

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Kelly Blair (Applicant)
AND Taylors Master Valet Limited (Respondent)
REPRESENTATIVES Philip James, Counsel for Applicant
Brad McDonald, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 4 July 2005
DATE OF DETERMINATION 23 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kelly Blair worked for Taylors Master Valet Limited from about 15 March 2004 until she was dismissed on 13 October 2004. Ms Blair says that the dismissal is both procedurally and substantively unjustifiable and that she has a personal grievance against her former employer.

[2] The reasons for the dismissal are comprehensively set out in Taylors' letter dated 13 October 2004. Following an investigation, Taylors concluded that Ms Blair took company goods and delivered them to McIntyre's Drycleaners, a competitor that is owned and operated by Ms Blair's mother (Rosemary McIntyre). Taylors concluded that Ms Blair had removed cash from its shop on 30 September and other sums over a period of time. Taylors concluded that Ms Blair had failed to accurately record her hours of work on her timesheet. Taylors concluded that Ms Blair had endangered its business by handing out business cards for McIntyre's Drycleaners. Taylors concluded that Ms Blair had opened and hidden an item of correspondence addressed to Taylors, being notice of an attachment order requiring Taylors to make deductions from Ms Blair's wages to meet her outstanding fines. Finally, Taylors concluded that Ms Blair had breached confidentiality by passing on to her mother's business the names of new Taylors' clients.

[3] In reaching its conclusions Taylors relied in particular on some videotape material and allegations made verbally and in writing by Greg Wilson. Mr Wilson is Mrs McIntyre's brother so Ms Blair's uncle. During the investigation (as in evidence) Ms Blair denied the various allegations and said that Mr Wilson was motivated by a desire to get back at his sister, there having been a recent falling out between Mr Wilson and Mrs McIntyre. Ms Blair had not been directly involved in their disagreement.

[4] The allegations are of behaviour which amounts to serious misconduct. In *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 the Court of Appeal held that the burden on an

employer is not that of proving to the Authority the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct. The Court said that the distinction is highlighted in cases involving alleged dishonesty. The employer can justify dismissal without having to prove dishonesty by showing that, after a full and fair investigation, it was at the time of the dismissal justified in believing that serious misconduct had occurred.

[5] In *New Zealand (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35, the Labour Court identified minimum requirements of natural justice as follows :

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
3. *An unbiased consideration of the worker's explanation in the sense that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

[6] To determine Ms Blair's grievance claim, I will need to review Taylors' investigation processes against the standard identified in *Unilever*. It is convenient to do that by reference to each separate ground for the dismissal. Part of Ms Blair's complaint is that Taylors attempted to force her out of the employment because of a dispute between Taylors and her mother. I will address that point first.

Mrs McIntyre's grievance

[7] Mrs McIntyre worked for Taylors for many years. Around November 2001, the business was purchased by Natasha Faigan and Matthew Faigan. Mrs McIntyre's employment continued but in May 2004 she was dismissed. Mrs McIntyre initiated a personal grievance which was resolved in about June 2004 after mediation assistance. Mrs McIntyre and her husband opened their own drycleaning business (McIntyre's Drycleaning Ltd) around 23 July 2004.

[8] Part of Ms Blair's problem is her view that Taylors sought to force her out of the employment in various ways because of her mother's dismissal and grievance. To support that view Ms Blair relies on a first written warning given to her on 5 July 2004 and her own dismissal in October 2004. The warning itself could have founded a sustainable grievance, at least on a procedural basis, but Ms Blair accepted that it was first raised outside the statutory time limit and no application for leave based on exceptional circumstances was made. The warning was not relevant to the dismissal decision so it does not need to be mentioned further. Several months passed without any action by Taylors against Ms Blair. However, by October 2004 there was sufficient reason for concern to entitle Taylors to seek explanations from Ms Blair on the various matters that eventually caused her dismissal. Taylors raised the allegations in a reasonable manner in writing and by giving Ms Blair an opportunity to seek advice before requiring any explanation.

[9] For the above reasons, I do not accept the contention that Taylors' investigation and Ms Blair's subsequent dismissal were motivated by Mrs McIntyre's grievance.

