

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 177A/08
5121793**

BETWEEN Geoffrey Blackmore
Applicant

AND GENERAL DISTRIBUTORS LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: John Armstrong and Susan Hoskin for Applicant
Stephen Langton and Michael O'Brien for Respondent

Investigation Meeting: 8 July 2008
9 July 2008

Submissions Received: 14 July 2008
16 July 2008

Determination: 18 August 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Blackmore claims he was unjustifiably dismissed from his employment as Duty Manager with General Distributors Limited ("GDL"). He asks the Authority to make orders for his reinstatement, reimbursement and compensation.

[2] GDL says its decision to summarily dismiss Mr Blackmore is justifiable because he lied to it and because he had encouraged a subordinate employee to resign thereby exposing it to legal action at the suit of that subordinate employee.

[3] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[4] Mr Blackmore was until his dismissal on 4 April 2008 employed by GDL as a Duty Manager at the Woolworths Browns Bay supermarket (“the supermarket”). Mr Blackmore had been employed by GDL and its predecessor for thirteen years at various of its supermarkets. The Duty Manager role Mr Blackmore held at the supermarket was a position of responsibility and involved managing the supermarket and supervising all staff when the store manager was not working.

[5] Mr Blackmore commenced a close personal and sexual relationship with one of the store’s checkout operators in June 2007. That operator need not be identified and for convenience I shall refer to her as Miss W. Miss W attended High School and had turned 16 in March 2007. Mr Blackmore was aged 34. Miss W worked as checkout supervisor and she and Mr Blackmore worked shifts together at the supermarket.

[6] On or about 6 August 2007 the manager of the supermarket Mr Peter Lawrence Hartley (“Mr Hartley”) learned from other employees of Mr Blackmore and Miss W’s relationship. He emailed GDL’s Human Resources Specialist Ms Emma Jane Kyne (“Ms Kyne”) on 6 August 2007 and wrote "I assume that the reporting of a team member to a person they in are relationship with is not permissible. If so, what do you suggest I do to remedy this?". Ms Kyne informed him of a conflict of interest policy in her reply email of 7 August 2007. Ms Kyne advised Mr Hartley he needed to put the matter to Mr Blackmore and Miss W. I take from this correspondence that Mr Hartley himself was not aware of any operative conflict of interest policy.

[7] On 14 August 2007 Mr Hartley met with Miss W and Mr Blackmore. He declared to Mr Blackmore and Miss W that he had been informed they were in a relationship and that if they were, that that was the time to tell him. Mr Blackmore became irate and told Mr Hartley he had no right to ask such a question. Mr Hartley said he understood Mr Blackmore found the enquiry offensive but the company’s conflict of interest policy entitled it to know. Mr Hartley then asked whether Mr Blackmore was denying a relationship with Miss W to which Mr Blackmore said “Yes, I am denying that.” Mr Hartley advised that if that was the case, then that was then end of the matter. Mr Hartley reminded both Mr Blackmore and Miss W that if they did enter into a relationship the company would have to take action because Mr

Blackmore as Duty Manager supervised Miss W. Mr Hartley referred to relocation or roster changes as possible steps to deal with the situation.

[8] Mr Blackmore was moved to send an email to Ms Kyne later that same evening. The email was vehement, petulant and defiant in my view. It is convenient that I reproduce it in its entirety, with its original emphasis¹, because it is elucidating of Mr Blackmore's perspective and exemplifies the attitude he continued to maintain subsequently:-

Emma,

Further to Pete's contact with you regarding the company's policy of people in relationships not being able to work together, let me make some points VERY CLEAR to the company.

The policy is discrimination, and I will NOT stand for it. Treating people as though they cannot be trusted when they have done nothing wrong and allowing that false perception to dictate forcibly changing people's working hours or location is something I will take the company to court over, should I ever find myself in that situation.

Relationships between employees outside of work is NONE OF THE COMPANY'S BUSINESS and the company needs to stay the heck out of involving itself in the personal lives of its employees.

