

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 89
5391366

BETWEEN CHRISTINE CAMPBELL
Applicant
AND AQUA PI HOLDINGS LIMITED
Respondent

Member of Authority: G J Wood
Representatives: R Ward for the Applicant
B Laracy for the Respondent
Investigation Meeting: 9 July 2013 at Wellington
Submissions Received: 9 July 2013
Determination: 24 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Christine Campbell, claims that her dismissal from the respondent (Aqua Pi/Marina Motor Lodge) was unjustifiable on substantive and procedural grounds. By contrast, the Marina Motor Lodge claims that she was justifiably dismissed for undercharging for a delivery fee and altering company records. Both parties sought costs against the other on the tariff basis applied by the Authority.

Factual discussion

[2] Ms Campbell commenced work in 2011 as a receptionist at the Marina Motor Lodge. She was responsible to the owner of the motor lodge business, Ms Carol Fearon. The motor lodge has a small staff and Ms Fearon was new to the role of a sole charge business owner responsible for staff.

[3] In May 2012, Ms Fearon had introduced an arrangement with a local restaurant for the provision of meals for the motor lodge's customers. Included in that arrangement was a service fee/delivery charge. That charge was to be \$5 per order.

[4] The first time Ms Campbell came to implement this charge was on 22 May. I accept that Ms Campbell was not fully cognisant of all the details of the new arrangements and genuinely believed that if she used her own car to pick up the meals she would be paid the delivery fee. Similarly, I do not accept that Ms Campbell was completely aware that if she had any issues about charging these fees that she had to contact another staff member. However, she was aware that the delivery charge was \$5. While these matters were discussed at a staff meeting, and were followed up by a letter which makes the policy clear, I do not accept that Ms Campbell ever saw those minutes, as other staff had initialled and dated them and she had not.

[5] On that day, two separate customers who were employed by the same firm ordered meals at the same time. Ms Campbell used her initiative to charge only one \$5 delivery fee, namely \$2.50 per meal, given that only one trip to the restaurant was required and the two customers worked for the same company. She collected the meals and the clients paid the delivery fee on completion of their stays.

[6] When Ms Fearon returned to work on 28 May, she reviewed the transactions for the period she had been away and considered that the two co-workers had been undercharged. The policy was quite clear in her mind that each meal should attract a service delivery charge of \$5 and therefore Ms Campbell had undercharged both customers and the motor lodge had lost revenue as a result, namely \$5.

[7] Ms Fearon then approached Ms Campbell about the transactions and said that she had no right to choose to charge a lesser fee. Ms Campbell could not understand that she had done anything wrong, which Ms Fearon found unacceptable. She maintained that it was her right as owner to set the fees and it was not for Ms Campbell to decide what fee to charge.

[8] This conversation turned into an argument, with neither party prepared to back down. Ms Fearon told her that that the motor lodge was her business and that she would make the decisions. Ms Campbell wanted to leave the premises during the course of her shift to get away from the argument. On her way to leave, Ms Campbell handed Ms Fearon the keys to the motor lodge and \$5 to pay for the undercharging.

Ms Fearon made it clear that she did not want Ms Campbell's money but wanted her to leave and that if she did not leave straightaway she would call the Police. Ms Campbell became quite contrary at this point, and told her to *go on then*, which Ms Fearon did. I do not accept that this call was made because Ms Fearon felt threatened for her safety, but more because as the owner of the business she had the right to tell Ms Campbell what to do. The Police spoke to Ms Campbell, who said that she was on her way out. The services of the Police were not required.

[9] Ms Fearon had already made it clear that the matter would be pursued further. Accordingly she arranged with Ms Campbell to attend a disciplinary meeting about the undercharging and the ensuing argument.

[10] Ms Campbell was upset about her treatment by Ms Fearon and was considering resigning. She engaged a lawyer (not Mr Ward), and they agreed that he would pursue an *exit package* for her.

[11] Unfortunately, the arrangements between the parties for the disciplinary meeting and/or an exit package meeting were confused by both parties. Thus the lawyer attended the meeting expecting it to be to discuss an exit package, whereas Ms Fearon's focus was on the disciplinary process. Fortunately, Ms Campbell was prepared for both.

[12] At the meeting the lawyer commenced proceedings by putting forward a settlement agreement, being an exit package. Ms Fearon thought that the motor lodge could not afford to pay the levels of money sought by Ms Campbell as part of the exit package, and that issue was not discussed in any depth.

[13] Instead, Ms Fearon produced papers relating to the delivery fee issue, but also documents relating to new allegations of altering Aqua Pi's booking and payment sheets. Ms Campbell had never been aware of these issues before, and a break was taken for her to peruse the documents.

[14] At the meeting Ms Campbell was able to respond to the delivery fee issues. Ms Campbell considered that it was within her discretion to charge only one \$5 delivery fee as there was only one delivery and the two people worked for the same company. It was also raised that Ms Campbell would have been the one to receive the delivery fee and that it was simply a trivial issue. Ms Campbell did not accept that

she had refused to leave the premises, and believed that Ms Fearon had overreacted by calling the Police.

[15] Ms Fearon did not specify the allegations about the changing of booking and payment records, although the records in question were provided, but noted that \$92 cash was unaccounted for. Ms Campbell denied taking any money or altering any records, adding that she could not fully comment on the documents said to support those allegations, as she had not had any time to properly peruse them.

[16] Ms Fearon did not accept Ms Campbell's explanations, and at the end of the meeting produced a dismissal letter, which had been pre-prepared. The letter states, amongst other things:

This letter is to advise you that your employment with Marina Motor Lodge has been terminated, effective from today.

I believe I have just cause to formulate the dismissal on the grounds of serious misconduct and I list the two instances below.

...

Further to the above it has come to my attention that a particular client's details were extensively altered whilst you were on shift, that being Wednesday 23 May between 6.30am and 2.30pm.

I have collated the supporting paperwork to substantiate my belief that you have tampered with client/company records with dishonest intent and retained unlawfully, possession of company property and I invite you to peruse the records if you wish.

[17] This letter demonstrates the unfairness of an employer possessing records that an employee is asked to peruse, after they have been dismissed. This approach was compounded by Ms Fearon offering further meetings to discuss the issues, when dismissal had already been carried out. It was therefore of no surprise that Ms Campbell did not pursue that option, but rather she raised a personal grievance. Despite significant efforts by the parties to settle matters, including by mediation, it has not proved possible. It therefore falls to the Authority to determine the matter.

The law

[18] In *Angus & McKean v. Ports of Auckland* [2011] NZEmpC160 the Full Court dealt with the application of s.103A in practise. It held at para [57]ff:

[57] The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's

dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.

[58] *Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon the specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections 3, 4 and 5 must be applied to this exercise.*

[59] *Finally, in determining justification under new s103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for that of a fair and reasonable employer in all the circumstances.*

[19] Section 103A of the Act provides as follows:

(3) *In applying the test in subsection (2), the Authority or the Court must consider –*

- (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.*

(4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*

(5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were*

—
(a) *minor; and*

(b) *did not result in the employee being treated unfairly.*

Determination

[20] Even taking into account the small size of the motor lodge and accordingly the lack of resources available to it, it is clear that this dismissal cannot be justified. An employer can not have sufficiently investigated allegations against an employee when the employer provides a bundle of documents, without prior warning, at an investigation meeting and requires an almost instantaneous response. This is also a breach of the requirement to raise concerns that the employer had before dismissing, and certainly did not provide the employee with a reasonable opportunity to respond before the dismissal.

[21] In this case, it follows that the dismissal over the paperwork issues could not be demonstrated to be a decision a fair and reasonable employer could make, because of insufficient investigation. Such was not a minor or technical breach.

[22] Ms Fearon's decision about the undercharging was also unreasonable in the sense that on the first occasion that Ms Campbell was asked to apply the delivery charge, she made, at worst, an administrative error that cost the motor lodge \$5. Ms Fearon simply would not accept that this was a genuine error, despite the evidence clearly pointing to that, particularly as this was the first occasion Ms Campbell had had to apply the policy. Dismissal for breach of a company policy which was not clear and which was administrative in nature is not an option open to a fair and reasonable employer.

[23] It was not dignified of either party to have got into an argument about the delivery fee issue, but Ms Fearon as the employer and the initiator of the discussion must be held to be more responsible than Ms Campbell for this, particularly as she was the one who called the Police, which was not necessary. Dismissal on these

grounds was also not a decision a fair and reasonable employer could have made. Ms Campbell's dismissal was therefore unjustified on the basis of both substance and procedure.

[24] Ms Campbell claims lost wages at the rate of \$640 per week. I accept that it took her around six months to find another job. She did apply for work through a number of sources, but was unsuccessful before then. On the other hand, Aqua Pi is a small company without a good deal of money and it would be unfair to award that degree of impost on it. In all the circumstances of this case I consider that three months' wages, namely \$8,320, is an appropriate level of compensation.

[25] Ms Campbell gave limited evidence on the impact of the loss of her job on her and it was not supported by any other form of evidence. In all the circumstances of this case, I consider that \$3,500 compensation is appropriate.

[26] In determining remedies I must also consider the extent to which the actions of Ms Campbell contributed towards the situation that gave rise to the unjustified dismissal. In this case, I do not accept that it can be demonstrated on the balance of probabilities that Ms Campbell did take unauthorised possession of any company property, or improperly altered company records. Clearly company records had been altered, but it was not demonstrated that Ms Campbell was the person responsible, particularly as other people working at the motor lodge had access to the computer system. There was certainly no proof that Ms Campbell kept any company property such as the allegedly missing \$92, as was accepted by Aqua Pi.

[27] I do not accept that Ms Campbell's actions were blameworthy in charging half a fee to two patrons rather than a full fee each for delivery, as only one delivery was undertaken and they both worked for the same business. While Ms Fearon did not agree with this approach and this is her right as the owner of the business, it had not been made sufficiently clear to Ms Campbell that she should not do so. Given that this was a new system it was entirely understandable that Ms Campbell might make a judgment that Ms Fearon did not agree with. However, that judgment to pay only one fee when one delivery was required and the two recipients of the delivery both worked in the same business has a certain internal logic to it and Ms Fearon was wrong to interpret that as wilful breach of company policies deserving dismissal. For example, would one fee or two have applied had the two co-workers been staying in the same room?

[28] Ms Campbell's response to Ms Fearon's raising the matter and her slightly sarcastic encouragement to Ms Fearon to ring the Police was, however, not the best way to deal with such an issue. Clearly Ms Fearon and Ms Campbell were upset, but neither did themselves any credit over this incident. Ms Campbell's part in this unpleasant incident must therefore be considered blameworthy and attract a reduction in remedies of 20%.

Costs

[29] This case took less than a day to investigate. Costs on the basis of the Authority's tariff are accordingly set at \$2,500.

Orders of the Authority

[30] I order the respondent, Aqua Pi Holdings Limited, to pay to the applicant, Ms Christine Campbell, the sums of:

- (a) \$6,656 gross in lost remuneration;
- (b) \$2,800 in compensation under s.123(1)(c)(i) of the Employment Relations Act 2000; and
- (c) \$2,500 in costs.

G J Wood
Member of the Employment Relations Authority