The investigation process

[10] Mrs Faigan is Taylors' managing director. On or about 29 September 2004, Greg Wilson (Ms Blair's uncle) left a phone message for Mrs Faigan. Skot Penfold is Taylors' general manager. In Mrs Faigan's absence, he returned the phone call and Mr Wilson told him that Ms Blair was taking stock items from Taylors for her mother's business. Mr Penfold had already been concerned about missing stock. Arrangements were made for Mr Penfold and Mrs Faigan to meet Mr Wilson at a café on either 30 September or 1 October. The exact date is not significant. At the meeting, Mr Wilson alleged that Ms Blair and several others had been taking various stock items from Taylors for McIntyre's Drycleaners. Mr Penfold made a brief note in his diary of what was said which I accept as substantially accurate. Then or during a subsequent phone conversation, Mr Wilson was asked to put the allegations in writing and he did so.

[11] Coincidentally, the Taylors' till was down by over \$120 on Thursday, 30 September 2004. There is a security camera mounted in the Taylors' shop which covers the serving counters, including both computers and their associated cash drawers. Mrs Faigan reviewed the videotape which showed Ms Blair removing bank notes from one cash drawer. Mrs Faigan then sought some legal advice.

[12] Mrs Faigan wrote a letter dated 1 October 2004 to Ms Blair containing various allegations based on the information from Mr Wilson, the suspicion about her taking money and an apparent discrepancy between Ms Blair's actual hours of work and her timesheets on 22 August and 26 September. Copies of Mr Wilson's letter, Mr Penfold's notes of Ms Blair's finishing times and Ms Blair's timesheets were enclosed. The letter specified arrangements for a meeting to discuss the allegations on 4 October. Mrs Faigan gave the letter to Ms Blair on 1 October 2004. Ms Blair asked her to specify what items were missing. Mrs Faigan mentioned furnishing bags, furnishing rolls and chemicals. In evidence, Ms Blair said that Mrs Faigan had alleged she took a 25 kg bag. Mrs Faigan denies that she said that. I prefer Mrs Faigan's evidence on the point. Ms Blair asked if she could leave and Mrs Faigan said *yes*, thinking the request related to just that day. Ms Blair left the premises and did not return to work. However, she received full pay until the dismissal was effected several weeks later. No complaint is made by either party about Ms Blair's absence from work pending the dismissal.

[13] Ms Blair's solicitor sent a fax to Taylors' solicitor on 4 October 2004. The fax contained a detailed response to the allegations set out in the 1 October letter. In summary, Ms Blair asserted a personal grievance as a result of the allegations and the way they had been made, that there had been an orchestrated attempt to have her leave the employment, that all the allegations were untrue and that Mr Wilson had a gripe against Ms Blair's mother so that his claims were unreliable. The solicitor offered to meet at a convenient time if still necessary, but required a copy of the videotape and advised that Ms Blair was too stressed to attend work meantime.

[14] Taylors' solicitor replied by letter dated 5 October 2004. That correspondence included the videotape and an explanation of the concern about what was disclosed by the videotape. There was a denial of any orchestrated attempt to have Ms Blair leave her employment and a request was made for a meeting. The letter also conveyed a new allegation that Ms Blair had opened, withheld and hidden confidential company mail.

[15] Ms Blair's solicitor responded by letter dated 7 October 2004. There was an explanation given about the videotape. Ms Blair had asked another employee (Kathryn Cobb) for spare \$10 notes, but was told there were none. Ms Blair then took \$10 notes from one cash drawer which had a \$100 note and \$5 and \$10 notes, and put the \$10 notes in the second cash drawer which did not have any. Further information was given about Mr Wilson's allegations. Two family members (Mr Wilson's mother and his aunt) would deny knowledge of Mr Wilson's allegations, contrary to

his claim that they could support them. The assertion about an orchestrated attempt to have Ms Blair leave was repeated. A meeting (if still required) was proposed for Friday 8 October 2004. No mention was made of the new allegation about hiding company mail.

[16] There was a meeting on 8 October with each party represented by their solicitor. Some notes of the meeting made by Mrs Faigan were produced at the investigation meeting. The notes are brief but I accept they are accurate as far as they go. Ms Blair (through her solicitor) emphatically denied taking any of Taylors' money. She would not answer any questions about the missing money however. It was said that Ms Blair had never seen one of the McIntyre's business cards; that Mr Penfold was mistaken about the timesheets issue; and Ms Blair denied telling another staff member about Mrs McIntyre's grievance settlement. The meeting then ended.