Two people working in collusion for dishonest purposes can occur within any level of relationship, from school friends, to personal friends, to husband and wife. It is most likely to happen between young school friends, where peer pressure is high, and less likely between people in a more serious relationship. There is a process in place for dealing with dishonest people, and that is a totally separate issue. If the company is going to decide to separate people to avoid the risk of dishonesty occurring then frankly it is targeting the wrong people in this policy.

I am EXTREMELY ANGRY at this non-issue being raised, and I will NOT tolerate it any further. It is extremely offensive, and as far as I am concerned it is in-the same league as telling me I cannot work with a particular person because my skin is white and theirs is black. Anyone in the company who supports this discriminatory policy should be sacked.

The company WILL NOT raise this issue with myself or Miss W again, regardless of whatever our relationship status is, whether it be friends or marriage. I have a contract with the company that is site specific, and I WILL NOT agree to any relocation, and the company WILL NOT breach my contract by telling me this offensive policy overrides my contract. It does not.

Until today there was no issue. Now there is. The company has made two good people feel as though they cannot be seen together, and has hugely upset a 16 year old female. That is disgusting in my opinion, and quite frankly if anyone in the company takes the matter any further, or brings tears to the eyes of [Miss W]

¹ Communicating in capital typeset is referred to as "shouting".

again, they will have me to deal with, and I will be relentless in putting them in their place. For me, it has made me so angry that I can honestly say I almost punched my store manager in the face this evening, after seeing how upset [Miss W] was. Discrimination is an ugly thing, and it is extremely disappointing to discover the company has such a policy. I am not surprised that it keeps it low key and does not let its staff know it even exists until it feels it needs to be raised.

I trust I have made my feelings well known, and that I will hear nothing further of this policy, regardless of my relationship level with [Miss W] or any of the other staff I have personal relationships with.

*Mr Blackmore,
Duty Manager.*

[9] Mr Blackmore and Miss W continued their personal and sexual relationship thereafter. They familiarised themselves with the conflict of interest policy that Mr Hartley had referred to. That policy, drafted inelegantly in my view, is this and I note that the references to "Company" and PEL are to Progressive Enterprises Limited, GDL's parent company:-

4 Conflict of Interest

4.1 Personnel

All employees must report any personal interest or obligation which could conflict with the impartial performance of their duties, or which could create any doubt that decisions they may make on behalf of the Company could be influenced by their personal interests.

4.2 Relatives and Friends

Potential conflict can arise as a consequence of an employee's family members, other relatives or other people with whom they have a close personal relationship being the supplier of goods and services to the Company; or a purchaser of goods from the Company.

Potential conflicts of this nature are to be advised at time of engagement; or if they arise subsequent to engagement, within 2 days of the potential conflict occurring.

An employee who has a potential conflict of this nature may not be involved in any Company dealings involving the person, or organisations with whom the potential conflict exists

4.3 Personal Relationships

All employees are expected to be objective and exercise good judgement when:

- Forming close personal relationships with others persons at PEL; and*
- Recommending relatives and other people with whom they have a close personal relationship for a position of employment at PEL.*

These relationships can create difficulties in the work environment (either perceived or actual) and can lead to uncomfortable and difficult situations.

4.4 Should a situation arise in which there is a potential for a conflict of interest between employee, obligations to the Company and any

relationships (personal, professional or otherwise) then at the earliest available opportunity, the conflict or potential for conflict should be disclosed to the employee's Manager/Supervisor.

- 4.5 *The Company is entitled to investigate the potential or actual conflict of interest. Depending on the circumstances action may be taken to remove the potential or actual conflict of interest.*

Such action may include transfer, termination of employment or the position of restrictions.

- 4.6 *Reporting of Actual or Potential Conflict*
All actual or potential conflicts must be advised in writing to the Managing Director no later than 7 days after they become known to any employee of the Company.

