IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 299
5401625

	BETWEEN	GRAEME ANDERSON Applicant
	A N D	OCEANIA GROUP (NZ) LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Warwick Reid, Advocate for the Applicant Richard Upton, Counsel for the Respondent
Investigation Meeting:	10 June 2014 at Auckland
Date of Determination:	11 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Anderson) was employed by the respondent (Oceania) at its Melrose Home and Hospital in Tauranga. Mr Anderson was a maintenance person. He had worked in that position for a number of years with a previous employer on the same site.

[2] Mr Anderson was dismissed from his employment on 9 October 2012 and he contends that that dismissal was unjustified. Oceania resists Mr Anderson's claim.

[3] In about 2008, Oceania purchased the facility that Mr Anderson worked at (Melrose) and on 3 June 2009 Mr Anderson signed Oceania's Acceptable Behaviour in the Workplace policy. Amongst other things, that policy defined serious misconduct as including *"possession or use of Oceania's property or vehicles without authorisation. This includes scrap waste or damaged items"*.

[4] On 17 June 2011, Mr Anderson entered into a written employment agreement with Oceania which contained a term incorporating Oceania's rules, policies and procedures into the terms of the employment and identified that those rules, policies and procedures could be viewed on Oceania's intranet.

[5] In June 2012, Oceania released its Code of Values and Conduct which included a provision stating that stealing, misappropriating or converting to the employee's own use property belonging to Oceania was criminal action and would result in notification to Police and dismissal.

[6] Early in 2012, management at Melrose became concerned about its property being removed from site by staff for their own personal use to such an extent that it hindered the work of other employees. Accordingly, Rosa Wallace, Melrose's manager, had a meeting with maintenance staff and again advised that the removal of tools and equipment belonging to Melrose was prohibited without her explicit consent. Mr Anderson attended that meeting and he told me at my investigation meeting that he was *"crystal clear"* about the message from that meeting.

[7] To reiterate the message from the meeting, Ms Wallace caused an entry to be placed on the company's intranet to re-emphasise the point; again Mr Anderson told me at the investigation meeting that he knew about that entry.

[8] That is the context then in which the events leading to Mr Anderson's dismissal were played out. In late September 2012, Mr Anderson removed from Melrose a 4 litre tin of stain for his own personal use. It is common ground that Mr Anderson did not seek permission to remove the stain. Mr Anderson accepted at the investigation meeting that he ought to have obtained that permission. He also accepted in answer to a question from counsel that he removed the stain for his own private use and not to facilitate any work for Melrose.

[9] The essence of Mr Anderson's explanation for this behaviour, when Oceania conducted its disciplinary investigation, was that first, other staff did the same thing, and secondly, that the stain that Mr Anderson had removed was effectively in replacement for other stain which was his personal property and which he had brought onto the Melrose site and which had subsequently disappeared.

[10] It also became apparent during the disciplinary process that, since the April 2012 meeting making it explicit that Oceania prohibited the removal of its plant from

site without authorisation, Mr Anderson had removed for his own use a weed-eater and a water blaster.

[11] There was an initial disciplinary meeting on 2 October 2012 and after an exchange of correspondence a second and final meeting on 9 October 2012 at which Mr Anderson was summarily dismissed, that dismissal being confirmed in writing by letter dated 11 October 2012.

[12] By letter dated 28 October 2012, Mr Anderson raised a personal grievance. Subsequently the matter was filed in the Authority, the parties attended an unsuccessful mediation and it now falls for disposition by the Authority.

Issues

[13] There is little if any dispute about the facts in this case and really the only issue for the Authority to decide is whether Oceania could have dismissed in the particular circumstances of this case.

Was Mr Anderson unjustifiably dismissed?

[14] I am satisfied Mr Anderson was not unjustifiably dismissed. I start my analysis with the base principle that theft, misappropriation or conversion of the employer's property to the employee's use is serious misconduct. There are numerous judicial pronouncements to support this fundamental precept.

[15] In addition, there are a number of relevant contractual provisions which bear on this aspect as well. I have already alluded to those in this determination. They include the employer's policy on Acceptable Behaviour in the Workplace which defines possession of or use of Oceania property without authorisation as serious misconduct. Next, there is the incorporation of Oceania's rules, policies and procedures in the employment agreement.

[16] Those rules, policies and procedures included a definition of honesty noting in that context that stealing, misappropriating or converting Oceania property to private use was criminal, could result in criminal sanctions and/or dismissal.

[17] Accordingly, I am satisfied that on any reasonable construction, the relevant provisions of Mr Anderson's employment agreement make clear that the converting of company property to personal use can result in criminal sanction and dismissal and

that there is ample judicial precedent for the view that such action resulting in dismissal will be found to be justified.

[18] Even more pointedly, it is apparent on the undisputed facts that Oceania became aware in early 2012 of a prevailing culture of staff removing plant and equipment from Melrose for their own use. That resulted in Ms Wallace having a fireside chat with the maintenance staff (including Mr Anderson) in which she made abundantly clear that the removal of plant or equipment from Melrose without her authorisation was forbidden. She followed that up instantaneously with a note on the intranet. As I have already noted, Mr Anderson understood the purport of the meeting in April 2012 and did not deny that he was aware of the follow up on the intranet.

[19] What makes that last mentioned aspect so pertinent is that the evidence that I heard suggested that the primary driver for Oceania to re-emphasise its commitment to discouraging misappropriation of its property was Mr Anderson himself. So Oceania felt it needed to take additional steps to reiterate its policy around misappropriation because Mr Anderson himself made that a necessity by failing to abide by the rules.

[20] It is apparent from the submissions filed on Mr Anderson's behalf that Mr Anderson is particularly troubled by the contention that he was dismissed for theft. Indeed, his able advocate, Mr Reid, made the point in his oral closing submission that Mr Anderson *"could not live with that"*. The purpose of the proceeding, from Mr Anderson's perspective, was to clear his name.

[21] Mr Anderson's submissions then proceeded to draw on the criminal law and emphasise the elements of the crime of theft and emphasised the contention that there was no dishonest intent on Mr Anderson's behalf. That is a point I will come back to, but for present purposes I simply make the observation that what Mr Anderson was dismissed for was a breach of Oceania's policy, specifically its policy on honesty.

[22] That policy refers to a finding that the subject individual had an intention to steal, misappropriate or convert items to private use and it is because Oceania found as a fact that that allegation was made out, that Mr Anderson was dismissed.

[23] I accept that Oceania uses the word *"steal"* in its policy but it is clear that it is using that word in a looser sense than a lawyer might use it and it would perhaps be more appropriate to think of Mr Anderson's behaviour as evidencing

misappropriation rather than theft because theft has a particular meaning in the criminal law.

[24] But whatever Mr Anderson's sensitivities on the matter, the short point is that Oceania found that he had breached its policy, a policy which it had gone to some lengths to enunciate both through the employment agreement itself and its link to company policies and procedures to its general policy on *"Acceptable Behaviour in the Workplace"* and its fireside chat with Mr Anderson in April 2012 about the removal of company property, followed up by a note on the intranet.

[25] Not only was the company's expectation on honest dealing by staff made absolutely clear in a general sense, but particularly in relation to Mr Anderson there had been the meeting in April 2012 followed up by the note on the intranet which was directed specifically at him and his immediate work colleagues. Even Mr Anderson accepted that he knew perfectly well what Oceania's expectations were and yet he still chose to behave as if the rules did not apply to him. It is difficult to see how any employer could do more to make clear what its expectations were than this employer.

[26] I return now to the contention made in submissions for Mr Anderson that he had no dishonest intent in removing the 4 litre tin of stain for his personal use. The reason this contention is able to be made is because of Mr Anderson's evidence, already alluded to in brief, that he told the employer that he regarded himself as simply replacing stain which was his personal property which he had left at Melrose and which had subsequently disappeared.

[27] The evidence was that Mr Anderson was at one point, ending in 2011 (that is the year before the events complained of) both an employee of Melrose and a contractor to Melrose. In that latter capacity, he had undertaken contracts painting parts of the facility. Again, the unchallenged evidence I heard was that with one exception which I will mention for the sake of completeness, where Mr Anderson was a contractor to Melrose, he purchased the paint. The one exception was a job that he did painting the dementia ward at Melrose where Melrose supplied the paint and he applied it.

[28] Mr Anderson's evidence is that, leaving the dementia ward job to one side, he provided the paint, applied it and kept the residue at Melrose.

[29] Accordingly, when he came to think about the job that he wanted to attend to at his own home, he says that he sought out one of the half used tins of the appropriate stain from one of his contractual jobs at Melrose, was unable to find one and therefore took a 4 litre tin of stain belonging to Melrose.

[30] I heard an interesting esoteric argument about who owned the residue of paint purchased for a contract of that sort. Was it the contractor or was it the principal?

[31] One argument went that the principal paid for the job and if there was paint left over at the end of the job then that paint belongs to the principal. Conversely, the countervailing argument was that the contractor contracted to supply the paint and priced the job on that basis and therefore the price could only be the labour and the quantity of paint actually used. The corollary is that the residue, if any, belonged to the contractor.

[32] As if to demonstrate the truth of that second proposition vesting the ownership of the paint residue in the contractor, the argument was advanced that if the contractor had miscalculated the amount of paint that was necessary, then the onus was on him to purchase additional paint.

[33] Although it is only of academic interest and not germane to the determination that I must make in this matter, I consider that the better view is that the residue (if any) belongs to the contractor because I think the argument that the contractor's obligation is to apply the appropriate quantity of paint sufficient to complete the principal's job is the more attractive and therefore *" unders and overs"* vest with the contractor and not with the principal.

[34] But that seems to me to not assist Mr Anderson because he was absolutely clear in his evidence to the Authority that he knew that the paint that he actually removed from Melrose did not belong to him and had never belonged to him. It was paint that belonged to Melrose and as a consequence, in removing it without authorisation, he was clearly in breach of the policy which he himself admitted to me on oath that he knew the purport of.

[35] Sadly for Mr Anderson, if he had just taken the time to discuss matters with Ms Wallace, as he was supposed to do, and as he knew perfectly was a requirement of Oceania's policy, her evidence was that she would have approved him taking a small amount of paint, provided he replaced that.

[36] The point Ms Wallace was making in her evidence when she made that perfectly sensible admission was that if it was a matter of convenience, then of course staff could make use of Oceania's property provided they did not benefit from it financially and that Oceania did not suffer financially. That is why she made the stipulation in her evidence that she would have allowed Mr Anderson to remove a small quantity provided he replaced an equivalent quantity. Such an arrangement would leave the parties in balance. But what Mr Anderson did was he decided, without consulting Oceania, that he was entitled to remove the item without going through the proper process mandated by the employer.

[37] It follows from the foregoing observations that I am not persuaded by the submission that Mr Anderson had no dishonest intent. He took Oceania property knowing that it was against Oceania policy for him to do that. The suggestion that there can be some informal form of set-off as between the stain which Mr Anderson says he left at Melrose and the stain belonging to Oceania which he removed for his own purposes, does not avail him because looked at in any sensible way, what he took was company property, he took it in direct contravention of company policy, he knew what that policy was, and in particular, he made no attempt whatever to discuss matters with Ms Wallace, Melrose's manager, who seemed to me to have a practical and sensible approach to matters.

[38] Based on that assessment of Ms Wallace's behaviour, it is difficult to see her not being prepared to reach some accommodation with Mr Anderson in relation to a small amount of stain based on his set-off argument, if she had known that that was what was happening. But she did not know. Mr Anderson simply took it upon himself to deal with the matter as if he knew best.

[39] Mr Anderson also alleges disparity. He says there was a prevailing culture at Melrose which allowed staff to be lax about the rules. He refers to two examples particularly of this occurring but I agree with Oceania's submissions that neither of those disparity arguments are on all fours with Mr Anderson's own behaviour and in any event, Mr Anderson's closing submissions very properly concede that disparity is *"not a big issue"* in the case.

[40] Sadly, the evidence I heard suggested that the principal person responsible for any culture of laxness with Oceania's property was Mr Anderson himself.

[41] Even looking at the examples that Mr Anderson relied upon when making the disparity allegation to Oceania during the disciplinary process, neither of them are in any way similar to his behaviour. The first predates his behaviour by three years and the second, on inquiry, actually rested on the contention that Mr Anderson himself had approved the other staff member removing paint, although Mr Anderson vigorously denies that allegation. On inquiry, the employer was satisfied that the other staff member who Mr Anderson had identified was genuinely remorseful and therefore in a quite different category from Mr Anderson who, throughout the disciplinary process, conveyed the impression that Oceania was making a fuss about nothing.

[42] Finally, I consider the process adopted by Oceania in investigating this matter and reaching a conclusion to dismiss. Mr Anderson raised various objections to Oceania's process. Principal amongst those objections was the contention that Ms Wallace adopted a minimalist approach to her inquiries and that she should have conducted a more elaborate investigation. Mr Reid for Mr Anderson told me *"this was a case that cried out for further investigation"*.

[43] I do not accept that submission. It seems to me that submission only has force if it is able to be contended that Mr Anderson had what I have referred to in this determination as a set-off of his stain against Oceania's stain. For reasons that I have already enunciated, I do not accept that set-off argument. The stain that Mr Anderson took belonged to Oceania. Ms Wallace had no idea that there was any contention made by Mr Anderson that he had any entitlement to set Oceania's stain off his allegedly missing stain; Mr Anderson never bothered to discuss matters with her. As I have already indicated, if Mr Anderson had had the sense to engage with his employer it seems to me likely that they would have come to a sensible and practical arrangement and none of the events that followed would have happened.

[44] Looked at exclusively as an investigation into the misappropriation of Oceania property, I am satisfied that all of the requirements of s.103A of the Employment Relations Act 2000 (the Act) are met.

[45] Oceania received a complaint, conducted some inquiries to establish its veracity, raised the issue with Mr Anderson, gave him a reasonable opportunity to comment, provided him with statements of people Oceania had spoken to, considered his various explanations and further investigated them as necessary particularly

concerning his allegations of disparity, reached a provisional conclusion, sought his submissions on penalty, gave earnest consideration to alternatives to dismissal and then proceeded to reach a final decision.

Determination

[46] I have not been persuaded that Mr Anderson has a personal grievance because I am satisfied that he was justifiably dismissed from his employment for a clear breach of Oceania's policy, the terms of which were well known to him.

Costs

[47] Costs are reserved.

James Crichton
Member of the Employment Relations Authority