

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 142
5367885

BETWEEN KEEGAN JOE BEAL
Applicant

A N D MULTI SHOWCASE CINEMAS
OF NZ LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Luke Acland, Counsel for Applicant
Nicole Ironside, Counsel for Respondent

Investigation meeting: 2 July 2012 at Nelson

Submissions Received At the investigation

Date of Determination: 11 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Keegan Beal, has two claims. The first is that he was unjustifiably disadvantaged in his employment and the second is he was unjustifiably dismissed a couple of months later. The unjustified disadvantage claim involves a warning, a demotion and a consequential reduction in his hourly rate of pay.

[2] The respondent Multi Showcase Cinemas of NZ Limited (trading as State Cinemas) (State), contends the warning and its subsequent consequences are justified. It denies dismissing Mr Beal and points out he remains in its employ, albeit in the demoted position.

Background

[3] Mr Beal commenced with State as a cinema attendant in July 2007. Having successfully completed a 12 week trial he was promoted to the position of duty manager (also known as floor manager) with effect 1 July 2011. As a duty manager he was responsible for a team of floor staff and required to ensure the cinema was always a safe, clean, professional and enjoyable place for customers and staff.

[4] The event which triggered this claim occurred on 4 November 2011. Mr Beal was working at the ticket counter with one of the cinema attendants, Vicki, that day. A package of promotional material arrived which the two opened. It contained cards sent for a scratch card type promotion. The two looked at the cards (Mr Beal says out of curiosity) and Vicki noticed some had slightly different colouring and markings. She scratched one of these cards, found it was a winner and showed Mr Beal.

[5] Shortly thereafter another employee, Bryan, came into the work area. Bryan was a projectionist but had previously been employed as a duty manager and also assisted the promotions manager, Louise, on a part-time basis. Mr Beal told Bryan the cards were different and it appeared the winners were easily identifiable. Here it should be noted, this was a nationwide promotion and State's promotion staff played no part in its development or conduct.

[6] Bryan then told Louise who went to look for herself. There is some debate as to whether or not Louise told Mr Beal to take the cards to the office of the general manager, Ms Mooyman, and he ignored her or whether she simply took them herself. Irrespective, and it is not important for this determination, that is, with one exception, where they went. The exception was the card scratched by Vicki. It was left on the counter and subsequently disappeared.

[7] The evidence is Mr Beal then did nothing. He told no one else the winners may be identifiable, including Ms Mooyman.

[8] It is clear Vicki did the opposite and told two others who then identified winning cards which they distributed to friends with, it would appear, some alacrity.

[9] The promotion was scheduled to continue until the end of November. Mr Beal says:

I did hear a rumour that two of the staff had purposefully handed winning cards to their friends. When I was next on shift with one of them I asked her straight whether she had done that. She said to me she hadn't and I believed her.

[10] Mr Beal also looked at the cards again. He was no longer able to find any of the identifiable cards but did nothing further. He did not raise either the original issue or the rumours of inappropriate use with Ms Mooyman despite, from State's perspective, several opportunities to do so. Here it should be noted there is a dispute over whether or not one of those opportunities actually existed. Having considered the evidence I conclude it did but, again, it is not crucial to the determination of this claim. Mr Beal admits he could have raised the issue with Ms Mooyman but did not do so.

[11] During the final week of the promotion Ms Mooyman organised a journalist from the Leader, a local newspaper, to prepare an article on one of the promotions winners, Judith. She goes on to say:

On the final day of the promotion, I was told by one of the duty managers (Tanya) that she had heard a rumour that staff had identified the winning scratch cards and that a staff member had deliberately given the customer, who the Leader was planning to do an article on (Judith), a winning card.

[12] Ms Mooyman says that concerned her, and she chose to investigate. She says the investigation revealed that for the duration of the promotion everyone on the floor, including the duty managers, knew the winning tickets could be identified. Mr Beal was interviewed as part of this process on 8 December 2011.

[13] About that meeting Ms Mooyman says:

... Keegan outlined what he and Vicki had done with the box of scratch cards after they had been delivered including taking cards out of the box and identifying the winning tickets once Vicki had scratched one of them. He said that he had told Bryan ... (the projectionist) that he was able to easily identify the winning tickets from their different markings. Shortly after the promotion had started, Keegan said that he had heard a rumour from staff that all of the winning tickets had been given out on the first day of the promotion by other staff members. He had asked one staff member whether this was correct and she had denied it... He continued to give out cards for the rest of the month. He said that he did not tell me that the winning tickets could be easily identified before the promotion started because he did not think it was important. He did

not know what had happened to the scratched winning card that Vicki scratched on 4 November 2011.

[14] In giving the above evidence Ms Mooyman is reliant on notes taken at the time of the meeting. Mr Beal accepts they are accurate.

[15] Following her investigation Ms Mooyman concluded she should consider disciplinary action against a number of staff including Mr Beal.