[10] Ms Kyne informed GDL's newly appointed area manager Mr Wayne Dohmen ("Mr Dohmen") of the situation with Mr Blackmore. Mr Dohmen, quite rightly in my view, took exception to Mr Blackmore's communication style and resolved to meet with Mr Blackmore to communicate his expectations in that regard and also to ensure there was no residual issues following on from the meeting Mr Blackmore had had with Mr Hartley on 14 August 2007. Ms Kyne wrote to Mr Blackmore on 20 August 2007 directing him to attend such a meeting the following day.

[11] Mr Blackmore wrote to Ms Kyne by email and copied to Mr Dohmen that same day. He wrote in a more conciliatory tone but remained defiant as follows:-

*Hello Emma,
 Thank you for your letter advising of a meeting for Tuesday 21st.
 Please accept my apologies for my email last week being as strongly worded as it was. However, my view has not changed, and I wish to remind you that I do not want to discuss the matter any further. I wish to advise you ahead of time that I will not be attending the meeting.
Please note that the policy does not in fact apply to me anyway, as I am not in a relationship with any co-worker other than that of friendship, but if you want, feel free to forward me a copy of the policy in its entirety. You can email me at [].
 Thank you,
 Mr Blackmore*

(emphasis added)

[12] At the informal discussion held with Mr Dohmen and Ms Kyne on 21 August 2007, Mr Dohmen confirmed that GDL accepted Mr Blackmore's denial to Mr Hartley of a relationship with Miss W and the matter would not be pursued further as a consequence. Mr Blackmore repeated the denial he had given to Mr Hartley, to Mr

Dohmen. Mr Blackmore was provided with a copy of the purported conflict of interest policy. An issue arose as to which individual employment agreement Mr Blackmore was employed under.

[13] On 20 September 2007 Miss W wrote to Mr Blackmore by email and ended the relationship. Miss W subsequently formed a new relationship with another employee at the supermarket. Mr Blackmore could not accept Miss W's decision and he experienced much trauma, upset and anxiety because of the breakup of the relationship thereafter which affected his work at the supermarket.

[14] Mr Blackmore was given a first written warning for poor timekeeping on 26 October 2007.

[15] On 3, 4, 5, and 6 November 2007 Mr Blackmore failed to report to work for duty.

[16] On 7 November 2007 Mr Blackmore requested a period of extended leave.

[17] On 13 November 2007 Mr Blackmore emailed Ms Kyne advising he would have difficulty working with Miss W and requested that GDL consider reorganising Miss W's shifts.

[18] On 14 November 2007 Mr Blackmore emailed Miss W and suggested that she resign as "it may be the best solution for both of us".

[19] On 20 December 2007 GDL commenced a disciplinary investigation into Mr Blackmore's conduct. The disciplinary investigation was prolonged because of the parties' lawyers being unavailable and because Mr Blackmore had asked GDL to delay making any findings until he had an opportunity to provide a psychiatric report.

[20] During the disciplinary investigation Mr Blackmore admitted that he had been engaged in a sexual relationship with Miss W in August 2007.

[21] On 12 March 2008 GDL delivered its findings. It concluded that Mr Blackmore had committed two acts of serious misconduct and two acts of misconduct. The instances of serious misconduct were:-

- a. that he had lied to GDL about the true nature of his relationship with Miss W; and
- b. that he had encouraged a subordinate, Miss W, to resign.

[22] The two instances of misconduct were unauthorised absence and disobeying an instruction to maintain reasonable behaviour.

[23] GDL advised Mr Blackmore that his conduct properly warranted the termination of his employment but indicated to him additionally that it was prepared not to impose that penalty if he agreed to relocate to another of its stores in the same role as Duty Manager but where he would not have sole charge responsibilities. GDL also indicated to Mr Blackmore that he would be subject to a final written warning.

[24] On 2 April 2008 Mr Blackmore rejected GDL's offer that he relocate. GDL then proceeded to implement its decision to terminate Mr Blackmore's employment.

