issue of contribution[5] above. There is no basis on which to reduce remedies.

[24] There is no claim for lost wages.

Costs

[25] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then application should be made to the Authority for a timetable to be set for the filing of costs memoranda.

Marija Urlich
Member of the Employment Relations Authority

[5] Section 124 Employment Relations Act 2000