

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 250
5408325

BETWEEN

OLIVIA CHANEY
Applicant

A N D

SURREAL LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Ben Walker, Counsel for Applicant
Lydia Luo, Advocate for Respondent

Investigation meeting: 3 September and 3 October 2013 at Christchurch

Submissions Received: 7 October 2013 from Applicant
None from Respondent

Date of Determination: 3 December 2013

DETERMINATION OF THE AUTHORITY

- A. The applicant was unjustifiably dismissed from her employment.**
- B. Taking contribution into account the respondent is ordered to pay to the applicant:**
- Reimbursement under s123 (1) (b) of lost wages and other money in the sum of \$12,147.40 gross.**
- Compensation in the sum of \$5600 without deduction.**
- C. I have ordered the respondent to pay to the applicant costs in the sum of \$1750 together with reimbursement of the filing fee of \$71.56.**

Employment relationship problem

[1] Olivia Chaney commenced employment in a clothing store owned and operated by Surreal Limited (Surreal) in Westfield Mall Riccarton, Christchurch in or about May 2012. On 12 July 2012 she was promoted to the role of assistant manager and her written individual employment agreement with Surreal was varied to reflect her new title.

[2] Ms Chaney was summarily dismissed from her employment on 18 December 2012 following a meeting held with her employer to discuss an allegation that she had been removing items from the store without permission. Ms Chaney said she was advised that her position was terminated because she had stolen a T-shirt.

[3] Ms Chaney says that her dismissal was unjustified substantively and procedurally. She seeks reimbursement of lost wages and/or other money lost since her dismissal in the combined sum of \$14,527.24 gross being lost wages up to the commencement of her parental leave on 29 March 2013 and then 14 weeks paid parental leave. Ms Chaney also seeks an award for compensation for hurt and humiliation together with costs.

[4] Surreal does not accept that Ms Chaney was unjustifiably dismissed from her employment. It says that her dismissal was justified and the process it adopted was fair. It says that she is not entitled to any compensation or wages or, in the alternative, is to be called *to proof* on the compensation and lost wages she claims.

The investigation process

[5] The respondent's sole director is Jiaying Luo, also known as Lydia Luo.

[6] The statement in reply was lodged by Surreal's lawyer Kathryn Dalziel who attended a telephone conference with the Authority and Ms Chaney's counsel on 8 May 2013. The employment relationship problem was set down for an investigation meeting on 27 June 2013 and a direction was made that Surreal provide copies from the policy and practice manual on staff purchases together with copies of the diary in which staff purchases are recorded for the period from mid-November 2012 to 31 December 2012. The policy was provided but not all of the diary entries that had been requested. Surreal did not comply with the timetable set for lodging and serving statements of evidence.

[7] On 6 June 2013 the Authority granted Ms Dalziel leave to withdraw as counsel following a written request for her to do so. On 24 June an email was received from Ms Luo advising that she had had to return to China as her father was ill. She provided a postal address in China. The Authority agreed notwithstanding opposition to adjourn the matter in the circumstances but advised in a notice of direction dated 28 June that once a new date is fixed the Authority would not look favourably on any further delay of the matter. A new date was then set on 3 September 2013 at 1pm. Arrangements were made by the Authority to connect Ms Luo to the investigation meeting by way of SKYPE as she could give no firm date of return to New Zealand. It was not possible to obtain a successful link. The only option available was to connect Ms Luo by telephone. She was available for most of the meeting although at one point her credit ran out and then contact ceased altogether before Mr Walker had an opportunity to ask Ms Luo any questions.

[8] This Authority had some further questions as well for Ms Chaney arising out of Ms Luo's answers. Another date was set for 3 October 2013 so that Ms Luo could be available for questioning if required by Mr Walker and some further questions could be asked of Ms Chaney. There was some considerable difficulty getting in touch with Ms Luo but eventually it was the understanding of the support officer that Ms Luo would call the telephone number where the meeting was being held at 1pm New Zealand time on 3 October 2013 from China. No call on that day was received from Ms Luo and no explanation as to why she was unable to telephone in as arranged on that date or any time since.