The merits

[25] In determining whether GDL's decision to terminate Mr Blackmore's employment was unjustifiable the Authority applies the statutory test of justification prescribed at section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification
For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable 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 would have done in all the circumstances at the time the dismissal or action occurred

[26] I assess the justification of GDL's decision by focusing on its findings of serious misconduct, that Mr Blackmore had lied to it and that he had encouraged a subordinate, Miss W, to resign.

[27] I find that the said conflict of interest policy was not known to Mr Blackmore, or Miss W, prior to the purported policy being drawn to their attention by Mr Hartley. The evidence before the Authority is that GDL routinely introduces applicable policies to employees by explicitly drawing them to individual employees' attention and obtaining their written acknowledgement of the same. There is no evidence that GDL introduced any conflict of interest policy to Mr Blackmore or Miss W. I find it did not do so. As well, as I have earlier said, I consider even Mr Hartley was not aware of any express conflict of interest policy.

[28] It is submitted on GDL's behalf that Mr Blackmore was undoubtedly aware of the policy after 14 August 2007. It is then submitted that Mr Blackmore in continuing his close personal relationship with Miss W subsequently, continued to act contrary to the known policy.

[29] While I agree that Mr Blackmore was fixed with knowledge of the purported policy, I do not agree that the said policy was actually that of his employer GDL. I find that the purported policy is not that of GDL but rather, is a policy of the parent company Progressive Enterprises Limited. The "company" referred to in the policy is PEL - Progressive Enterprises Limited. The Corporate Policy Manual provided to the Authority is entitled as that of Progressive Enterprises Limited. GDL and Progressive Enterprises Limited are not the same entity. Although related, they are entirely different entities. I am not persuaded that the purported policy is as a matter of fact, the policy of GDL and there is no evidence before the Authority that it is. There is no evidence that it was formally adopted as the policy of GDL. Workplace policies implemented pursuant to an employer's management prerogative ought to be explicitly communicated to employees. This one was not and nor am I persuaded it is actually the policy of GDL so as to apply to Mr Blackmore's employment. Consequently, I am led to conclude and I find accordingly, that there was no such policy that applied to Mr Blackmore.

[30] I note this was a point Mr Armstrong raised in the disciplinary meeting held with on 16 January 2008. Mr Armstrong said this on Mr Blackmore's behalf:-

Conflict of interest policy not part of agreement and the policy was explained by Peter. Explained to Mr Blackmore in vague terms with no specifics. Not in agreement. Mr Blackmore not bound by agreement with conflict of interest. Mr

Blackmore never signed it covered by award which is no reference to conflict of interest.

[31] It is unnecessary for me to comment further on the policy including as to the reasonableness of it or whether the breach of it constitutes grounds for summary dismissal. Notwithstanding my immediately foregoing conclusion, I believe the very situation that conflict of interest policies are directed to avert eventually occurred following the cessation of Mr Blackmore's relationship with Miss W. While Mr Blackmore adopted a mendacious and disdainful position in relation to his employer's interest in his personal affairs I expect that he is now understanding and accepting of it. I mean by that, that he sought his employer's assistance when he felt his authority had been undermined when Miss W challenged him and addressed him in an over-familiar and aggressive fashion². I understand from my questioning of him, that Mr Blackmore is now acutely aware of the underlying rationale for such policies and that he accepts the legitimacy of them.

[32] So when GDL through Mr Dohmen wrote to Mr Blackmore by letter dated 20 December 2007 invoking a formal disciplinary process, it specified the allegations against Mr Blackmore in relation to the conflict of interest policy as these:-

2. *Failure to notify your Manager of a relationship between yourself and a staff member in contravention of the Company's Conflict of Interest Policy.*

3. *Disregarding a clear directive to notify management should a potential conflict of interest eventuate.*

[33] Given my conclusion that the no such Conflict of Interest Policy applied to Mr Blackmore, it must follow that such allegations even though factually established, cannot be upheld.

[34] But Mr Blackmore was not ultimately dismissed because of those allegations. GDL justifies its dismissal, for the most part, because it says Mr Blackmore lied to it.