[17] Following the meeting, Taylors' solicitor sent a fax to Ms Blair's solicitor noting that there had been no discussion at the meeting about the allegation that Ms Blair had opened company mail. Details of the circumstances in which the mail was found were given. A copy of an attachment order addressed to Taylors and dated 22 September 2004 was enclosed. Ms Blair's solicitor responded by letter dated 11 October 2004. Ms Blair denied having opened or hidden any company mail and denied having seen the particular item ever before. Ms Blair also said that the letter would have been posted on 23 September and delivered on 25 September, a day she was not at work. She therefore could not have opened and hidden the attachment order.

[18] Ms Blair's employment was terminated by letter dated 13 October 2004 after Taylors had taken some time to consider Ms Blair's responses. The letter comprehensively records the reasons for the dismissal as follows :

On the 8th October we met with you and your representative to discuss and investigate the allegations raised against you by letter dated 1 October 2004.

After carefully considering your responses to the allegations raised we have decided to terminate your employment with our company immediately for gross misconduct and serious breaches of your employment agreement that have recently come to our attention.

The reasons for your dismissal are:

1) You have been seen taking company goods without permission or authorisation and then delivering the same to McIntyre's drycleaners, who are in competition with us and owned by your mother.

We spoke in detail with Greg Wilson, Rosie McIntyre's brother, and also Thomas, Greg's partner. Greg approached us unsolicited, and gave detailed information to us about the goods that had gone missing from our company.

We have considered your claim that Greg's account to us was purely motivated by a personal rift with Rosie and Dave McIntyre. We have also considered the letter you have shown us provided by Valerie Wilson, Rosies mother, saying she had no knowledge of any theft.

However, whatever the reasons for Greg coming forward, he provided information about specific items going missing, such as our unprinted laundry bags, and names of specific chemicals that have gone missing, that he could not have known about unless he had witnessed the theft of these items.

Many items have vanished since the end of July 2004, and this coincides with the opening of your mother's drycleaning store. After carefully considering all the facts presented to us, we believe that some of these items have been taken by you.

You provided no possible explanation to us today for you not being involved in the disappearance of these items.

2) *You have been seen on video surveillance removing cash from the Taylors MV Drycleaners shop without authorisation or permission.*

Joy Cobb has been concerned for some time about the possibility you have been taking cash from the tills. Joy first spoke to me some months ago, and advised there was a pattern of the tills being under on your rostered days, and the till balancing when you were absent.

Joy asked me to organize a new debit/credit facility on our tills to be checked as she was concerned it was interfering with the balancing. This probably affected only a few days takings. Once Joy was certain of the fact that this was not interfering with the balancing, she spoke with me and detailed her concerns. It has been very distressing for Joy to allege this, as she has had a long and close relationship with you.

Any attempt by us to confront the possibility of you taking cash, would surely, as it has now, been labelled as an attempt to have you leave after your mother left this company.

You have said you had a discussion with Kathryn Cobb on Thursday 30th September, about putting more \$5 and \$10 notes in the till. I have spoken with her and she denies any conversation took place. On the day in question I had stocked the till up with plenty of change at 10am, and then at about 11-40am.

You also state that I asked you to get change, this is not true. You came to me and asked for change a short time after I had balanced the tills. This is shown on the video surveillance.

According to our till reading, there were not many cash transactions in between 11-40am, and about 1pm, the time you claim to have needed more change. When I balanced the till at 5-30pm, we were \$120 under. You also claim there was a \$100 note given, but I do not recall at all any \$100 notes when I prepared the days takings for banking that evening. You left at 2pm this day.

Since the time that you have been suspended on pay, our tills have balanced every day. This has not occurred since the last time you were away sick.

After considering all the facts, we believe you have been removing significant amounts of cash from our tills over a period of time.

3) *Failing to accurately record attendance at work.*

We accept your explanation regarding the two days involving a delivery and work at home for the week ending 26 September.

After considering the facts available to us, we do not accept your explanation that Skot is mistaken in the recording of the times that you left work on the other weeks

and days. Skots records are accurate as marked in his diary, as he was present on site and able to record the time you left.

Joy Cobb, who prepares the wages, had approached Skot and indicated that she did not think your hours were accurate. For this reason Skot kept a record of the times you left work. His records of your departure from work vary significantly from your time sheets.

We do not accept your claim that you have put down extra time because you did not take lunch breaks. The time sheets have a clear section to be marked if lunch is not taken. We have also spoken to several staff members who report you have had lunch breaks regularly, and also they claim you have been in fact taking extra unauthorised "smoking" breaks.

4) Endangering company clientele by handing out business cards for McIntyre's drycleaners.

You deny even seeing a McIntyre's business card. We find this hard to accept, especially as you have been seen at the McIntyre drycleaners premises, not only by Greg Wilson on regular occasions, but also by other people known to ourselves on regular occasions, they claim up to 5 days a week.

It seems absolutely likely from our point of view, that in light of the fact we have been told you have been promised future employment there, and because of your family relationship, and also in line with the removal of stock etc by yourself, that this has occurred.

5) Opening and withholding confidential company mail without authorisation.

On Monday October 4th, a letter addressed to Taylors and marked private and confidential, was found opened and hidden in your work diary, in the postal room desk drawer. This related to a deduction from your wages because of unpaid court fines. Not only was this completely unauthorised, but also puts us in breach of an instruction requested of us by the district court.

This letter was sent on about the 22 September, and you were on the 7.00am shift, with access to the mail unsupervised and also finishing the mail sorting, during this week.

6) Breaching the confidentiality of Taylors MV Drycleaners and its clientele by relaying confidential business information to McIntyre's drycleaners.

We believe you have been passing on the names of the new agencies we have gained, as they have now been approached by our competition. It seems highly unlikely to us, that this is just coincidence. We also believe information regarding prices and quotes for our new and existing customers have been passed on to McIntyre's Drycleaners.

The above offences are deemed Gross Misconduct in the Organisational Rules which form a part of your employment contract with Taylors MV Drycleaners and constitute a serious breach of the trust and confidence necessary for the continuation of our employment relationship.

We will make payment of any outstanding pay/holiday pay to you immediately.

Justification for concluding that Ms Blair had taken stock

[19] This conclusion rests on an acceptance of Mr Wilson's claims against the background of missing stock. Ms Blair was given a copy of Mr Wilson's letter in which he says he witnessed her delivering to McIntyre's bottles of cleaning chemicals that she had taken from Taylors some time in August 2004.

[20] The evidence is that Mrs Faigan and Mr Penfold were impressed by Mr Wilson's ability to identify particular chemicals and missing items. That in their view gave credence to his claims, irrespective of his motivation for making them. I find that Ms Blair had a fair opportunity to respond to the allegations made against her by Mr Wilson. She knew that she might be dismissed and she knew the specifics of the allegations. She had ample opportunity to state her explanation which comprised an absolute denial and an attack on Mr Wilson's motives. The dismissal letter indicates that the employer gave that explanation proper consideration but ultimately rejected it for the reasons expressed. I find that there was a fair investigation and reasonable grounds for the employer's belief that Ms Blair was involved in stock items going missing.

Justification for concluding that Ms Blair had taken money

[21] This allegation rests on the video footage and a history of the cash drawers not balancing, in particular being short on days that Ms Blair worked. The video footage for Thursday 30 September at about 1.09 pm shows Ms Blair taking notes from the near cash drawer. When the cash drawer balances were done for that day Taylors was about \$120 short.

[22] Again, I find that Ms Blair had a fair opportunity to respond to the allegation. She was given a copy of the videotape and the basis of the allegation was squarely put to her in the employer's letter dated 1 October 2004.

[23] Ms Blair's first explanation before viewing the videotape was that Mrs Faigan had asked her to get notes from the cash drawer to change for smaller denominations. Having seen the videotape, Ms Blair then said that she had asked another worker (Kathryn Cobb) for spare \$10 notes and took \$10 notes from one cash drawer to put in the other cash drawer after Ms Cobb had said that she had no change.

