

Mr Bryers exchanged the new Nokia phone for his old mobile phone which he preferred to use, and he had the number of the new phone transferred back to his old one.

[4] Independently of CHH, Ms Craig then arranged for her private cellphone number to be allocated to the mobile phone Mr Bryers had returned and which no longer had a number connected to it. She had kept the Nokia phone for about three months by the time CHH found out where it was.

[5] Ms Craig had not asked anyone at CHH for permission to take the Nokia mobile phone and use it as her own, or to transfer her private number to it.

[6] When asked by CHH management to explain her conduct, Ms Craig said she had believed that the Nokia phone handset was not the property of CHH but belonged to Leading Edge Communications, the firm contracted to supply mobile phones to CHH. Ms Craig also explained that a staff member of Leading Edge had given permission for the transfer of her private number to the phone, after Mr Bryers had returned it and taken back his old mobile phone. She explained that the phone had been faulty and that she had believed it was valueless to CHH.

[7] At the conclusion of an inquiry, CHH Mill Manager, Mr Wu Khoo, announced to Ms Craig that he considered her actions amounted to theft of company property and that her conduct had destroyed his trust in her. Mr Khoo dismissed Ms Craig on 23 July 2007.

[8] Although dismissed with immediate effect, Ms Craig was paid salary for one month in lieu of notice, in recognition of her long service of over 10 years with CHH.

[9] Soon after her dismissal Ms Craig raised a personal grievance. She claimed the dismissal had been unjustified.

[10] Mediation undertaken by the parties did not resolve the grievance.

[11] In addition to a determination from the Authority that her dismissal was unjustified, Ms Craig seeks remedies of reinstatement to employment by CHH, compensation for hurt feelings, humiliation and distress, and reimbursement of lost wages. Recognising a possibility that recent restructuring of her former position by CHH may now preclude reinstatement to it, as an alternative remedy Ms Craig seeks

compensation for loss of redundancy compensation she contends would have been paid if her employment had not been terminated for misconduct.

Issues

[12] This investigation requires the Authority to establish the material facts, where any are in dispute, and to apply to them the relevant statute and case law in reaching a determination of the employment relationship problem according to its substantial merits.

[13] The applicable statute law is s 103A of the Employment Relations Act 2000. Principles to be applied under s 103A have been set out by the Employment Court in *Air New Zealand v Hudson* [2006] 3 NZELR 155, where the Court found that s 103A requires the Authority to consider whether dismissal is justified “from the point of view of a neutral observer” - at para [113] of judgment.

[14] The Court explained and emphasised the requirements of s 103A very recently in *Toll New Zealand Consolidated Limited v Rowe*, unreported, AC 39/07, 19 December 2007.

[15] Ms Craig does not protest that she did nothing at all wrong to deserve any punishment. By the time of the Authority’s investigation if not before, she expressly acknowledged that she must carry some blame for her actions of keeping and using the Nokia mobile phone for herself.

[16] There is no dispute that at material times whoever the owner of that phone was, whether CHH or Leading Edge, Ms Craig knew before she arranged the transfer of her personal number to it that the Nokia did not belong to her. Neither is there any dispute that Ms Craig did not seek and did not get, authorisation from her employer before taking over the phone for her personal use.

[17] The essence of her grievance is that CHH was not justified in viewing her actions as theft or stealing, one or both of which terms were used by Mr Khoo when dismissing Ms Craig.

[18] She contends that CHH did not fully and properly consider whether her actions were the product of an innocent mistake she had made as to the ownership or

control of the mobile phone, rather than a deliberate intention to dishonestly take and keep property belonging to someone else.

[19] In addition to the innocent nature of her actions, Ms Craig contends that when CHH was deciding what punishment should be imposed she was not given due credit for her long service and record of good conduct. If that had been properly taken into account she considers that at the most a warning would have been justified for her actions.

[20] Further, in her grievance claim Ms Craig has called into question the motives of CHH in commencing a disciplinary inquiry into her conduct when at the time her continuing employment remained the subject of unconcluded negotiations between her and CHH. She suggests that CHH found it convenient to terminate her employment for misconduct rather than to continue those negotiations. They had become necessary because of a mistake made by the company in relation to a new position with CHH which had been offered to and accepted by Ms Craig.

[21] About one month before her dismissal, CHH announced to Ms Craig plans to restructure her position. Communications between her and the company led to the new position being offered and she accepted it a few days later. Shortly afterwards Ms Craig was told that a mistake had been made. There followed a period of uncertainty about her ongoing employment, during which a grievance claim seemed likely to be raised by Ms Craig. Redundancy was a possibility, subject to suitable financial terms, and a further alternative was the negotiation of conditions of employment for the position mistakenly offered to Ms Craig.

[22] It is clear that on the management side there had been confusion and miscommunication with Ms Craig and that CHH was embarrassed by the mistake it had made in offering her the new job. Ms Craig questions whether CHH used the Nokia phone issue as a convenient means of terminating her employment without the company having to resolve the problem it had created. Termination on the grounds of misconduct would have avoided a redundancy situation and the possibility that redundancy compensation would have to be paid.

Employer's inquiry and conclusions

[23] As noted by the Court in *Sherwood v Woolworths NZ Ltd*, unreported, 17 October 2002, AC 67/02, there is an implied term in every contract of employment

that the employee will use the property of the employer for the employer's purposes or in accordance with the employer's instructions. The term means that the employee will not use the employer's property for his own purposes without the employer's permission. CHH had expressed this term as a company rule required to be observed by its employees. As to the definition of property of the employer, the Court held it included property controlled by the employer, as well as property owned by the employer.

[24] The Nokia phone returned by Mr Bryers had never been owned by Ms Craig. She clearly knew that it was property controlled by CHH, as it was part of her duties to administer or apply that control. Forms completed by her on earlier occasions showed that she was familiar with the administration procedure, and she admitted she knew the procedure and company policy for transferring phones and getting faulty phones repaired.

[25] Ms Craig had explained during the inquiry that she believed the phone was faulty and therefore semi-useless. She said she had been able to use it only to send text messages or take photographs with its built in camera. An issue arose during the Authority's investigation about the state of repair of the phone when Ms Craig took it over. CHH established from Mr Bryers that the phone had not been faulty while it was in his possession. In the course of the inquiry Ms Craig heard Mr Bryers confirm this. CHH did not check this information against the equipment itself, but by the time it was able to do that three months had gone by since the phone had gone into the possession of Ms Craig.

[26] More recently Ms Craig has said that Mr Bryers had not told her the phone was faulty and she had not said to CHH that he had told her that. This may raise a question about the circumstances in which it did become faulty, if that is what happened to it. I note that upon directly hearing Mr Bryers' statement about the condition of the phone, Ms Craig chose to remain silent when she ought to have been able to offer an explanation as to how the cellphone had become faulty and in whose possession it was when that happened.

[27] Contradicting her most recent statement that she had not said Mr Bryers had told her the phone was faulty, are the 23 July meeting notes ("4"). They record Ms Craig explaining after the 4 pm re-commencement of that meeting, that Mr Bryers had returned the phone "stating ... that the microphone wasn't working."

[28] None of this has relevance to the primary issue of justification for the dismissal (although it is of relevance to a secondary issue of blame or contribution), as I accept that Mr Khoo did not attach any significant weight to the question of the condition the phone was in when it was taken over by Ms Craig. What he concentrated on was the fact that Ms Craig had not asked anyone within CHH for permission to take the phone for her own use, and her length of service and experience in her particular position which ought to have made it clear that she was not able to treat this property as her own, whether it was owned or simply controlled by CHH.

[29] In support of her innocent mistake explanation, Ms Craig relied on her statement that she had rung an employee or staff member of Leading Edge and discussed the Nokia phone and its redeployment once Mr Bryers had returned it. She said that Shalom of Leading Edge had told her she could transfer her private number to the Nokia phone. By the time CHH held its disciplinary inquiry Shalom had left Leading Edge. Nevertheless as part of its inquiry CHH did consult Leading Edge about this and obtained some information. None of it came from Shalom herself, since she had left the company, but the information given about this aspect of the case tended to cast doubt on Ms Craig's explanation.

[30] It was reasonable for CHH to rely on what it was told by Leading Edge that Shalom was unlikely to have approved the allocation of a private number to the Nokia phone, or at least not if she had had full knowledge of the circumstances. I do not consider that CHH was required to track down Shalom and take a statement directly from her. Employees who make personal use in their employment of opportunities for their own advantage by making arrangements with the employer's customers, contractors or agents, run the risk that if disciplinary action is taken against them later on their employer will not have the ability to obtain all information that may be relevant to a disciplinary inquiry, since access to the source of some information may be outside of the employers control. Also, it may be reasonable for the employer not to wish to compromise its relationships with customers and contractors by asking for information in connection with the alleged misdeeds of its employees.