[35] I accept that lying to an employer may be grounds for summary dismissal. An employee has a duty to be open and honest in responding to an employer's concerns about possible misconduct. That is a duty at common law but also, one which flows directly from the statutory duty of good faith that both parties owe to each other. It is

² The pizza incident

a serious breach of both obligations to mislead or lie to the employer. Such breach constitutes serious misconduct justifying summary dismissal. I accept that an employer is entitled to expect higher standards from managerial personnel.

[36] I was immediately concerned that an allegation of lying was not expressly specified in the letter of 20 December 2007, which formed the basis of the ensuing disciplinary investigation.

[37] Mr Blackmore should not have had to guess as to what the allegations against him were and an allegation of lying is easy enough to state. I find that the allegation of lying was not formally put to Mr Blackmore in the letter of 20 December 2007. I give consideration now to whether the allegation was one which evolved and if so, whether it was properly put to Mr Blackmore fairly and reasonably and in good faith, for him to answer even though it was not formally notified at the commencement of the disciplinary process.

[38] Although GDL's witnesses invited me to conclude that an allegation of lying is capable of being implied from the allegations specified in the letter of 20 December 2007, I do not agree. Mr Dohmen said that the allegation in the letter that Mr Blackmore "failed to act with honesty and integrity" covered the lying allegation. He also said that Mr Blackmore was "almost lying by omission". But under this particular allegation GDL concluded that Mr Blackmore's exaggeration for effect indicated such a failure. There is no reference to three instances of lying in the findings as apparent from GDL's summary document of the meeting on 12 March 2008 ("the summary document"). This also answers the same submission made by GDL's counsel.

[39] The summary document recorded the advice communicated to Mr Blackmore in a meeting with him on 12 March 2008 that he had lied:-

Mr Blackmore was dishonest in his dealings with the Company when representing the nature of the relationship (at the time of the original conflict of interest investigation) and said that they were friends outside of work, but did not disclose the sexual nature of the relationship at this stage.

...

The company considers that Mr Blackmore acted contrary to the expressed needs of the business and acted dishonestly in his approach to his relationship with [Miss W] by deliberately lying to the Company about the relationship at the time it was investigated in August.

[40] When I asked Mr Dohmen to do so, he identified three instances of Mr Blackmore lying, his statements made to Mr Hartley in the meeting on 14 August 2007, his email to Ms Kyne of 20 August 2007 and his statements at the meeting with Mr Dohmen and Ms Kyne at the meeting held on 21 August 2007. However, when I asked him, Mr Dohmen could not identify any specific allegation of lying explicitly put to Mr Blackmore for him to answer.

[41] I agree with Mr Blackmore's counsel that if it is accepted that Mr Blackmore was provided with a copy of the conflict of interest policy at the meeting with Mr Dohmen and Ms Kyne on 21 August 2007, the three instances of lying Mr Dohmen identified clearly preceded Mr Blackmore's knowledge of the said policy. It is submitted by counsel that GDL's finding that Mr Blackmore had lied when all his responses were based only upon a verbal explanation of the conflict of interest policy, is therefore grossly unfair. That may well have been a submission made on Mr Blackmore's behalf if an express allegation of lying had been put to Mr Blackmore.

[42] "Failing to notify his manager of the relationship" contrary to policy is not the same allegation as lying to his employer. Firstly and somewhat technically, the former is an omission, the latter is a positive act of commission. Next, there is a temporal distinction to be made. The "failure to notify" could apply only to conduct after knowledge of the said policy. The allegation(s) of lying as a matter of fact, preceded knowledge of the policy. For these reasons, the two allegations being separate and distinct are not the same.

[43] GDL's counsel remind the Authority that Mr Blackmore accepted when questioned at investigation meeting that the allegation that he had been dishonest was one that he knew about fairly and squarely. When he was asked if he knew the allegation that he had been dishonest might result in his termination he said, by way of acknowledgment in my view, that "there were lots of possible outcome in amongst the allegations".