[24] Ms Cobb works in the office as the accounts administration assistant. When she was asked by Mrs Faigan before the dismissal, she said that she had not had a conversation with Ms Blair about change on 30 September. What happened was that Ms Blair came into the office looking for change. The \$5 and \$10 notes from takings are generally retained for change, but Ms Cobb had banked them earlier on 30 September. Ms Blair discovered there was no change in the office without any comment from Ms Cobb. Ms Blair then left the office. Ms Cobb did not see whatever Ms Blair did at the cash drawers.

[25] Mrs Faigan rejected the first explanation because she knew that the discussion with her initiated by Ms Blair about change had occurred earlier than the time of the incident shown on the video footage. Mrs Faigan also knew that she personally had balanced the cash drawers and put in fresh floats at about 9.30 am and had checked the cash drawers for change at about 11.40 am. Mrs Faigan also checked the transaction records to establish that there were very few cash transactions between 11.40 am and 1.09 pm.

[26] The video footage at about 1.09 pm shows Ms Blair looking in the far cash drawer, then opening the near cash drawer and taking notes out. She then returns to the far cash drawer which

she opens. It is not possible to tell with any degree of certainty whether she did or did not put the notes that had been taken from the near cash drawer in the far cash drawer.

[27] The essential concern was whether Ms Blair had any proper purpose in taking the notes out of the cash drawer, or whether it was done as part of her taking money from Taylors given the cash shortage for the day. I find that Taylors properly advised Ms Blair about the specific allegation and gave her a fair opportunity to proffer any explanation for taking the money out of the near cash drawer. Taylors gave the explanation fair consideration and was entitled to reject the innocent explanation given Mrs Faigan's recollection, supported by the video footage. Taylors was then entitled to conclude, as it did, that Ms Blair took the money, that being the explanation for the cash shortage that day.

Justification for conclusion about false time records

[28] It emerged during the investigation meeting that Ms Blair believed she had been asked to explain apparent discrepancies between her observed working times and her timesheets on two days. She gave an explanation on that basis. That explanation was accepted. However, Taylors concluded that other apparent discrepancies amounted to falsification of the timesheets in the absence of any explanation of these other instances.

[29] I find that the concern about the timesheets was not adequately put to Ms Blair. The original letter conveying the allegation was ambiguous, causing Ms Blair to explain about two dates rather than various dates over two weeks. As a result, Ms Blair did not have a proper opportunity to address the full range of concerns about the timesheets.

Justification for breach of confidentiality and endangering company clientele

[30] I find that Taylors has not proven that it was justified in believing that Ms Blair had breached confidentiality or endangered its company clientele. Both concerns were based on little more than supposition and the basis for the concerns was not properly put to Ms Blair.

Justification for conclusion about the attachment notice

[31] By the time of the investigation meeting, Taylors had found a second version of the attachment notice. The second version was found by Kathryn Cobb some time after Ms Blair left. It is dated 11 August 2004. Because it was found after Ms Blair's dismissal it is not relevant for present purposes.

[32] The issue raised with Ms Blair after the commencement of Taylors' investigation into their other concerns related to the discovery by Joy Cobb of the attachment notice dated 22 September 2004. Mrs Cobb is Kathryn Cobb's mother and is employed by Taylors in an administrative role. I accept her evidence that she discovered Ms Blair's diary in or on a desk and found the attachment notice inside the pages of the diary. The notice had been removed from its envelope.

[33] The circumstances of the discovery that pointed to Ms Blair opening and hiding the letter addressed to Taylors were fairly put to Ms Blair for her comment. Ms Blair denied any knowledge of the document and claimed that it would have been posted on Thursday, 23 September and must have arrived on Saturday 25 September, a day she did not work. Taylors rejected Ms Blair's explanation because the letter was found between the pages of her diary and the timing gave her the opportunity to have identified, opened and hidden the attachment notice. Ms Blair had commenced

work at 7 am on Friday 24 September 2004. The conclusion that Ms Blair had hidden the attachment notice was open to Taylors in the circumstances.

Conclusion

[34] The ground for the dismissal that Taylors has not been able to prove justification for are the timesheet discrepancies, the breach of confidentiality and endangering company clientele. However, there is no doubt that proven grounds support the conclusion of serious misconduct and that Ms Blair would have been dismissed regardless of the unproven grounds. Accordingly I reject Ms Blair's personal grievance claim.

[35] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority