

individual employment agreement. Fuller's disciplinary policy sets out the standards of conduct expected from its employees including setting out examples of serious misconduct and misconduct.

[3] On 23 January 2014 Ms Bailey was working in the main ticket office at the Auckland ferry terminal. All passengers arriving at the ferry terminal are required to produce or purchase a ticket on arrival.

[4] Ms Bailey became aware that a customer who had arrived from Half Moon Bay was not able to produce a ticket confirming she had paid for her journey. Ms Bailey says she was instructed by her supervisor, Mr James Gear, that the customer was not to leave the terminal.

[5] At the time Mr Gear was dealing with this customer, a tour to Rangitoto had been cancelled and other customers were requiring refunds which kept Mr Gear busy.

[6] The customer attempted to leave the ferry terminal which caused Ms Bailey to intervene. Ms Bailey advised the customer she was not allowed to leave. Mr Gear also intervened and the customer returned to be seated in the terminal area, where she tried to locate the ticket she had purchased on the ferry. Ms Bailey says she was instructed to stay with the customer while Mr Gear called the Police.

[7] Despite being told to stay, the customer left the ferry terminal. The customer had previously explained that she had to catch a bus departing from SkyCity for Whangarei and that the bus left in 20 minutes. Ms Bailey and another employee followed the customer across the road from the ferry terminal. The customer realised she had left a bag behind at the ferry terminal and returned to retrieve it.

[8] The customer then left the ferry building again, and again, Ms Bailey and her colleague gave chase. This time Ms Bailey phoned the police on her mobile phone and kept the police up to date with information as to the whereabouts of the customer. At the time the customer left the terminal the second time she was nearly run over by a taxi at which time Ms Bailey's colleague yelled advice to the taxi driver that the customer was a "bit loopy" and Ms Bailey told the customer she was "crazy".

[9] The customer was followed up Queen Street and into Victoria Street. The purpose of following the customer was to alert the bus driver to the concerns

regarding the customers' failure to produce or pay for her ferry ticket. Ms Bailey was advised by the police that no police officer would be attending and the two employees turned around and walked back to the ferry terminal.

[10] It was common ground that the Auckland Transport Security guard followed Ms Bailey and her colleague on both occasions.

[11] The events of the day resulted in a formal complaint from the customer to Fullers that not only had Ms Bailey and her colleague followed the customer up Queen Street and then Victoria Street, but also that Ms Bailey and her colleague had made loud derogatory comments about her as they followed her.

[12] The customer attached to her letter of complaint the ticket she had purchased on the boat from Half Moon Bay to Auckland. The customer explained that the ticket had become lodged in the toe of one of the shoes she had in her bag. The customer set out her account of events including that she had explained to Mr Gear that she had purchased a ticket on the ferry but could not find it in her bag. The customer had advised Mr Gear that she needed to catch a bus to Whangarei which was due to depart from SkyCity within 20 minutes. The customer also set out in her letter a brief account of her recent medical history as a cancer patient.

[13] The complaint was investigated by Ms Angeline Sina, Ticketing Manager and Ms Caitlyn Barrett, HR Advisor. Ms Sina was satisfied Ms Bailey's conduct amounted to serious misconduct and issued a final written warning.

The Issues

[14] The issues for the Authority are:

- i. whether the action by Fullers in issuing a final written warning was justifiable;
- ii. if not, what, if any, remedies should be awarded; and
- iii. what, if any, costs should be imposed.

The Final Written Warning

[15] On 23 January 2014 the customer formally complained to the Police that she had been subjected to intimidation and on 24 January 2014 she wrote a formal complaint to Fullers that she had been chased by two employees, abused, yelled at,

called a “thief”, “white trash”, and “loopy” and that one of the employees had attempted to take her wallet from her bag.

[16] Fullers conducted an initial investigation into the complaint. A meeting was held on 10 February 2014 where Ms Bailey was invited to provide her view of events from 23 January 2014. Prior to the meeting Ms Bailey had been advised that the meeting may lead to disciplinary action.

[17] On 11 February 2014, Ms Sina wrote to Ms Bailey advising her that disciplinary action may be necessary and set out the following allegations of serious misconduct and misconduct.

- Intimidating and harassing the customer by following her up towards SkyCity out of our premises;
- Causing a customer to feel “dirty ... mortified and embarrassed” by verbally abusing the customer using words like “thief, white trash and loopy”;
- Exhibiting very poor customer service by the above actions and failing to represent Fullers in a professional manner;
- Leaving your place of work – without permission from your manager – to follow the customer out of our premises.

[18] Ms Bailey was advised that if the allegations were upheld, disciplinary action up to and including dismissal was a possibility.

[19] The disciplinary meeting was held on 12 March 2014. Ms Bailey was represented by Mr Russell Mayn, Secretary/Treasurer of the Auckland Branch of the Maritime Union. The meeting lasted for approximately 30 minutes.

[20] Ms Bailey provided a written account of what had occurred on 23 January 2014. As a result of the information provided by Ms Bailey, and Mr Mayn on her behalf, further investigations were carried out. These further investigations included interviews of other employees who were present on 23 January 2014.

[21] There was no dispute that the customer was unable to produce a ticket as proof that she had paid for her journey from Half Moon Bay. There was also no dispute that the customer refused to purchase a ticket and was advised by Mr Gear that to leave the ferry terminal without producing or paying for a ticket would be considered theft and that he would call the police.

[22] The key areas of dispute arose with respect to Ms Bailey's actions in leaving the ferry terminal and following a customer and whether Ms Bailey had spoken in derogatory terms leading to the embarrassment and humiliation of the customer.

[23] Ms Bailey's explanation for leaving the terminal was that she had been instructed by Ms Suzie Wilson, Contact Centre Manager, to "run after" or "chase after" the customer. Further, that Mr Gear had told her to "stay" with the customer. Ms Bailey denied calling the customer a "thief" but acknowledged in her written account that she had called the customer "crazy". Ms Bailey's colleague had previously acknowledged that she had called the customer "loopy". Both employees denied the customer had been called "white trash".

[24] After receiving Ms Bailey's written and verbal explanations on 12 March 2014, Ms Sina and Ms Barrett undertook further enquiries.

[25] Ms Wilson was interviewed and denied giving any instructions to Ms Bailey and went so far as to deny even being aware of the customer issues as she was fully engaged in dealing with customer concerns regarding the cancelled Rangitoto tour.

[26] The security guard who had followed the employees up Queen Street and into Victoria Street was also interviewed. He advised Ms Barrett that as far as he was aware no instruction had been given to either of the employees to follow the customer.

[27] Another employee, who was working on 23 January 2014 and was aware of the situation with the customer, was interviewed. He reported that Mr Gear had told someone not to let the customer leave but that could not be interpreted as chasing after a customer. The employee was unable to confirm whether Mr Gear knew the two employees had left the ferry terminal or not. The employee stated that no instruction had been given and that it would be pretty unusual to follow a customer.

[28] In his second interview, Mr Gear advised that he was not aware the customer had left the ferry terminal or that the two employees had followed the customer across the street from the ferry terminal.

[29] On 28 March 2014 Ms Sina wrote to Ms Bailey and set out a brief summary of the information she and Ms Barrett had obtained during the further investigations. The notes of the interviews were not provided to Ms Bailey or her representative. Ms

Barrett's evidence at the Authority's investigation meeting was that she had the notes available for Ms Bailey, but neither she nor Mr Mayn requested them. Ms Barrett told the Authority that she had advised Mr Mayn and Ms Bailey at the commencement of the 2 April 2014 meeting that they were available if they wished to review them.

[30] Mr Mayn does not recall the offer of the notes and/or the CCTV footage and as a result neither he nor Ms Bailey had the opportunity to review the notes or view the CCTV footage prior to Fullers confirming its decision to issue Ms Bailey with a final written warning.

[31] In her 28 March 2014 letter, Ms Sina advised Ms Bailey that she was satisfied that Ms Bailey had breached Fullers standards of behaviour by:

- i. Verbally abusing a member of the public in a way that is degrading and/or causes personal embarrassment (serious misconduct);
- ii. Bullying, intimidation or harassment of a customer (serious misconduct);
- iii. Leaving her place of work without prior authorisation (misconduct); and
- iv. Poor customer service (misconduct).

[32] It was proposed that Ms Bailey would receive a final written warning. Ms Bailey was invited to attend a further meeting to discuss the findings and the proposed disciplinary action. That meeting took place on 2 April 2014.

[33] The only notes of the meeting on 2 April 2014 were those taken by Mr Mayn. The notes produced by Mr Mayn do not record any concerns being raised about the process of the investigation undertaken by Fullers including any concerns about not viewing or having access to the CCTV footage. The fact that Fullers had viewed the footage was articulated in the letter dated 28 March 2014. I am satisfied it is more likely than not that Ms Barratt had copies of the notes of the interviews and the CCTV footage available to pass onto Mr Mayn on request. I am surprised they were not handed over as a matter of course, given the reliance Fullers made on the interviews and the CCTV footage.

[34] During the meeting Mr Mayn raised concerns that Ms Bailey was put into a position where she had to deal with a situation she was not trained in and where no company policy was in place. Mr Mayn raised the possibility of attending mediation.

[35] Ms Sina made it clear to Mr Mayn that she was satisfied Ms Bailey had acted without any instructions and had bullied the customer by her comments. Ms Sina made it clear that no instruction had been given to Ms Bailey to follow the customer in the way she did.

[36] Following a brief adjournment Ms Sina advised Mr Mayn that Fullers was prepared to attend mediation. The meeting ended with the agreement that mediation would follow.

[37] The parties attended mediation but did not resolve the matters between them. Following mediation the proposal to issue a final written warning was confirmed in writing on 30 May 2014 without any further discussion.

The law

[38] Ms Bailey alleges that her final written warning was unjustified and that one or more terms and conditions of employment have been affected to her disadvantage. The statutory test of justification is contained in s 103A of the Employment Relations Act 2000 (“the Act”). That section provides that the question of whether an action was justifiable must be determined, on an objective basis, having regard to whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. In applying the test the Authority must consider the non-exhaustive list of factors outlined in s 103A(3):

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer’s concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee’s explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[39] In addition to the factors described in s 103A(3), the Authority may consider any other factors it thinks appropriate.¹ An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.²

[40] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[41] As a full Court observed in *Angus v Ports of Auckland Ltd*:³

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

Unjustified disadvantage

[42] Ms Bailey was issued with a final written warning on 30 May 2014. The action of imposing a final warning is an action to Ms Bailey's disadvantage. The warning has rendered Ms Bailey liable to dismissal for an infringement that would not otherwise place her in that jeopardy.⁴

[43] Fullers disciplinary policy allows Fullers the discretion to escalate its four step warning process depending on the seriousness of the offence or issue. After interviewing all witnesses Fullers was satisfied that Ms Bailey had breached two of its rules relating to misconduct and two of its rules relating to serious misconduct and determined not to dismiss as a result of the serious misconduct, but to go one step short of dismissal and issue a final written warning.

[44] In the letter dated 28 March 2014 Ms Sina set out her findings and proposed disciplinary action. Ms Sina advised Ms Bailey that she was satisfied Ms Bailey:

¹ Section 103A(4).

² Section 103A(5).

³ [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

⁴ *Van Der Sluis v Health Waikato Ltd* [1996] 1 ERNZ 514.

- i. had followed a customer from the ferry terminal without authorisation and without any specific instruction from a senior member of staff to do so;
- ii. that it is not normal for employees of Fullers to follow customers off the premises and up the street;
- iii. had followed the customer off Fullers premises twice, without informing a senior staff member;
- iv. called the customer “crazy” and had told the customer that not paying for the ticket was theft.

[45] The findings are consistent with the information received by Fullers during its investigation. While the notes of the interviews and the CCTV ought to have been made available to Ms Bailey and Mr Mayn, I am satisfied the content of the relevant information received by Ms Sina during her further investigations was put to Ms Bailey in summary form in the letter dated 28 March 2014.

[46] However, at the Authority’s investigation meeting Ms Sina, in her written evidence told me that during her investigations she considered it more likely than not, that personal insults were traded and that Ms Bailey was telling the customer she was a thief. Ms Sina acknowledged that this was not set out in her letter of 28 March 2014 nor was it put to Ms Bailey during the disciplinary process.

[47] Further, Ms Bailey’s colleague attended the Authority’s investigation meeting and provided a written brief of evidence. During the investigation meeting Ms Bailey’s colleague corrected her written evidence which initially stated that Ms Bailey was arguing with the customer and telling the customer she was a thief.

[48] That written evidence was consistent with the statement made by Ms Bailey’s colleague as recorded by Fullers, during her own disciplinary process. In that statement the employee is recorded as advising Ms Sina that Ms Bailey had said to the customer “...*you are a thief, what you are doing is theft*”.

[49] Ms Bailey’s colleague told the Authority in her oral evidence that what actually happened was that Ms Bailey was telling the customer that what she was doing was theft but did not actually call the customer a “thief”. When questioned

further on this Ms Bailey's colleague told me that she had not seen the statement from her disciplinary process until the day before the Authority investigation meeting and that the statement was not correct.

[50] There is no statement from the security guard about what, if anything, he overheard Ms Bailey say to the customer, and others interviewed were not present at the time the comments from Ms Bailey were allegedly made.

[51] I agree with the submissions made by Mr Mitchell that a finding that Ms Bailey had called the customer a "thief" is not reasonable. The evidence of Ms Bailey on this point is entirely consistent with the evidence of Ms Bailey's colleague. By not putting the statements from her disciplinary process to Ms Bailey's colleague to check for correctness Fullers has relied on incorrect information.

[52] This is academic in the end as Fullers has never accused Ms Bailey of calling the customer a "thief". The letter of 28 March 2014 only refers to Ms Bailey telling the customer that not paying for her ticket was theft.

[53] The finding that Ms Bailey had left the work place without authorisation and that there was no instruction to follow the customer, was reasonable. Ms Wilson was unequivocal in both her written and oral evidence that she had provided no such instruction and indeed, was focussed entirely on dealing with refunds for the cancelled Rangitoto tour. Mr Gear, in his statements to Ms Sina and Ms Barrett told them it would not be unusual for him to instruct an employee to "*keep an eye*" on the customer in circumstances where the customer had failed to produce a ticket. In his statements Mr Gear says the intention of his instruction was to have Ms Bailey literally watch the customer and if anything happened to report back to him.

[54] Ms Bailey acknowledged that she had undertaken training in customer services. The training included information that employees will not be aware of what customers are dealing with in their personal lives and the stressors that cause their reactions. The training specifically identified a "golden rule" that if a customer becomes visibly upset or aggressive, employees are instructed to "*stop communicating with them*". The training included a reminder to employees that they were to always be courteous and calm when dealing with customers.

[55] On 23 January 2014 Ms Bailey was involved with a customer who was highly emotional and from all accounts, was abusive. Ms Bailey's training required her to stop communicating with the customer as soon as the customer demonstrated these behaviours. Ms Bailey did not. Instead, she closely followed the customer out of the workplace, up Queen Street, and into Victoria Street reiterating that the actions of the customer in leaving without producing a ticket was theft. Ms Bailey also called the customer "crazy". This was all carried out in a very public environment.

Determination

[56] I am satisfied the investigation of the allegations against Ms Bailey was fair. It would have been preferable for Ms Barrett to provide full copies of the interview notes and the CCTV footage during the disciplinary process to Ms Bailey so that she could comment on it. I am satisfied, however, that Ms Bailey was provided with the relevant detail from the interview notes relied on by Ms Sina when she set out a summary of the information in her letter of 28 March 2014.

[57] An employer has an obligation to provide all relevant information to employees when conducting a disciplinary process. In this matter that included the CCTV footage. The failure to provide the CCTV footage, is a defect in Fullers process, however, I am satisfied this failure did not result in any unfairness to Ms Bailey.

[58] The test of justification must be applied having regard to all the circumstances at the time in question. Those circumstances included a customer who had paid for a ticket but had lost it in her bag, was becoming increasingly emotional, was becoming abusive to the employees dealing with her in the terminal, and who was intent on leaving the terminal to catch a bus. All of these facts were known to Ms Bailey when she followed the customer out of the Fullers workplace and across the road to Queen Street.

[59] Fullers investigated Ms Bailey's claims that she had been instructed to follow the customer. Ms Sina was satisfied that neither Ms Wilson nor Mr Gear gave such an instruction, that such an instruction would be highly irregular and while Mr Gear did request Ms Bailey to stay with the customer, Fullers satisfied itself that Mr Gear

did not intend nor was he aware that Ms Bailey had followed the customer away from the ferry terminal.

[60] Fullers reached a reasonable conclusion that Ms Bailey's actions in following the customer off the worksite without authorisation and reminding the customer that what she had done was theft, constituted serious misconduct in that it was intimidating and harassment. Ms Bailey's actions were also demonstrative of poor customer service.

[61] I find that the decision to issue Ms Bailey a final written warning was within the range of what a fair and reasonable employer could have done in all the circumstances at the time.

[62] Ms Bailey has not been subjected to an unjustified disadvantage in her employment.

[63] Costs are reserved.

Vicki Campbell
Member of the Employment Relations Authority