[44] It is correct that in the first meeting held with Mr Blackmore on 16 January 2008 there are various points where GDL states that Mr Blackmore had been dishonest. Mr Dohmen made these particular statements in that regard:-

- *Mr Blackmore denied relationship at time of meeting*
- *Denied in relationship with [Miss W] at the time of the meeting, said they were friends didn't acknowledge relationship*
- *Mr Blackmore was not open with context of relationship. He denied a relationship but was having a sexual relationship with a colleague*
- *Mr Blackmore entered into a relationship. Not honest with company about nature of relationship*
- *Denied relationship at the time of the meeting, told the company at no time no conflict of interest. We gave Mr Blackmore benefit of doubt, but clear in expectation that he inform us.*

[45] However, those statements or questions were pursuant to a discussion about compliance with the policy. That is apparent from Mr Blackmore's statement towards the end of the discussion at the meeting of 16 January 2008:-

I was not in breach of policies. I am in breach of your personal view.

[46] Mr Blackmore maintained he was not in breach of the policy. His employer GDL believed he was. The parties were therefore discussing the application of the conflict of the policy and whether Mr Blackmore had complied.

[47] But the critical and pertinent enquiry was one which is actually completely independent of the policy and questions surrounding the application of it. The correct enquiry was whether Mr Blackmore had lied. It would have involved this - *"Mr Blackmore we believe you have lied. We do not accept what you say. Please explain to us why you have lied"*. I am of the view that this essential enquiry did not occur. I say again, I consider that to be an entirely different discussion from whether or not Mr Blackmore had complied with policy.

[48] In this regard I note the comment Mr Armstrong made and the response from Mr Dohmen. I interpret this exchange to identify the correct enquiry:-

Dohmen *Friendship one thing, relationship different, sex equals serious. Friendship communicated to us. Not factual or honest.*

Armstrong *Why not asked that question if the company considers it serious.*

[49] If the correct enquiry had been made, i.e, that Mr Blackmore had openly lied to GDL, then the three instances of lying Mr Dohmen particularised for the Authority but admits were not explicitly put to him, would have been. It seems clear that Mr Dohmen as the decision maker, had those three instances of lying in mind when he made his decision to summarily dismiss Mr Blackmore. But they were not actually put to Mr Blackmore.

[50] Perhaps if Mr Blackmore had been asked the questions I consider he should have, he may have explained, that he did not understand the rationale for the policy at first but given subsequent events he now understood it. He may have realised he was paid wages to advance his employer's interests before his own and that he did not actually know better than his employer about matters within its managerial prerogative. He may have realised the error of his belligerence and the arrogance of his self-interest. He may have accepted his judgment had been very poor indeed. He may have sought to mitigate his conduct by admitting he was wrong and sought to prevail upon his employer of 13 years to take a merciful view of his behaviour and view it in context with kindness, compassion and understanding and above all else, in good faith. I find he was denied the opportunity of such consideration or any at all as he may have elected to place before his employer in any such enquiry.

[51] The real discussion that should have occurred would have made it clear to Mr Blackmore that his employer considered he had lied to it. GDL would have communicated to Mr Blackmore that it did not believe him and additionally, why I did not believe him. Mr Blackmore would then have been invited to respond, by perhaps denying he had lied and explaining why he did not consider he had lied. Alternatively, if he admitted to lying, he would have been invited to say by way of mitigation why he had done so. It is my view that these were the questions and the discussion that was required in advance of any decision to summarily dismiss Mr Blackmore for lying to his employer. I find it did not occur in advance of Mr Blackmore's summary dismissal. I find it is the same enquiry that a fair and reasonable employer would have conducted in the same prevailing circumstances.

[52] Having reached these views, it is unnecessary for me to comment on the second ground for summary dismissal. I indicate however, that it is my view that the alleged

conduct is merely an incident of the general allegation that Mr Blackmore had conducted himself in breach of the conflict of interest policy.

The determination

[53] A person at peril of suffering a penalty is entitled to be heard in their defence. That ought come as no surprise to any anybody and it is not a notion peculiar to lawyers. In my view, while Mr Blackmore was heard in relation to whether he had complied with policy, he was not heard to explain whether or why he had lied.

[54] Standing back and considering matters objectively, I now determine for all the above reasons that GDL's decision and how GDL acted were not the actions of a fair and reasonable employer. **I find that Mr Blackmore was unjustifiably dismissed and he has a personal grievance for unjustifiable dismissal.**

Contribution

[55] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Blackmore's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[56] Mr Blackmore adamantly refused to accept that GDL had any legitimate concern in relationships he might have with co-workers and specifically those he supervised. He made public comments on this website critical of GDL in this regard.

[57] I find that Mr Blackmore lied to GDL when he was asked directly by Mr Hartley on 14 August 2007, if he was in a relationship with Miss W. Mr Blackmore confirmed to Mr Hartley that he denied he and Miss W were in a relationship. He said he and Miss W were "just good friends" seeing each other outside of work. Mr Blackmore says in his affidavit that Mr Hartley did not expressly ask if the relationship was sexual.

[58] The dishonesty was repeated in Mr Blackmore's email of 20 August 2007 to Ms Kyne. Mr Blackmore was dishonest when he advised "I am not in a relationship with any co-worker other than that of friendship".

[59] Mr Blackmore was dishonest again when the matter was raised in the meeting he had with Mr Dohmen and Ms Kyne on 21 August 2007.

[60] I find that Mr Blackmore and Miss W formed a close personal relationship in June 2007 and which by late July included sexual intercourse. In an online chat session in June 2007, they had agreed their relationship would proceed as "friends with benefits". "Benefits" was sexual intercourse.

[61] Mr Blackmore tells the Authority he thought Mr Hartley meant by relationship, that he and Miss W were a couple or "boyfriend and girlfriend". I understand Mr Blackmore to have maintained, rather perversely, that he and Miss W were not a couple or "boyfriend and girlfriend" but rather, they were "friends with benefits (i.e sex)" or friends who had casual sex, something altogether different. I reject that explanation as entirely disingenuous, insincere and dishonest. I rather consider Mr Blackmore knew precisely what Mr Hartley and his employer was asking of him.

[62] The purported conflict of interest policy is concerned with "close personal relationships". That is on any interpretation what Mr Blackmore had with Miss W whether the accompanying sex was casual or otherwise. I do not consider Mr Blackmore is genuine in what he would have both GDL and the Authority believe.

[63] Mr Blackmore's concealment of the truth is apparent from his correspondence with Miss W immediately following the meeting with Mr Hartley. He wrote to Miss W in an online chat session and contrary to his duty of good faith owed to his employer:-

We won't - we'll just keep doing what we want to do, and they can go jump in the lake ... I keep going over what I am going to say if they raise it again

[64] Mr Blackmore did not deny the application of the conflict of interest policy. Rather, he insisted that it did not apply to him because he was not involved in a relationship with Miss W. That was plainly dishonest and I infer that Mr Blackmore knew it to be so.

[65] If Mr Blackmore had not lied when he was asked if he was in a relationship with Miss W, the pizza incident would have been unlikely to have occurred and the conflict between him and Miss W and the considerable anxiety he experienced likely averted. While Mr Blackmore perceived the policy with disdain and contempt, he ultimately sought the benefit of it when he sought the GDL's assistance in managing his work relationship with Miss W.

[66] Mr Blackmore experienced considerable stress and anxiety about returning to work and working with Miss W and her new boyfriend. GDL could have taken appropriate steps at the relevant and proper time. It was unable to deal with and manage the situation appropriately because Mr Blackmore had concealed the true situation from it. By the time GDL became aware of the previous relationship, it could do nothing to manage it with a view to avoiding the consequences of any breakup, the very situation that actually occurred.

[67] I accept that GDL must necessarily repose a high degree of confidence and trust in its management staff including Mr Blackmore as Duty Manager. I accept that GDL is right to have very serious concerns about the level of trust and confidence it is able to repose in Mr Blackmore.

[68] I find that Mr Blackmore concealed the true situation from his employer because he did not agree that his employer had any business knowing of his private affairs. He thought he knew better than his employer. He was wrong about that view and I consider he accepts that now. I find that Mr Blackmore deliberately lied to his employer and he continued to maintain that dishonesty. Mr Blackmore's behaviour in this regard was seriously blameworthy in my view. This blameworthy conduct is directly linked to the situation that led to the personal grievance I have found. Having found that way, I am obliged to reduce either or both the nature and extent of remedies to be provided to him.

[69] It can be artificial to quantify such contribution as a percentage but I accept it is convenient to do so. As I have earlier said, I regard this exercise as no more than

recognition of the legal principle that no person should profit from their own wrong³. That same principle has been referred to as a fundamental maxim of the law⁴.

[70] Mr Blackmore failed to act towards his employer in good faith. His actions were inconsistent with his continuing faithful service to GDL. I find that Mr Blackmore's actions were entirely causative of his dismissal. It is entirely as a result of Mr Blackmore's lying that his employer was prevented from dealing with the situation that its purported policy was directed at preventing.

[71] Mr Blackmore's lying caused the situation that led to his personal grievance. I find his actions completely blameworthy and I am not permitted to provide remedies to him in this situation. **I decline to make any formal orders as sought by Mr Blackmore by way of remedies.**

[72] Because of my view as to Mr Blackmore's extent of contribution, it is unnecessary for me to express any view as to whether or not Mr Blackmore acted unreasonably and failed to mitigate his losses in respect of the two offers of relocation extended to him by GDL.

Other matters

[73] **The interim order I made on 14 May 2008 reinstating Mr Blackmore is now discharged.**

[74] **I order that the evidence gathered in the investigation and as disclosed in the pleadings in relation to Mr Blackmore's personal medical condition and history shall not be published.**

[75] **There is an order made on 4 July 2008 that Miss W's name is prohibited from publication.**

[76] Mr Blackmore applies to have his name prohibited from publication. In support of that application it is submitted that Mr Blackmore is a vulnerable individual and should in the interests of justice be protected by name suppression. It is said that

³ *Cooper & Levin Meats Limited*, unreported, WA40/08, 10 April 2008, L Robinson

⁴ *Salt -v- Fell* [2008] NZCA 128, paragraph [90]

publication of Mr Blackmore's name will create unfair speculation regarding his medical issues and could prejudicially affect his ability to manage staff. Finally it is said that the nature of the evidence is extremely personal and it is not in the interests of justice or the public to link Mr Blackmore's name to the evidence when the repercussions of doing so could cause his mental harm. As to the last ground, there is no expert opinion tendered to the Authority in support.

[77] In reply, GDL's counsel submits a request for name suppression is belated because the Authority has already issued a determination in which the parties are identified. It is said that GDL is entitled to have a judgment on the substantive issues. It is submitted that it would be abhorrent to justice for Mr Blackmore to have made the issue public on his website and then be granted name suppression in the objective public judgment dealing with the issues. Finally it is said that to grant name suppression may invite incorrect suspicion and speculation about GDL's other Duty Managers.

[78] I decline to grant Mr Blackmore an order prohibiting publication of his name. Firstly, the Authority has already issued a determination identifying him. Secondly, I am not persuaded that any of the grounds submitted in support of the application are sufficient to rebut the presumption of open justice. I am not persuaded it is in the public interest to make such an order.

[79] Having made that decision however, I recognise it is necessary to preserve Mr Blackmore's right to challenge my refusal. So as not to render any such challenge nugatory, I consider it just and proper to grant an interim order that his name not be published. **I order that Mr Blackmore's name is prohibited from publication. That order shall lapse 28 days after the date of this determination.**

Costs

[80] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Langton is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Armstrong is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson

Member of Employment Relations Authority