[16] On 9 December she handed those concerned a letter inviting them to attend a formal meeting. It advised she wished to discuss *issues of concern in relation to our recent Golden Ticket promotion* and they should be aware it was a formal meeting which could result in disciplinary action. Recipients were advised disciplinary action might range from a reprimand to a formal warning or dismissal. Recipients were invited to meetings at various times on 13 December.

[17] Mr Beal was to be on leave that day and his meeting was therefore postponed till he returned on 20 December. On his return he became aware some of his colleagues had either been dismissed or chosen to resign during the disciplinary process. At 10am he met with Ms Mooyman. She was accompanied by an external consultant who took notes. The notes are comprehensive and, again, Mr Beal accepts they are accurate. The meeting concluded with Ms Mooyman advising she was going to consider what Mr Beal had said before making a decision.

[18] The two met again at 3pm. Ms Mooyman states she told Mr Beal she had decided to demote him from his duty manager position and that his return to a cinema attendants role would mean a reduction in his hourly rate of pay. Her reason was a conclusion he had not complied with his duties and responsibilities as duty manager and she could no longer trust him in that role as:

- a. he had failed to report that both he and one of his staff had discovered differently marked cards were apparently winning cards and easily identifiable as such. In her mind this allowed Vicki to tell others which led to situation where staff had an ability to act dishonestly;
- b. he had failed to report what Ms Mooyman considered a serious incident; namely that Vicki had scratched one of the cards (which she seems to liken to theft);

- c. the scratched card had not been secured and once it had gone missing Mr Beal made no attempt to inquire as to its whereabouts; and
- d. he had failed to report rumours about the distribution of winning tickets which, despite the denial he elicited from one of those concerned, he now said he thought to be true given he found no more winning tickets when, after hearing the rumours, he looked.

[19] Ms Mooyman goes on to say:

I went on to tell Keegan that I had taken into account his previous work record and his acknowledgement that he should have reported the matter to me together with his lack of involvement in any dishonest conduct, in deciding to demote rather than dismiss him for serious misconduct and to give him a final warning.

[20] Written confirmation of the decision, the demotion and the resulting reduction in pay was given to Mr Beal at the end of his shift that evening.

[21] Mr Beal chose to challenge the decision, with the key remedy being reinstatement to his position as duty manager. The possibility of that occurring was removed by what Mr Beal considers an act of bad faith on State's part. After raising the grievance Mr Beal was advised, through his lawyer, that the five duty manager positions had been disestablished and replaced with two shift managers. He complains he should have been consulted given his claim for reinstatement to an affected position.

[22] It is his inability to return to the duty manager role that has led to the claim of unjustified dismissal. Whilst State accepts that it did not conduct an individual consultation with Mr Beal, as he was no longer a duty manager and therefore no longer thought to be directly affected, it contends he did participate in other consultative activities which influenced the restructuring decision.

Determination

[23] As said earlier Mr Beal claims to have been both unjustifiably disadvantaged and unjustifiably dismissed.

[24] I shall address the dismissal claim first. A dismissal is a sending away. It signifies the end of an employment relationship. Mr Beal remains employed, albeit in

a position of lesser responsibility and attracting a lower rate of pay. He has not been dismissed but the situation in which he finds himself may be the result of an unjustified action by his employer, State.

[25] It is well accepted a claim of unjustified action is considered in two parts. First there has to be a disadvantage which, secondly, it was unjust to impose. The onus of proving the disadvantage falls upon the applicant. Assuming that is done, the onus of justification falls upon the respondent (refer *NZ Labourers etc IUOW v Shell BP and Todd Oil Services Ltd* [1988] NZILR 471).

[26] Mr Beal's rate of pay has been reduced and he has been reassigned to a position of reduced responsibility and status. It goes without saying that is a situation where one or more of his conditions of employment has been altered to Mr Beal's disadvantage.

[27] The question then becomes whether or not State can justify the changes. The answer:

... must be determined, on an objective basis, [by considering] 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.

[28] In applying the above test I must consider section 103A(3) and whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[29] The test cited above is that which came into force as a result of legislative changes effective 1 April 2011. A key change is that the word "could" was substituted for the "would" that previously applied.

[30] In *Air New Zealand v Hudson* [2006] ERNZ 415, 435 the Employment Court held that in the context of considering justification the Court of Appeal's use of the *could* in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 widened the range of responses open to an employer. In *Hudson* the difference between *could* and *would* was explained as:

The difference between whether a person is able to respond in a certain way or whether a person who is able to respond would actually respond in that way.

[31] Traditionally the objective review has been performed by considering the employers actions from both a substantive and a procedural perspective. Whilst it is clear that issues of substance and process overlap and that there is no such thing as a firm delineation, separation still provides a useful means of analysis, especially given the new s.103A(3).

[32] State's justification is there were various serious breaches which meant it could no longer trust Mr Beal to perform the role of duty manager. That this was a view they could reach was effectively conceded by Mr Beal in numerous answers he gave to Ms Ironside.

[33] Mr Beal conceded it was inappropriate for Vicki to simply scratch the card (he went so far as to concede it was a serious interference with the company's property) and, albeit in hindsight, he should have secured it; he should have advised Ms Mooyman of the possibility that the winners could be identified and that he should have done something about the rumours regarding improper distribution especially when he discovered no winning tickets remained.

[34] Essentially Mr Beal's view at the time was that by telling Bryan he had fulfilled his responsibilities, especially as Louise became aware as a result. That said, he now concedes, with the benefit of hindsight, he was the responsible manager, he should have done more and State could form a negative view about his conduct. In other words State could, in the circumstances and from a substantive viewpoint, reach a conclusion of impropriety and take disciplinary action.

[35] Mr Acland asked that I treat Mr Beal's many concessions with caution. I do not. They were not wrung from him and are, to the extent they can be, consistent with

admissions already made to Ms Mooyman prior to her making her decision. He is, in my view, simply being open and honest about what occurred.

[36] Whilst I have concluded State could have reached the conclusion it did, it must do so in a way that accords with the requirements of s.103A(3) – the procedural aspect of the analysis.

[37] In respect to resources I note State used the services of an experienced consultant. A lack of resources can not, therefore, provide an excuse for any deficiencies should they be found to exist. That said, I conclude the investigation was thorough. It involved an initial gathering of information from eleven individuals and was followed with disciplinary action against four of those staff. Mr Beal was the last of those four and by that time further information had clearly been gleaned from the others. Confirmation this was a thorough investigation comes from the fact there are few factual disagreements and the couple that remain do not affect determination of the claim. The parties agree on what happened – they differ on how those facts should be applied and Mr Beal's actions judged.

[38] The question of whether or not State adequately raised its concerns with Mr Beal is one issue in contention. Mr Acland notes the letter asking Mr Beal to the disciplinary meeting was generic and fails to identify the four specifics Ms Mooyman uses to confirm her view Mr Beal was unable to remain a duty manager. Whilst correct, I do not consider this amounts to a failure to comply with the Act's requirements. Mr Beal was aware of the issue with specifics having been discussed during the preliminary interview of 8 December. All four points were then canvassed during the first meeting of the 20th thus complying with the requirement that the concerns be raised. Finally, and while she does not say she did this, I note Mr Beal's evidence that during the second meeting Ms Mooyman described why she had reached the conclusion she had and gave him an opportunity to comment before confirming the outcome. It was not an opportunity Mr Beal took – he says he did not do so as he was taken aback by events.

[39] The third point – an opportunity to respond has effectively been covered in the above paragraph. It was given and there is no real challenge in this respect. Similarly the evidence leads to a conclusion that the response was considered. Ms Mooyman thought about it for some hours then gave a final opportunity for comment. She also

tempered the outcome by considering mitigating factors that operated in Mr Beal's favour.

[40] There is however one further issue that needs consideration and that is Mr Beal's claim of disparity. There are two parts to this allegation. The first is that Louise was allegedly aware the winners were identifiable, did nothing but was not disciplined. The second is that all the duty managers knew of the issue with the cards and the rumours of improper use, yet Mr Beal was the only one disciplined. State's response to the first claim is that its investigation led it to conclude Louise had examined the cards, decided the winners were not identifiable and there was not therefore anything to report. That is a factual finding which differentiates her situation from that of Mr Beal. I accept that argument. State claims the other duty managers were reprimanded and justifies the lesser penalty on the grounds they (a) were not the directly responsible manager and (b) did not possess the level of information Mr Beal had – they were working on rumour and innuendo as opposed to hard fact (a reference to Mr Beal seeing the card Vicki scratched and following up on the rumours by ascertaining the winning tickets had all gone in quick time). I find the explanation adequate. It answers the claim of disparity.

[41] Finally there is the claim State acted improperly by restructuring and, in particular, not conducting a personal consultation with Mr Beal. In a restructuring setting it is well established that:

When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.

Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[42] Ms Mooyman gave evidence the five duty manager positions had been replaced with two shift managers. She outlined some significant differences between the jobs and explained why the change had occurred. That evidence went unchallenged and it leads me to accept there was a substantive justification.

[43] Ms Mooyman also said discussions which led to the changes commenced in April 2011 and while Mr Beal was not granted an individual consultation at the time of the final decision, he had earlier involvement. Mr Beal accepts that to be correct. In the circumstances, and given my conclusion State was justified in demoting him, I

conclude its actions in this respect justified, especially given Mr Beal was aware of the initiative and could have voiced concerns. It is clear the restructure was not aimed at depriving Mr Beal of his claimed reinstatement – it was the culmination of a ten month review.

[44] For these reasons I conclude that State has discharged the onus upon it and justified its decision to demote Mr Beal. The application therefore fails.

Costs

[45] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority