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Southcombe v Freedom Air Limited (Auckland) [2007] NZERA 140 (2 May 2007)

Determination Number: AA 134/07 File Number: 5037944

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

**BETWEEN AND
REPRESENTATIVES MEMBER OF AUTHORITY
INVESTIGATION MEETING SUBMISSIONS RECEIVED**

Chris Southcombe Freedom Air Limited

Paul Wicks, Counsel for Applicant
Kevin Thompson, Counsel for Respondent
Dzintra King 7 February 2007

From the Applicant on 26 February and 12 March 2007 From the Respondent on 9 March 2007

DATE OF DETERMINATION

02 May 2007

DETERMINATION OF THE AUTHORITY

The applicant, Mr Chris Southcombe, claims he has been unjustifiably dismissed by the respondent, Freedom Air Limited. The respondent denies that the dismissal was unjustified.

Annual Leave Application

Mr Southcombe started his duties as a flight attendant on 4 January 2005. Prior to this he had undergone a two week training period in November 2004. While training he completed a cabin crew leave application form. His first preference was for two blocks of two weeks leave in June 2005. Mr Southcombe was subsequently granted leave from 6 June to 18 June followed by three rostered days off so his return to work would take place on 22 June 2005. Despite not having been granted four weeks' leave Mr Southcombe booked an overseas trip in early April departing New Zealand on 6 June for Perth, then travelling to Paris and returning from Athens on 28 June. This trip was paid for on 12 May before his leave, which did not cover the planned period away, had been approved.

Mr Southcombe attempted to work out a way whereby he could obtain the extra leave he needed. He looked at swapping leave with other crew. He dealt with Ms Sarah-Jane Whitehead, the Cabin Crew Base Manager, Ms Ayesha Sethna, the Base

Manager, and Mr Mike Lewis, the Cabin Crew Manager, who had worked with Mr Southcombe when they were both with Air New Zealand.

Sick Leave

On 29 May Mr Lewis and Mr Southcombe had a telephone conversation. There is a dispute about what Mr Southcombe said in the course of this conversation but it is evident that Mr Lewis formed the view that Mr Southcombe had said that he would resign. He telephoned Ms Whitehead and told her that Mr Southcombe would be leaving a resignation letter that day in the Crew Room.

Ms Whitehead later told him that Mr Southcombe had called in sick and there was no resignation letter. Mr Southcombe provided what the respondent took to be a medical certificate dated 30 May 2005 which stated that Mr Southcombe had been ill since 29 May and that he had been advised to return for a medical review "on his return from leave after the 30 June".

Mr Southcombe said that when he visited his doctor he had told the doctor that he was due to start leave the following week and where and how he would be travelling. His doctor had said he needed time off work and he had not been sure about travelling in his state of health. However the doctor had told him that travelling to warmer climes did not bother him as long as Mr Southcombe took it easy.

Ms Whitehead understandably felt she needed some clarification regarding the leave as a period of annual leave had been approved and now it appeared Mr Southcombe would be off sick. She faxed Mr Southcombe on 30 May saying:

I have requested clarification of your medical certificate so we can appropriately show the type of leave taken as of 22 June.

Chris, we are keen to work with you to ensure that any leave you take is clear, and any illness is dealt with in an appropriate manner. Please be aware you currently have no sick leave available and any sick leave taken will be unpaid. I have offered assistance by inviting you to see the company nominated doctor at our expense.

I look forward to hearing back from you to clarify your leave.

On 2 June Mr Southcombe returned to his doctor who produced a further letter stating that Mr Southcombe was slowly improving, that he should seek a review on around the beginning of July. He went on to say:

I understand that he may not qualify for leave over this time. I have advised him that in the interest of his health that he should take leave without pay until he has returned to full health to return to flying duties.

Ms Whitehead wrote to Mr Southcombe on 3 June saying that she had received a further medical certificate which indicated he would be unfit to return to work until around 1 July and that he would be on leave without pay from 22 June until his return. She said:

Freedom Air would be disappointed to think that you are using this medical certificate for the purpose of ensuring that you can go travelling rather than resting to recover from an illness.

Chris, please respond to me before your holiday around the concerns I have highlighted in this letter. If I don't receive a response from you before you leave on holiday we will have no other option than to convene a formal disciplinary interview on your return to investigate this matter.

Mr Southcombe telephoned her at 5pm. She told Mr Southcombe that if he was as sick as his doctor indicated he should be taking time to recover and not travel overseas. She said Mr Southcombe told her he was unsure whether he would be travelling and if he intended to do so he would get a medical clearance to fly. He did not say that his doctor had already told him it would not be problematic for him to travel.

4 July Investigation

Mr Southcombe subsequently proceeded with his travel plans, flying to Perth, Singapore, Paris, the Greek Islands and then returning to New Zealand.

Ms Whitehead discussed the matter with Mr Lewis and they determined that the situation was unsatisfactory and required further investigation. On 27 June Mr Lewis wrote to Mr Southcombe asking him to attend a meeting to discuss the concerns raised by Ms Whitehead in her 3 June letter. He wrote:

The intention of the meeting is to investigate whether you recently used your medical certificate provided for rest and recovery, for the purposes of travelling overseas.

In the course of the meeting Mr Southcombe said his doctor was aware that he intended to travel and was ok with that and that the doctor had told him it was up to Mr Southcombe whether he travelled or not. Mr Lewis asked what the difference was between going on an overseas holiday and not being able to operate on a Trans Tasman flight. Mr Southcombe said he had rested on the flight, taken medication and that it could be said that it had been wrong of him to go but that he had rested while he away. He said that he had made the wrong decision but was caught in a situation where he would have lost his money if he had not travelled. There was an adjournment after which Mr Southcombe was suspended.

Dismissal

The following day Mr Lewis phoned Mr Southcombe and told him his employment had been terminated. The reason given was that:

We have lost trust and confidence in you as an employee due to the situation of using sick leave for the purposes of travelling overseas on a holiday. At the meeting yesterday you informed us that the reason you went on the trip was that you were unable to receive a refund on your tickets. We do not see this as a mitigating factor, particularly as you had made the travel arrangements without checking whether you could be released on leave.

Purpose of Sick Leave

Generally speaking, sick leave is for recovery from illness and annual leave is for recreation. The [Holidays Act 2003](#) provides separate entitlements to sick and annual leave.

I accept the respondent's submission that the purpose of sick leave is fundamental this case and that its purpose is to excuse the employee from the obligation to attend work and to take time to rest and recover in order to be able to return to work as soon as possible. I also agree that an employee does not have carte blanche to undertake whatever activities he or she wishes during a period of sick leave.

However, I do not think it possible to set absolute rules regarding what constitutes appropriate activities during a period of sick leave. A data input operator who is unable to use her hands may be able to go to the cinema. A person with a stress related illness may be able to play golf, do the garden or visit friends whereas a person suffering from pneumonia would not. The guiding principle must be that the activities undertaken during a period of sick leave must be conducive to enabling a recovery and a return to work; and that any activities undertaken should not militate against a recovery.

Was the Inquiry Fair?

There was considerable debate regarding the question of who was the proper arbiter of what constituted appropriate use of sick leave: was it the doctor or the employer? This is not a black and white issue either. There will be circumstances in which the employer is clearly obligated to take account of and abide by the advice and recommendations of a medical practitioner.

These will be the majority of cases.

In this case, however, the doctor did not tell Mr Southcombe that he should take an overseas holiday in order to recover from his respiratory illness. His note of 2 June 2006 states: "I have advised him that in the interests of his health that he should take leave without pay until he has returned to full health to return to flying duties". Mr Southcombe said that Dr Ogle advised him that travelling away to warmer climes did not bother him provide he was taking it easy. Dr Ogle said that he encouraged Mr Southcombe to proceed with his plans as convalescing in the dry warmer weather of a northern summer was something he would recommend more often if patients had the facility to do that.

The applicant says that the company should have spoken to Dr Ogle prior to making a decision to dismiss. Mr Wicks pointed to the following passage in the Statement in Reply:

What we are unsure about is whether Chris informed his doctor about his extensive travel plans e.g Perth, Singapore, France etc. It is unlikely that a Doctor would recommend that level of travel for a person who is too sick to perform their role. It is our belief that the Doctor would have recommended to Chris to ensure he rested to recover from his illness. We doubt he would have recommended such extensive travel.

The contention is that the failure to follow up with the doctor resulted in incorrect conclusions being drawn. Establishing that Mr Southcombe's explanation was genuine and that he had provided full details of his travel plans to his doctor goes to the heart of assessing the nature and degree of the misconduct and whether dismissal was appropriate.

At the meeting Mr Southcombe said his doctor told him it was up to him whether he travelled or not. At the time of the meeting and at the time of making the decision the employer did not question this. Mr Southcombe said it was wrong of him to have gone away but that he rested while he was away and that he would have lost his money if he had not travelled. He also said that looking back it could have happened differently and he was remorseful.

A subsequent expression of doubt by Freedom Air about the degree of disclosure about his holiday plans and a failure to have ascertained the extent of the disclosure at the time of making the decision to dismiss does not affect the justifiability of the dismissal. Mr Southcombe did not tell his employer on 3 June that he had already discussed this with his doctor. Rather, he told his employer he would seek such advice before making a decision.

Decision

Serious misconduct is "conduct that deeply impairs or is destructive of the basic confidence or trust that is an essential of the employment relationship" Northern *Distribution Union v BP Oil NZ Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483, 487.

At para 145 of *Griffith v Sunbeam Corporation Ltd*, unrep, WC 13/06, Wellington, 28/07.06 Couch J said:

The use of sick leave is, by its nature, a matter requiring a significant degree of trust of the employee by the employer. ...in general, abuse of the right to paid sick leave will be serious because it involves obtaining payment by false pretence or, at least, attempting to do so. Having said that, not every instance 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.

At para 46 Couch J noted that there was no specific provision identifying abuse of sick leave as serious misconduct. However, he also said that there was no evidence of any other factor that would suggest that the right to sick leave could be exercised other than honestly and in genuine case of sickness. The fact that Mr Southcombe had been given unpaid leave to use for the purposes of sick leave does not alter the thrust of Couch J's comments. Mr Southcombe had not been given unpaid leave for the purposes of taking annual leave.

Mr Southcombe had an obligation to use his sick leave honestly and properly. That he knew he had not done so is clear from the interview notes taken at the disciplinary meeting.

Freedom Air had an admission that he had taken an overseas holiday (which he had planned and paid for without having leave for that purpose granted) and had used unpaid sick leave in order to take the holiday. There was also an acknowledgement of wrongdoing on Mr Southcombe's part and the employer was entitled to rely on that admission.

Mr Southcombe was given notice of the allegation (he was in fact told on 3 June prior to going overseas that the company would have a problem if he used what was intended as sick leave to travel overseas), he had a real opportunity to refute the allegation and explain his conduct and there was an unbiased consideration of his explanation.

I agree with the respondent that sick leave is not available to take overseas holidays and that this is recognised by the fact that the [Holidays Act 2003](#) differentiates between sick leave and annual leave. I agree also that the real issue is what use Mr Southcombe chose to make of the "medical certificate" that was provided, which the company accepted as a valid medical certificate. There was no assertion by Freedom Air that the sickness was not genuine and the decision to dismiss was not made on that basis; nor was the decision to dismiss made on the basis that Mr Southcombe engineered an illness and obtained a certificate for the purpose of taking an overseas trip for which leave had not been granted. The allegation was that he did not use the leave for the purpose for which it had been granted.

I also agree that this is an employment issue and not a medical issue. Mr Southcombe's doctor told him there was no impediment to his travelling and that the travel could be beneficial. The issue is not whether he was precluded from travelling or whether he was given permission by his doctor to travel. Mr Southcombe had a responsibility to consider whether it was proper for him to use his unpaid sick leave to take a holiday. Mr Southcombe was aware, before he made the decision to go on holiday, of the employer's concerns about that course of action and it is evident that he knew it was not the right thing to do given his admission during the interview that took place upon his return to New Zealand.

Mr Southcombe's conduct was of such gravity that Freedom Air was entitled to say it had lost trust and confidence in him. In the circumstances, Freedom Air was also entitled to make the decision to decide to terminate his employment. That is what a fair and reasonable employer would have done faced with an employee who had used unpaid sick leave to take an overseas trip, which action constituted a misuse of sick leave.

Mr Southcombe was justifiably dismissed and does not have a personal grievance.

Costs were reserved. If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King Member
Employment Relations Authority