[9] A support officer then sent to Ms Luo at the email address used previously to communicate with her a copy of final submissions provided by Mr Walker and gave her seven days to respond but no request for an extension of time to respond or any actual response was received.

[10] In those circumstances the Authority has proceeded to investigate and determine this matter on the basis of the evidence from Ms Chaney, Ms Luo's answers to questions over the telephone after she took an affirmation, the material documents and in the absence of any written statement of evidence from Ms Luo some weight has been placed on the contents of the statement in reply.

The test in s103A

[11] The personal grievance that Ms Chaney was unjustifiably dismissed arose after 1 April 2011. There is no dispute that there was a dismissal. The question of whether the dismissal was justifiable must be determined applying the test set out in s103A of the Employment Relations Act 2000. The requires the Authority on an objective basis to determine whether Surreal's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal. In applying that test the Authority must consider the factors in s103A (3) (a) to (d) and any other factors it thinks appropriate in s(4) of the Act as to the fairness of the procedure. The Authority must not determine a dismissal unjustifiable if any procedural defects were minor and did not result in Ms Chaney being treated unfairly.

The Issues

[12] The issues for the Authority to determine are:

- Was the dismissal justifiable applying the test in s103A;
- If the Authority concludes that Ms Chaney's dismissal was unjustified then what remedies is she entitled to and are there issues of mitigation or contribution.

The background against which the issues are to be assessed

[13] On the afternoon of 17 December 2012 Ms Chaney had a brief and informal meeting with the store manager, Shelley Winika. Ms Winika had been away for about a week or so prior to that date and Ms Chaney had been for that time the first point of contact for other staff and effectively in charge.

[14] At the meeting Ms Winika showed Ms Chaney a T- shirt from one of the boxed sets of two in the store and asked if Ms Chaney had taken one whilst Ms Winika had been away. Ms Chaney advised Ms Winika that she had and asked her whether there was a problem with that. Ms Winika advised that Ms Luo had a problem with it because she did not know that Ms Chaney had taken it and there would be a meeting about it. Ms Chaney said she was not advised by Ms Winika when that would happen and nothing was mentioned about the nature of the meeting or what the issue with her having taken the T-shirt was.

[15] On the evening of 17 December 2012 Ms Chaney received an email from Ms Winika. The email referred initially to the brief meeting that they had had that same day and that Ms Chaney had been advised by Ms Winika of an allegation that she had been removing clothing from the store without permission. It stated that the company would carry out an investigation into the allegations and Ms Chaney would then have an opportunity to respond. The email also recorded that Ms Winika advised Ms Chaney the allegations were very serious and could result in her instant dismissal. Ms Chaney did not accept that reflected the nature of the discussion that had actually taken place.

[16] The email also advised that the company had conducted an investigation and that that investigation indicated that items had been removed from the store and a meeting was required to be held so that Ms Chaney could have an opportunity to respond to the allegations. Ms Chaney was advised in the email that the meeting was to be held the following day on Tuesday 18 December 2012 at 1pm in Surreal. She was also advised that Ms Winika would be attending the meeting together with Ms Luo and that she was welcome to bring a representative with her to the meeting.

[17] Ms Chaney said that on receipt of the email she omitted to notice, although it was clearly stated, that the matter could result in her instant dismissal. Ms Chaney did not take a representative to the meeting. I do not find any responsibility for that decision can rest with Surreal.

[18] Ms Chaney attended the meeting on 18 December which took place in the store staff room at the back of the shop at 1pm. She was asked to explain her actions with the T-shirts. Ms Chaney said in giving her explanation she accepted that she had taken the T-shirts from the store and explained that Surreal was selling a boxed set of two T-shirts for \$69 so the box is therefore a single product. She said that she gave the explanation in the statement of problem the contents of which were confirmed by her written statement of evidence as to the circumstances in which she removed the T-shirts. In the absence of any notes from that meeting and only limited input from Ms Luo I will set out the relevant parts from the statement of problem as forming the basis of the explanation.

