

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 270/09
5126256

BETWEEN WESLEY REMMERSWAAL
Applicant

AND TELECOM NEW ZEALAND
LIMITED
First Respondent

MICHAEL CASEY
Second Respondent

ELENA KEEGAN
Third Respondent

Member of Authority: R A Monaghan

Representatives: M Edwards, counsel for applicant
J Rooney, counsel for respondents

Investigation Meeting: 22 May 2009

Determination: 10 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Telecom New Zealand Limited (“Telecom”) dismissed Wesley Remmerswaal for serious misconduct in that he was absent from rostered shifts without authority, claiming payment for the time not worked and falsifying his timesheets. Mr Remmerswaal says the dismissal was unjustified and has raised a personal grievance.

[2] Mr Remmerswaal also seeks orders for the payment of penalties against Michael Casey and Elena Keegan in their personal capacities, on the ground that they incited, instigated, aided or abetted Telecom’s breaches of the employment agreement.

[3] Mr Casey was employed as the team manager of the team in which Mr Remmerswaal worked. Ms Keegan was contracted to Telecom to provide human resource management services. Mr Casey and Ms Keegan conducted the disciplinary process that led to Mr Remmerswaal's dismissal.

Events leading to the dismissal

[4] Mr Remmerswaal was employed in Telecom's service centre in the position of technical analyst, commencing 2 May 2005. His duties were to answer calls from Telecom customers who were experiencing technical difficulties with computer software and hardware, printers, networks and connectivity, and resolving and managing those difficulties. In other words, he provided first and second level IT support from a call centre. The service operated 24 hours a day, 7 days a week, and Mr Remmerswaal's hours of work were set as part of a rostered shift system.

[5] Mr Remmerswaal was rostered to work 12-hour shifts on 25 and 26 December 2007, and on 1 and 2 January 2008. His colleague, Harvinder Singh, was also rostered to work on those shifts.

[6] Messrs Remmerswaal's and Singh's work stations were in a cubicle and located a few feet from each other. Mr Casey's work station was on the other side of a partition separating his work station from Mr Remmerswaal's. On 22 December 2007 Messrs Casey, Remmerswaal and Singh were standing at or near their work stations when they had a conversation about work over the Christmas – New Year break.

[7] It was common ground that the discussion included comments on the likelihood that the period would be quiet. It was in effect common ground that the need for two experienced people to be present during a quiet shift was discussed. Mr Casey gave permission for one person to leave early if the shift was quiet. Mr Casey denied saying that Messrs Remmerswaal and Singh could 'manage their own time.'

[8] Mr Casey sat down at about that point in the conversation. I accept that he did not hear its continuation in which, according to Messrs Remmerswaal and Singh, they discussed how they would share the shifts. He did not participate in the

conversation. I do not accept that he said or did anything at the end of the conversation that could reasonably be construed as authorising the arrangement. Moreover the practical effect was that only one person would be covering each full shift. Mr Casey had rostered two people to cover the shifts, but authorised one to leave early in the circumstances he set out. The change Messrs Remmerswaal and Singh planned to implement was sufficiently significant in that context to require an express authority which was not given.

[9] Messrs Remmerswaal and Singh said in evidence that they believed Mr Casey overheard the later part of the conversation. Both believed, too, that Mr Casey had acquiesced in their plan to share their shifts.

[10] Accordingly Mr Remmerswaal worked 1 pm – 7 pm, being half of his rostered shift, on 25 and 26 December 2007 and 1 and 2 January 2008. Mr Singh worked the other half of each shift on each of those days.

[11] Timesheets for each shift were completed electronically through the company's 'SAP' system. Mr Casey asked Mr Remmerswaal to complete his timesheets for the Christmas period several times between 3 and 24 January 2008. Eventually on 25 January 2008 Mr Casey directed Mr Remmerswaal to complete the timesheets. Mr Remmerswaal said he felt pressured, and blindly copied information from the relevant rosters which he had sought from Mr Casey for reference. Even so there was a conversation about the hours worked over the period, and Mr Casey had provided Mr Remmerswaal with a sheet showing his total average hours worked which he also used to complete the timesheet. Mr Remmerswaal was able to turn his mind to comparing the roster with his average hours and days worked.

[12] Mr Remmerswaal said that, because he felt pressured, he recorded that he worked a full 12-hour shift on each of the four public holidays in question. At the time he did not remember that he had worked reduced hours on those days.

[13] Mr Singh had recorded earlier in January that he worked a full shift on each of the four days. He, too, said that when completing the timesheets he forgot that he had not worked full shifts. He, too, was later dismissed.

[14] Meanwhile, on or about 16 January, another employee told Mr Casey that a third employee was saying Messrs Remmerswaal and Singh had not worked their full shifts on those days. Mr Casey recognised at the time that there was some animosity in the workplace and said he took the information with a grain of salt as a result, although he later spoke to the third employee and decided to commence an investigation.

[15] He had not progressed any further by 25 January, when the timesheets were completed. Then on or about 29 January a service delivery manager advised him that two clients had complained their calls were unanswered over the Christmas period, and his check of telephone records for the four days in question showed several calls were missed. His check of telephone log in records showed Messrs Remmerswaal and Singh were both logged in to the telephone system for the full shift on all four days. Finally, his check of security records recording when the building was accessed showed Messrs Remmerswaal and Singh had been present for work for between 4 and 6 hours each on the four days.

[16] A letter to Mr Remmerswaal dated 30 January 2008 drew attention to the failure to work for the full rostered shifts, as well as the indication in the timesheets that Mr Remmerswaal worked for the full shift each time and was credited accordingly. Mr Remmerswaal's building access data, pay record for the relevant period, and the timesheets were attached to his letter. He was advised that claiming for time not worked was viewed as serious misconduct and disciplinary action up to and including dismissal could result. A meeting was sought for 7 February.

[17] The meeting went ahead on that date. Mr Singh was also questioned in a parallel set of meetings.

[18] Mr Remmerswaal attended the 7 February meeting together with a support person. He explained that he and Mr Singh had agreed to share the shift, in reliance on Mr Casey's various comments that they could manage their own time and could leave early if it was quiet. Mr Casey replied that he told them they could leave early, but not 6 hours early or that they could share the shift. There was a conflict in the evidence regarding whether he also said there should have been more communication about the matter. Secondly Mr Remmerswaal said the timesheets had been completed

a month after the relevant shifts, and without thinking. Thirdly, there was a discussion about why the telephone logs showed Mr Remmerswaal (and Mr Singh) logged in for 12 hours. Mr Remmerswaal could not explain why the logs showed he was logged in for the whole shift, but said he did not touch Mr Singh's phone or log him in and out. When he was questioned, Mr Singh said he logged Mr Remmerswaal in, intending to take calls coming through on Mr Remmerswaal's phone as well as his own, but did not recall logging Mr Remmerswaal out.

[19] An unrelated concern of Telecom's was also discussed, but it was dealt with at the time and was not part of the decision to dismiss. I do not refer to it again.

[20] After the meeting Mr Casey and Ms Keegan decided further information about the phone login and the completion of timesheets was necessary.

[21] A second meeting was held on 8 February to discuss these matters. Mr Remmerswaal said he had used the SAP system for the last 18 months. He identified some issues with his use of the system but did not attribute to those issues to his recording that he had worked full shifts instead of half shifts. Regarding the logins, he could not remember whether he had logged anyone in or out, and said there was no reason why anyone else would have logged him in.

[22] Mr Casey and Ms Keegan were not satisfied with the responses to why both Mr Remmerswaal and Mr Singh were logged in for the entire shift. Mr Casey did not accept that Mr Remmerswaal had advised him of the plan to share shifts, or that he had authorised such a plan. Nor did he find it plausible that Mr Remmerswaal had forgotten that he worked half shifts when he completed the timesheets.

[23] There was a third meeting on 15 February. Mr Casey set out the conclusions that: the failures to work full rostered shifts were unauthorised absences, in that he did not authorise the sharing of shifts and he was not notified of that plan; Mr Remmerswaal was in a position of trust, and it was a breach of trust to fail to work the full rostered shift or notify anyone of that failure; and it was unlikely that the incorrect entry of hours worked was an honest mistake. He and Ms Keegan had concluded that the absence was unauthorised and the time records were deliberately falsified. They proposed to dismiss Mr Remmerswaal and sought his feedback on that proposal.

[24] A fourth meeting went ahead on 26 February, to obtain the feedback. This time Mr Remmerswaal attended with Mr Edwards. Mr Edwards made representations to the effect that: Mr Casey had accepted his instructions about leaving work early had been misunderstood (which Mr Casey denied at the time and subsequently); Mr Casey had accepted that he said Messrs Remmerswaal and Singh could manage their own time (which Mr Casey also denied then and subsequently); the timesheets were completed incorrectly because Mr Remmerswaal was chased and stood over while he completed them (Telecom says the 'standing over' allegation had not been raised before then, and denies the allegation); the incorrect completion of the timesheets was an honest mistake; it was not open to Telecom to conclude Mr Remmerswaal had deliberately falsified his timesheets on the information it had; and dismissal was not an appropriate outcome.

[25] The final meeting occurred on 27 February. Mr Casey read out a prepared statement. He repeated his denials that he gave permission to Messrs Remmerswaal and Singh to share their shifts or to manage their own time, and did not believe there could have been any misunderstanding about the requirement that full shifts be worked unless he had given express permission to do otherwise. He considered it unlikely that Mr Remmerswaal had forgotten that he worked only half of each of the rostered shifts. Mr Remmerswaal's actions constituted serious misconduct and he was dismissed with immediate effect.

Whether the dismissal was justified

[26] The test of the justification for a dismissal is to take an objective approach, with reference to whether the employer's actions were those a fair and reasonable employer would have taken in all the circumstances at the time the dismissal occurred.¹ It includes a consideration of whether, at the time of dismissal, the employer had clear evidence on which it could safely rely, or had carried out a full and fair investigation which left it on the balance of probabilities with grounds for believing, and it did believe, that the employee was at fault.²

¹ S 103A Employment Relations Act 2000.

² **Airline Stewards & Hostesses of New Zealand IUOW v Air New Zealand Limited** [1990] 3 NZLR 549

[27] With reference to those tests, the further issues Mr Remmerswaal has raised are:

- a. whether there was a failure to conduct a full and fair enquiry in that Telecom, -
 - (i) failed to reveal that Mr Casey had been on notice of Mr Remmerswaal's failure to work full shifts from as early as 16 January 2008, and
 - (ii) allowed Mr Casey to act as co-decision maker when it was necessary to determine the extent to which his actions contributed to or mitigated any alleged misconduct;

- b. whether Telecom honestly concluded Mr Remmerswaal was guilty of serious misconduct, namely conduct that went to the heart and root of the employment agreement, was deeply destructive of it, and was fraudulent conduct rather than lesser (if any) misconduct

- c. even if such a belief was honestly held whether the associated conclusion was reasonable from an objective standpoint, with particular reference to, -
 - i. the evidence actually available to it,
 - ii. the need for evidence as convincing as the charge is grave,³
 - iii. whether the conclusions about Mr Remmerswaal's explanation could reliably be drawn, and
 - iv. whether significant facts and conclusions were put to Mr Remmerswaal for his response.

1. Whether a full and fair enquiry was conducted

[28] I do not accept there is substance in the concern that Mr Casey had been on notice of Mr Remmerswaal's failure to work full shifts from as early as 16 January 2008. Mr Casey treated the information given to him on 16 January with a degree of scepticism initially, but the information received on or about 29 January concerning

³ NZ (with exceptions) *Shipwrights etc IUOW v Honda NZ Limited* [1989] 3 NZILR 82, 85

client complaints caused him to commence a more formal investigation. He did so in an appropriately timely way.

[29] It was submitted that, if Mr Casey had disclosed to Mr Remmerswaal before the completion of the timesheets on 25 January that a question had been raised about the hours he had worked, Mr Remmerswaal would have been prevented from completing the timesheets incorrectly. There was an associated submission to the effect that Mr Casey should have drawn the inaccuracy in the timesheets to Mr Remmerswaal's attention on 25 January when they were completed. It was pointed out that timesheets were rejected from time to time when they were inaccurate.

[30] I do not accept the submissions to the effect that Mr Casey was obliged to put to Mr Remmerswaal the information he had received from other employees promptly or at least before 25 January, because at the time Mr Casey had not reached any conclusion that the concerns had merit. The information which caused him to act came to his attention after 25 January.

[31] Similarly, on 25 January Mr Casey had no reason to reject the timesheets.

[32] The evidence and submissions regarding the client complaints were based on an assumption that the only mechanism for conveying complaints about service in the call centre was the emailed system with which Mr Remmerswaal was familiar. Mr Casey said he received the complaints orally and informally from the service delivery manager who had spoken directly to the clients about their concerns. There was nothing unlikely or unusual in his account. Moreover, the complaints were not relied on for any reason other than that the receipt of the relevant information prompted a formal investigation into the hours worked at the call centre on the days in question. It was not reasonably open to Mr Remmerswaal to conclude that information about the complaints had been concealed or that the complaints were 'made up'. The accusations to that effect were unfounded.

[33] For the above reasons I do not accept that Mr Remmerswaal was subjected to any form of entrapment in respect of the completion of his timesheets.

[34] Regarding Mr Casey's role as co-decision maker as well as a witness, Mr Rooney referred to a decision of the Employment Court on an appeal in **The Warehouse Limited v Cooper**⁴. There the investigator and maker of a recommendation to dismiss was also an indirect witness to the activity leading to the employee's dismissal. The court commented that, ideally, the person concerned should have relinquished or substantially stepped back from that final role. However it found there was no real unfairness. The witnesses who gave statements at the time gave consistent accounts in evidence before the Employment Tribunal, whose decision was the subject of the appeal. In addition the decision to dismiss was made with the concurrence of three senior managers.

[35] Here, on the evidence in the Authority I do not accept it was reasonably open to Messrs Remmerswaal and Singh to conclude Mr Casey had authorised them to share their shifts and to proceed accordingly. Further, the accounts they gave in evidence were not quite the same as those given during the employer's investigation. In particular, according to the company's note of a meeting held on 31 January Mr Singh was expressly asked whether the arrangement to share shifts was discussed with Mr Casey, and he replied that it was not. He did not add that it was, nevertheless, discussed in Mr Casey's hearing.

[36] On the evidence I heard I consider it likely that Mr Casey said both that Messrs Remmerswaal and Singh could manage their own time, and that one person could leave early if the shift was quiet, although less likely that the statements were made during the same conversation. However in deciding to share their shifts so that they worked a half shift each, Messrs Remmerswaal and Singh exceeded the reasonable bounds of the authority to leave early which Mr Casey had given them.

[37] For these reasons, while it would have been preferable if Mr Casey had stood aside from making a decision on the point, I do not believe any unfairness resulted.

[38] Regarding the incorrect completion of the timesheets, I do not accept that Mr Casey pressured and stood over Mr Remmerswaal while he completed his timesheets. They were several weeks late and Mr Casey was entitled to, and did, insist that they be completed. He did not stand over Mr Remmerswaal while they were being

⁴ [2000] 2 ERNZ 351

completed, rather he walked away while Mr Remmerswaal completed them. I do not accept that Mr Casey placed Mr Remmerswaal under such pressure to complete the timesheets that Mr Remmerswaal did so in a hurry, and without recalling that he had worked only half shifts on the days in question. Moreover, suggestions that Mr Casey 'stood over' Mr Remmerswaal in an attempt to 'entrap' him into completing the timesheets as he did were so contrived as to reflect adversely on Mr Remmerswaal's credibility.