[31] I consider that the extent to which CHH made enquiries of Leading Edge and of current and former employees of that firm, was reasonable in the circumstances.

The information that was obtained from Leading Edge increased the considerable doubt felt by Mr Khoo about Ms Craig's explanation of innocent mistake.

[32] I accept the evidence of Mr Khoo, who made the decision to dismiss Ms Craig, that when inquiring into the alleged misconduct he had not believed her explanation that she had acted innocently under a genuine but mistaken belief that the Nokia phone was not the property of CHH but belonged to Leading Edge and was valueless to CHH. Mr Khoo told the Authority that he had concluded that Ms Craig knew what she was doing when she assumed possession of the phone. He said he had rejected Ms Craig's explanation that she had made a mistake, because it had been her responsibility to manage the process of issuing and accounting for mobile phones and because she had not asked anyone at CHH before converting the phone to her use and keeping it in her possession.

[33] I find that CHH conducted a fair and full inquiry into the circumstances surrounding the misconduct alleged against Ms Craig. She participated in that inquiry and was assisted by representatives. I find it was reasonable for Mr Khoo to reach the conclusion he did, that Ms Craig had set out to take the Nokia phone knowing that it was either the property of CHH or was valuable property CHH had an interest in or some form of title to.

[34] The reasonableness of Mr Khoo's conclusion can be judged against the fact that new the Nokia mobile phone handset had a retail value of about \$350. Although that cost had not been on-charged by Leading Edge, the phone had been acquired by CHH under a 24 month contract with Leading Edge which cost \$18 per month, or about \$430 for the full two year term.

[35] In this case the item taken into possession by an employee was not of relatively small monetary value, and it was not in the category of left-over materials or equipment seemingly abandoned by a contractor after some work has been completed at the employer's workplace. The acquisition and use of mobile phones has become near universal and it is therefore unlikely that Ms Craig believed the Nokia phone was an item that had been discarded by CHH and had no value to anyone except herself.

[36] Given the particular circumstances, it seems to the Authority a reasonable conclusion for Mr Khoo to have reached that Ms Craig had deliberately or

purposefully set out to breach the CHH rule against taking possession of company property without authorisation. Those circumstances included;

- the number of years that Ms Craig had been in the employment of CHH,
- her position of employment in which she was required to understand and apply company procedures in relation to the transfer of mobile phones to employees,
- the cost or commercial value of the mobile phone under CHH's contract with Leading Edge,
- the fact that Ms Craig had made no attempt to seek authorisation from anyone within CHH;

[37] I am satisfied that Mr Khoo viewed the situation in the light of these circumstances in reaching his decision to dismiss.

[38] Ms Craig was offended by being branded a thief by Mr Khoo. Regrettably for Ms Craig, "thief" was a term which on its ordinary and natural meaning, without needing to resort to definitions for the purposes of criminal law, was capable of being applied to the circumstances.

[39] The reference made to theft while perhaps unnecessary by Mr Khoo, shows the depth of his conviction about the nature of her conduct as had been inquired into. The Authority finds that his conclusion about that conduct was reasonable in the circumstances. Following the inquiry Mr Khoo was left with reasonable grounds for believing that Ms Craig had deliberately converted the Nokia phone to her own use and possession, and she had done so knowing it was not hers and that it was under the control of her employer, whose permission she had deliberately not sought.

[40] It has not been disputed that actions of this nature by an employee are reasonably able to be viewed by an employer as amounting to serious misconduct.

[41] Applying the test of s 103A of the Act, I find that a neutral observer (very likely a person who owns or has the use of a mobile phone) would have rejected the innocent mistake explanation on the facts known to CHH. I find that viewed objectively the actions of CHH and how CHH acted, were what a fair and reasonable

employer would have done in all the circumstances at the time the dismissal of Ms Craig by CHH occurred.

[42] The employer's conclusion about the nature and seriousness of Ms Craig's misconduct being a reasonable one, as I have found, it was open to Mr Khoo to impose the ultimate punishment of dismissal notwithstanding Ms Craig's length of service with the company. Although free of misconduct or disciplinary action, that service history may have been a matter of aggravation rather than mitigation, since the employer could reasonably have expected Ms Craig to have known better. Even if CHH had accepted the explanation of innocent mistake, the lack of judgement shown by Ms Craig in what she had done might well have left it open for the employer to decide to dismiss on notice rather than give a warning, the penalty she contends should have received at the most.

The restructuring

[43] I find that the contention of Ms Craig that the disciplinary inquiry by CHH had been motivated by the need to find a way out of an embarrassing mix-up by the company over her position and conditions of employment, is based on mere suspicion raised by a coincidence of timing rather than any grounds of substance. Ms Craig had committed the acts later discovered to be misconduct in April 2007, nearly three months before mid-June when the problem arose about her ongoing employment and conditions of that.

[44] I accept the evidence of Ms Amanda Hacche, CHH Human Resources Manager, that it was on 19 July 2007 when she found out a spare mobile phone was missing and in turn this led to the discovery that Ms Craig had the Nokia phone previously issued to Mr Bryers. I accept that prior to this Ms Hacche had not known and had no reason to suspect, that Ms Craig had taken the phone. The following day Ms Hacche began the inquiry that resulted in the dismissal of Ms Craig. I accept that by a mere coincidence of timing this was in the middle of the discussions surrounding the future of Ms Craig's position of employment with CHH, but once her misconduct was discovered Ms Craig became liable at any time to be held to account by CHH.

[45] Understandably, CHH decided to act immediately upon its discovery that Ms Craig had the phone in her possession. Had it decided instead to do nothing until after the employment problem had been resolved, CHH would still have been open to

the same criticism that it had ulterior motives in raising the matter at all. It seems to me quite improbable that CHH would decide to do nothing about its discovery, given the kind of property involved and also the situation that had led to the discovery, which was that the company had wanted a spare mobile phone for a staff member to use in the course of his employment.

Ms Hanlen

[46] The Authority was offered access to evidence from Ms Tracey Hanlen, a former CHH employee who had performed the same role as Ms Craig. The relevance of her evidence was confined to the fact that she had worked in the same position as Ms Craig for some four years and would be able to comment on the procedure that she had followed in relation to the administration of mobile phones among company employees. Ms Hanlen left CHH in 2006 and so was not involved in the disciplinary inquiry conducted a year later by the company, after the discovery of the Nokia phone in the possession of Ms Craig.

[47] It follows that any relevant information Ms Hanlen might have had was not considered by the employer in making its decision about any misconduct by Ms Craig. I have found that the investigation conducted by CHH was full and fair and therefore there was no need to extend it to information gathered from Ms Hanlen or from any other former employee who had left CHH before the alleged misconduct occurred. Other receptionists still in the employ of the company were spoken to by CHH in the course of its inquiry.

Disparity of treatment

[48] Near the end of the Authority's investigation meeting, for the first time an issue was raised on behalf of Ms Craig by one of her supporters about disparity of treatment between herself and another employee who had allegedly taken company property but who had not been dismissed as punishment.

[49] Although the Authority is an investigative body, except in exceptional cases it cannot be expected to investigate new claims such as disparity simply on the basis of a claim made for the first time close to the end of an investigation meeting. It is quite possible that the time required to properly investigate the circumstances in which another employee has been subjected to a disciplinary procedure, and what the

outcome of that was, may be as great as the time needed for the investigation of the applicant's case.

[50] It is reasonable therefore to expect, particularly when applicants are well represented, that claims of disparity of treatment will be raised at an early stage and that at the same time sufficient information will be provided in support of them to enable the Authority and the respondent employer party to consider them in advance of an investigation meeting. A call can then be made by the Authority whether to investigate further, desirably when the investigation meeting is held. The Authority does not have unlimited time and must allocate its resources reasonably to the disposal of other cases as well.

[51] I am unable to make any findings about the claim of disparity of treatment.

Determination

[52] Accordingly, the determination of the Authority is that the dismissal of Ms Craig was a justified dismissal. It follows that no orders are to be made against CHH and that Ms Craig is not entitled to the remedies she has sought.

Costs

[53] As usual, it is expected by the Authority that counsel for the parties will discuss any question of costs that arises and endeavour to resolve it between themselves. If that is not possible, application in writing can be made in the normal way for a determination.