[19] On 13 December 2012 Ms Chaney said she removed the T-shirts from the box because she liked them and wanted to wear one as it was hot. She said that the practice at Surreal for making staff purchases during the time she had been employed

was the employee could notify their manager that they wished to purchase a particular item of stock and could then take it without immediately paying for it. The manager would record the item in a diary and then deduct the value of the item from the employee's next pay either as a lump sum or over time. Ms Chaney said that if Ms Winika was away and she was acting as manager she would record her purchases herself in the diary and let Ms Winika know when she returned to work that she had done so.

[20] After Ms Chaney changed into one of the T-shirts she placed the other on her bag in the staff room. Whilst wearing the T-shirt Ms Chaney explained that she advised Ms Luo when she came into the store that day that she had taken the T-shirts and was wearing one. Ms Chaney said that Ms Luo noted that down on an A4 piece of paper and not in the diary. It was not disputed by Ms Luo that Ms Chaney told her about the T-shirt that she was wearing but she did not accept she was advised about the other T-shirt. Ms Luo's view was that Ms Chaney had already worn the T-shirt and that she said *I have purchased the T Shirt*. Ms Luo said that she took this to mean that Ms Chaney had paid for the T-shirt. She did not accept taking a note down of Ms Chaney having taken the T-shirt or shirts at that time. Ms Luo said that permission to purchase the T-shirt had not been given from the manager before it was worn.

[21] Ms Chaney in her written evidence said that she assumed that there may have been a problem with the way in which she had taken the T-shirts because she had not recorded them in the diary herself, but did not think there would be any real issue with this because she had told Ms Luo on 13 December 2012 that she had purchased them. In her oral evidence Ms Chaney said that she had in fact recorded the T-shirts in the diary by putting the tag from the box of T-shirts into the diary and writing her name beside it and the amount of \$10 per week. Ms Chaney said in her oral evidence that she did not ask Ms Luo to open the diary at the meeting on 18 December 2012. Ms Luo did not accept there was anything recorded in the diary. The entries made on that day were not supplied as directed by the Authority.

[22] Ms Chaney worked on 15 December 2012 at Surreal. She brought the second T-shirt to the store with her and said it sat on the top of her bag. Ms Chaney said that during the day Ms Luo asked staff to confirm what they may have purchased from the store. Ms Chaney wrote in her statement of problem that she was asked about some specific items such as a crochet dress, some earrings and a key ring and

that she confirmed that she did want to purchase these items. Ms Chaney said that she was not specifically asked about the T-shirts and she was not surprised because these had already been recorded as items she had purchased.

[23] Having given her explanation at the disciplinary meeting Ms Chaney was asked to leave the store. She was called back to a resumed meeting at 3.30pm where she was advised that her employment had been terminated.

[24] The dismissal was then confirmed in writing on 18 December 2012. The letter which appears to have been emailed, provided, amongst other matters:

Dear Olivia

You're (sic) Employment

We refer to our meeting on Tuesday 18th December 2012. At the meeting we detailed the allegations against you of serious misconduct. The allegations were removing items from the store.

You provided a response to the allegations raised. You did admit that you removed items from the store without permission or the knowledge of any staff knowing that any permission was granted.

At the meeting we advised you it was likely that your employment would be terminated and invited you to comment on that possibility.

We have considered in full your response to the allegations and to the likelihood of your dismissal. We remain of the view that your conduct in removing items from the store constitutes serious misconduct. Your behaviour is totally unacceptable to the company. As a result of your misconduct, the company's trust and confidence in you as an employee has been irreparably damaged. ...

Was the dismissal justifiable?

Reason for dismissal

[25] From the letter of 18 December 2012 Ms Chaney was dismissed because she admitted removing items from the store without permission or the knowledge of any staff knowing that permission was granted. The dismissal was for what appears to be an admission of dishonesty in removing items from the store without permission. It is unclear from the letter confirming the dismissal what *the items* were as Ms Chaney said that there was only reference to one T-shirt at the disciplinary meeting. After she received a copy of the disciplinary letter Ms Chaney sent a text to Ms Winika asking what items referred to as she understood it was *only the t-shirt that had the*

misunderstanding. That matter was never clarified although it seems to be accepted by Ms Luo in her answer to the Authority that the item relied on was of a T-shirt.

