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Department of Labour
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THEMES IN EMPLOYMENT LAW

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Holidays Act 2003 –
Consent to take annual leave

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In *Ashton v PMP Print Limited* unreported R Arthur, 27 August 2007, CA 104/07, the Employment Relations Authority considered whether an employee was unjustifiably dismissed for taking leave. In its determination the Authority discussed previous case law on the issue.

The employee claimed that he was denied five weeks leave to travel to the soccer world cup. He claimed firstly, that his manager had previously agreed to the leave, and, secondly that, he was unjustifiably dismissed for taking leave without authorisation.

The employer denied any prior approval was granted, and asserted was entitled to refuse the leave application. The employer argued its managers took reasonable steps to accommodate the employee's leave request but were entitled to dismiss the employee for serious misconduct when he went away for a period of 24 days despite leave only being granted for 15 days.

The Authority found the employer did not unequivocally commit itself to agreeing to the employee taking extended leave. The employer argued that due to its concerns about engineering commitments the leave was refused. The Authority found having reviewed the evidence the employer's conclusion that the employee's leave proposal did not meet its business needs was a reasonable one.

The employer's response to the employee's leave request was not an outright refusal, but an offer to provide 15 days of leave. However, the employer's offer drew the line at extending that offer to 24 days as sought by the employee. The Authority found that in terms of s18 (3) and (4) Holidays Act 2003 the employer's actions did not amount to unreasonably withholding consent to a leave request or failing to attempt to agree to the annual holiday.

The employer assumed the employee had not already committed to his travel plans as he did not know the outcome of his leave application. The employee had not informed the employer of his arrangements in any detail. The Authority concluded the statutory good faith obligations to be responsive and communicative lay equally on the employee as well as the employer. The employee never gave any real consideration to adjusting his travel plans to fit within the 15 days leave offered by the employer.

The employee informed the employer that he intended to take the 24 days leave which was not agreed to by the employer. The employer cautioned the employee that going ahead with the unauthorised leave period of 24 days would be seen as a wilful breach of the employment agreement and would result in disciplinary action for serious misconduct. The employee was asked to attend a disciplinary meeting upon return from his leave. Following what the Authority found to be a procedurally fair investigation, the employee was dismissed.

The Authority found that the employee's deliberate defiance of the employer's refusal to grant the 24 days leave was clearly capable of being considered serious misconduct by a fair and reasonable employer. The Authority found the employee's

actions were a wilful and deliberate act which placed the employer at some risk. Furthermore, it would seriously undermine the confidence of a fair and reasonable employer to continue to rely on the faithful service of the employee.

The Authority went on to discuss the applicability of *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668 (EC) and *Brownless v Tasman Pulp & Paper Co Ltd* [1994] 2 ERNZ 647. In *Burberry* the Court found the employer had unjustifiably dismissed a worker when their manager had underestimated the cultural importance of the leave requested, and refused the leave so shortly before the day sought as there was no time for the employee to make alternative arrangements. The Authority distinguished the present case from *Burberry* as the instructions given by the employer were both lawful and reasonable. The Authority found in the present case the employee was clearly appraised of the decision well in advance and clearly notified of the likely consequences should he flout the employers decision.

In *Brownless* the employee, on the advice of his union organiser, took leave after being initially refused the leave by his employer. The employee was later dismissed for disobeying a lawful and reasonable instruction. The Court in *Brownless* found that the dismissal was unjustified because the employee was really a pawn in a wider dispute between the employer and the union and the consequence of dismissal was too harsh in those circumstances. The Authority in the present case distinguished *Brownless* because the applicant's decision to go ahead with his holiday was not on the basis of any advice provided to him by the union.

The Authority concluded the actions in *Ashton* were a wilful and deliberate act of disobedience that a fair and reasonable employer would consider constituted serious misconduct that fatally undermined the respondent's trust and confidence in the employee. The Authority found both the respondent's actions in refusing the leave and dismissing the applicant were justified.