[39] Mr Casey played no role in the incorrect completion of Mr Remmerswaal's timesheets, and I did not find persuasive the attempts to create one.

[40] Overall, adopting the approach in **Cooper**, I find no unfairness resulted from Mr Casey's role as co-decision maker as well as witness.

2. Whether Telecom honestly concluded there was serious misconduct

[41] Both unauthorised absence and falsification of records were listed as grounds for summary dismissal on Telecom's intranet at the 'Disciplinary Issues and Processes/Dismissal NZ' page. I accept that the conduct in question here was capable of amounting to serious misconduct, and that Telecom honestly concluded there was serious misconduct.

3. Reasonableness of the conclusion regarding serious misconduct

[42] For the reasons already discussed, Telecom had reasonable grounds for concluding that Mr Remmerswaal's absence from work for half of each of the relevant shifts was unauthorised.

[43] Regarding the falsification of timesheets, there was no doubt that Mr Remmerswaal recorded that he had worked full shifts instead of half shifts. The question is whether Telecom had reasonable grounds for concluding that he did so deliberately. Mr Remmerswaal's explanation was that he had done so innocently and in error. He attempted to place some of the blame for his error on Mr Casey, by alleging that he was hurried or pressured into completing the forms and that he was entrapped into completing them as he did.

[44] Telecom was entitled not to accept the explanation. I say this bearing in mind the test in the **Honda NZ** case.⁵ The attempt to divert attention to Mr Casey's actions was unconvincing. Secondly the shifts in question occurred on high-profile public holidays, not on ordinary days which might arguably become indistinguishable from each other after a period and hence forgotten. Also, there were as many as four of them. Thirdly, the change was part of an agreement discussed with Mr Singh, and unlikely to be forgotten. Overall the explanation was inherently unlikely and Mr Remmerswaal's various attempts to place responsibility for his actions elsewhere did not assist his credibility.

[45] For these reasons I conclude the dismissal was action an employer acting fairly and reasonably would take, and was justified.

The claims for penalties

[46] The penalties against Mr Casey and Ms Keegan were sought under s 134(2) of the Employment Relations Act 2000.

[47] As the Employment Court has said:

“To warrant the imposition of a penalty under s 134(2) of the Employment Relations Act 2000, the plaintiff must establish that there was an act of incitement, instigation, aiding or abetting and that this act was wilful.”⁶

[48] In **Xu v McIntosh**⁷ the Employment Court said of penalties in general:

“[43] The other penalties sought by the defendant correspond exactly with the grounds of her grievance; there is a risk of doubling up if penalties are to be awarded for the same breaches of the employment agreement. ...

[45] If an employee seeks recovery of money underpaid or lost as a result of a personal grievance that is also or includes a breach of an employment agreement, then it seems wrong that a penalty should also be imposed unless there are special facets of the breach calling for punishment of the employer on top of compensation for the employee.”

⁵ See footnote 3

⁶ **Credit Consultants Debt Services NZ Limited v Wilson & Anor**

⁷ [2004] 2 ERNZ 448

[49] It was submitted that Ms Keegan's and Mr Casey's 'concealment' of the fact of Mr Casey's being on notice that Mr Remmerswaal had worked less than his full shifts warranted the additional punishment of this kind. I have found that Mr Casey was not on notice as alleged, even less was Ms Keegan. Further the accusation of concealment was unreasonable and unfounded. It should not have been made.

[50] There will be no order for the payment of penalties.

Costs

[51] Costs are reserved.

[52] The parties are invited to resolve the matter themselves. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a response.

R A Monaghan

Member of the Employment Relations Authority