[26] The reasons and justification for the dismissal in the statement in reply is also explained further beyond simply the admission of removing items without permission in 2.21. Dismissal is stated to be justified on the basis that there was a company policy around staff purchases, that Ms Chaney was trained in it and took items from the store in contravention of it without making arrangements for payment. Those matters do not appear in the letter confirming dismissal and they add to the reasons in that letter.

[27] In conclusion I find that the reasons for dismissal were those set out in the letter confirming dismissal that Ms Chaney admitted taking items from the store without permission. Policies and rules I accept could form part of the investigation but the letter inviting Ms Chaney to the disciplinary meeting and the letter of dismissal do not refer to those matters as specific allegations in terms of alleged breach. No findings in that regard are referred to. It is not clear from the letter of dismissal what it was concluded was removed from the shop without permission and unclear whether items other than one T-shirt removed were relied on to reach a decision to dismiss. Objectively assessed it is difficult given the use of the word items to conclude they were not. The focus at the disciplinary meeting was on one T-shirt.

Process and substance

[28] I have considered whether there was a sufficient investigation of the allegation as required under s103A (3) (a) and whether Ms Luo genuinely considered Ms Chaney's explanation before she was dismissed under s103A (d). This was a small store with limited resources.

[29] The allegation was that Ms Chaney removed items from the store without permission – see email sent 17 December 2012. It was a serious allegation suggesting dishonesty on Ms Chaney's part and there needed to be more than mere suspicion about that although not proof beyond reasonable doubt.

[30] I am not satisfied that Ms Chaney's explanation was limited to an admission that she removed items from the store. The explanation went further than that as

already outlined including having told Ms Luo that she had taken the T-shirts and had that recorded by her.

[31] Whilst Ms Luo did not dispute that she had a conversation about the T-shirt Ms Chaney was wearing on 13 December 2012 she said that she was only told by Ms Chaney about one T-shirt and that it had been purchased already rather than permission was being requested to buy at a discount. Ms Luo in her answers by telephone said that she did not write the T-shirt down then and there but went to the sale reports. She said that the next day she added it on the list but not the second T-shirt. Objectively assessed a record was taken at some point of at least one T-shirt in the possession of Ms Chaney. Ms Chaney's explanation was that she thought a record was taken of both T-shirts.

[32] Ms Luo was both decision maker and involved in a very material yet disputed discussion with Ms Chaney. In a fair and proper investigation she needed to be open to any available evidence from explanations given. Objectively assessed I am not satisfied that there was sufficient investigation or genuine consideration of some of the explanations by Ms Luo with an open mind.

[33] The first is whether Ms Chaney advised Ms Luo she had taken/purchased both T-shirts and on that basis concluded she had permission to wear/remove them from the store. Objectively assessed the words; *have purchased* or *have taken* in terms of ascertaining intention could be confused or misunderstood. Care was required that Ms Luo did not close her mind to a possibility she misunderstood what Ms Chaney said to her or indeed what she wanted to convey to her. There did not seem adequate investigation into whether the particular T-shirt could only have been purchased from a box of two in which case it would be less likely that Ms Chaney would have told Ms Luo about either T-shirt if there had been dishonest intent. There was no investigation into where the second T-shirt was on 13 December 2013. Ms Chaney says it was on her bag in view of all staff. There was no investigation into whether other employees had seen it on 13 December 2013.

[34] The second matter is that although it was not disputed in the statement in reply that Ms Chaney took both T-shirts home on 13 December 2012 it was unclear what if any view had been reached about that on 18 December 2012. If it had not been accepted that the second T-shirt had been taken home on 13 December 2012 then a fair and reasonable employer could have been expected to have investigated and/or

reached some conclusions whether the second T-shirt from the box had been seen in the store by anyone between 13 and 15 December 2012. There was no investigation into that matter.

[35] Notwithstanding that, reliance was placed on another employee's undated handwritten statement attached to the statement in reply that Ms Chaney removed the second T-shirt with some earrings on 15 December 2012 in a manner akin to concealment. That written statement was not shown to Ms Chaney as part of the investigation which was unfair and not in accordance with good faith.

[36] Ms Chaney explained that she returned to the store with the second T-shirt on 15 December 2012 as she intended to but in fact did not wear it. What happened on 15 December when Ms Chaney was seen carrying the second T-shirt by another employee is a matter that a fair and reasonable employer could be expected to investigate and weigh as to whether there was dishonesty or a view there was no permission to have the T-shirt. It is less likely if someone is dishonest and removes an item they would return with it again to the place it had been taken from and leave with it again. It is also less likely that someone who does that would consider they did not have permission to have the T-shirt. As an aside it seemed to have been accepted that the earrings were noted down and arrangements made for payment.

[37] The third matter is about arrangements not having been made to pay for the T-shirts establishing a dishonest intention. Ms Chaney explained that she expected after she had told Ms Luo about the T-shirts that deductions would be made from her pay in the normal way. The various diary entries provided support that time payment was allowed on items purchased by staff. There are entries beside Ms Chaney's name that show \$10 on pay days and beside another employee's names showing amounts to be deducted. It seems that these entries were made by the employee at least on some occasions. On 12 December there is an entry from Ms Winika in the diary that whilst she is away – *Olivia – please send Lydia the girls hours and any deductions.*

[38] Whilst Ms Luo placed weight on Ms Chaney not mentioning the T-shirts when asked on 15 December about purchases made a note had already been taken down about one T-shirt by Ms Luo. A fair and reasonable employer could have been expected to place some weight on the fact that Ms Luo never asked a direct question of Ms Chaney about payment for the T-shirts or even I find for the one T-shirt.

Ms Luo was not in a position having never asked that question to know how Ms Chaney would respond.

[39] In her answers to the Authority by telephone Ms Luo said that she could not make a conclusion about whether Ms Chaney had stolen the items but that she could not have a person breaking the rules in charge. The allegation though about breaking the rules was not I find a specific one that enabled Ms Chaney to properly answer it before she was dismissed. In her evidence Ms Chaney said that the first time she had even seen the policy on staff purchases was when it was disclosed as part of the documents requested by the Authority.

[40] This did not meet the requirements of s103A (3) (c) of the Act that Ms Chaney has a reasonable opportunity to respond to the employer's concerns before dismissal. A breach of a policy is a different allegation to one of theft/dishonesty and could have led to a different outcome than dismissal. I find that the investigation undertaken was done so on the basis Ms Chaney had been dishonest and taken a T-shirt without permission rather than that Ms Chaney's actions were in breach of policies and rules. I am not satisfied that in carrying out the investigation into the allegation Surreal's process was that which a fair and reasonable employer could adopt for reasons set out above. There was a failure to meet the s103A (3) requirements as set out above and not I find in a minor way that did not cause actual unfairness.

[41] On the basis of the unfair process undertaken I am not satisfied that a fair and reasonable employer could in all the circumstances conclude that Ms Chaney admitted removing items from the store without permission.

Determination

[42] I find that Ms Chaney has a personal grievance that her dismissal was unjustified. She is entitled to remedies.

Remedies

Lost Wages

[43] When Ms Chaney was dismissed she was five months pregnant. She gave birth to her daughter on 29 April 2013 and anticipated taking maternity leave from 29 March 2013. I accept that mitigation of loss was difficult in those circumstances and Ms Chaney struggled to find other employment.

[44] Ms Chaney worked an average of 37.5 hours per week. She was paid Mr Walker submits \$15 per hour and also received average commission of about \$30 per week. That is a combined sum of \$592.50 gross per week or \$118.50 per day. I have calculated lost wages from Wednesday 19 December 2012 to Wednesday 27 March 2013 being 14 whole weeks plus two additional days to 29 March 2013.

[45] Subject to any findings I may make about contribution Ms Chaney is entitled to lost wages in the sum of \$8532 gross.

Paid parental leave

[46] In *McKendry v Jansen* [2010] NZEmpC 128, [2010] ERNZ 453 the full Court considered whether s123 (1) (b) or s123 (1) (c) (ii) permits the Authority to order payment of compensation for the loss of an entitlement to paid parental leave. It was held that compensation for such a loss can be other money lost under s123(1) (b) of the Act or the loss of a benefit. I have considered this claim under s123 (1) (b) of the Act. Ms Chaney would have been entitled to paid parental leave, having worked the required period of at least six months for Surreal had she not been unjustifiably dismissed from her employment. Mr Walker has provided the rate parental leave would have been paid as \$475.16 per week for a period of 14 weeks. That is a sum of \$6,652.24 gross.

[47] Subject to any findings about contribution I find that Ms Chaney is entitled to reimbursement in the sum of \$6652.24 gross being other money lost as a result of the grievance.

[48] The combined award subject to any finding as to contribution under s123 (1) (b) of the Act is \$15,184.24 gross.

Compensation

[49] Ms Chaney explained that there was considerable financial stress for her because she was pregnant and a single mother. She said that she was unable to purchase items for her baby. She also had to undergo blood tests and have additional sessions with her midwife that she puts down to the stress of being dismissed. Almost immediately after dismissal Ms Chaney's lawyer wrote and asked that she be reinstated however that was opposed. Ms Chaney also referred in her written

evidence to the allegation of theft being a serious mark against her character and humiliating.

[50] I accept that Ms Chaney was badly affected by her dismissal. Subject to any findings about contribution an appropriate award under this head is the sum of \$7000.

Contribution

[51] I have not had to until this point make any findings as to what occurred with the T-shirts. I am now required to do so in determining under s124 of the Act the extent to which Ms Chaney's actions contributed towards the situation that gave rise to her personal grievance. The evidence does not satisfy me on the balance of probabilities that Ms Chaney took the T-shirt from her employer with no intention that she would pay for it. There is no contribution for conduct of that nature.

[52] One of the matters where I do find a possibility of contribution is whether Ms Chaney recorded in the diary as is required that she had taken the T-shirts. In her evidence Ms Chaney said that she did record the purchase in the diary as outlined earlier in this determination and put \$10 alongside the tag from the T-shirt box. I have not seen a copy of entries for 13 December 2012 as that page was not provided by Ms Luo.

[53] I find on the balance of probabilities that Ms Chaney did not record her purchase of the T-shirts in the diary. Instead I find she simply told Ms Luo of the purchase and relied on her to make a note. What Ms Chaney told the Authority about recording the purchase of the T-shirts in the diary is inconsistent with three documents before the Authority. The first and arguably the most persuasive is a letter from Ms Chaney's solicitor Grant Cameron written on 20 December 2012 to Ms Luo. That is two days after the dismissal. There is no suggestion in that letter that Ms Chaney put an entry into the diary herself about the T-shirt. Rather that Ms Luo made a note instead. Then there is the statement of problem. In para. 2k that provides; *I did not mark this in the diary that was usually used for recording staff purchases and in para.2q...I assumed that instead that there might have been a problem with the way in which I had taken the t-shirts because I had not recorded these in the diary myself, but did not think that there would be any real issue with this because I had told Lydia.* Then there is the statement of evidence that in para. 2 confirms the narrative or events and facts in the statement of problem.

[54] I find that Ms Chaney's failure to record the T-shirts in the diary contributed toward the situation that gave rise to the personal grievance. A clear record of items purchased was required to be kept. That was the usual process. Had Ms Chaney undertaken it on this occasion it would have removed any misunderstanding about the purchase as it provided a clear record of what had been taken. Recording items which an employee intends to purchase and which are to be worn or removed from the store is a very important requirement. In this matter I do take into account that Ms Chaney did talk to Ms Luo about the T-shirts.

[55] I assess contribution at 20%.

[56] Applying that contribution to the findings I have made about the other remedies I make the following orders:

(a) I order Surreal Limited to pay to Olivia Chaney the sum of \$12,147.40 gross under s123 (1) (b) of the Employment Relations Act 2000 being reimbursement of wages and other money lost as a result of the grievance.

(b) I order Surreal Limited to pay to Olivia Chaney the sum of \$5600 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s123 (1) (c) (i) of the Employment Relations Act 2000

Costs

[57] Ms Chaney has been successful in her claim. She is entitled to a contribution towards costs. The two meetings required to investigate this matter were not lengthy in duration. I intend to assess and award costs on the basis of half the usual daily tariff for costs in the Authority of \$3500. That is the sum of \$1750 together with the filing fee of \$71.56 and I so order.

Helen Doyle
Member of the Employment Relations Authority