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**Edlin v Beare Haven Investments Limited (Wellington) [2017] NZERA 2036;
[2017] NZERA Wellington 36 (11 May 2017)**

New Zealand Employment Relations Authority

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**Edlin v Beare Haven Investments Limited (Wellington) [2017] NZERA 2036 (11
May 2017); [2017] NZERA Wellington 36**

Last Updated: 20 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 36
5623695

BETWEEN ROBERT EDLIN Applicant

AND BEARE HAVEN INVESTMENTS LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: Charles McGuinness, Counsel for Applicant

Gerard Dewar, Counsel for Respondent

Investigation Meeting: 1 and 2 November 2016 at Wellington

Submissions Received: 21 and 29 November 2016 from Applicant

23 November and 2 December 2016 from Respondent

Determination: 11 May 2017

Employment relationship problem

[1] The applicant, Robert Edlin, claims he was unjustifiably dismissed by the respondent, Beare Haven Investments Limited (Beare Haven), on 29 March 2016.

[2] Beare Haven accepts it dismissed Mr Edlin but says the decision was justified.

Background

[3] Beare Haven operates a franchised Pak'n'Save supermarket in Lower Hutt.

[4] Mr Edlin was employed at the supermarket as a loss prevention officer in November 2012. Beare Haven says it has an established set of rules governing the way loss prevention officers operate and interact with customers which have been reiterated to staff, including Mr Edlin, on a number of occasions.

[5] In particular emphasis is placed on a memo signed by the Stores owner, Keiran O'Sullivan, and three staff including Mr Edlin on 3 July 2014. Contained therein is advice that:

Security Staff must watch customers from the point of taking/concealing items until they leave the store before they can apprehend. They must watch them 100% of the time.

...

There is to be no speculative fishing trip where there may be suspicion of under weighing or that product may be concealed.

If security staff have not witnessed it on the security system and followed the customer 100% they are not permitted to approach the customer or ask for assistance.

[6] The memo also advised departure from the above would amount to serious misconduct likely to result in dismissal and that Mr O'Sullivan was no longer prepared to accept a departure from these policies.

[7] On Saturday 19 March 2016 Mr Edlin was monitoring cameras overlooking the self-checkout area which is one of the supermarket's biggest problem areas. He noticed a child was eating product which he thought probably came from the store. He says it appeared to be a muesli bar with the wrapper still on but peeled back. He says the child was seated in a trolley and with a woman he presumed to be the mother.

[8] Mr Edlin goes on to say:

She arrived at the checkout and the child was still eating the bar which at that stage interested me because possibly the bar

was going to be consumed and not paid for. This was a very minor matter indeed. When the mother took the wrapper off the bar and disposed of the wrapper which has the barcode on my interest increased. So rather than just leave it, I called to the supervisor downstairs in charge of the check-out, told her what I had seen and that is what I used to do quite often (sometimes the supervisor would ring me up and say they have seen something and I would then confirm what they thought they had seen by viewing the recording.)

[9] Mr Edlin says having reported what he had seen he simply left the supervisor to it. He says he did not suggest there had been a theft but simply explained what he had seen.

[10] Mr Edlin says this was a common procedure when it is simple case of something not being scanned or wrongly scanned. He says:

We would ring downstairs and just say, checkout on "B" – they've put the wrong product through, and we would not go down there and interfere. It would be simply fixed by changing the price codes down there.

[11] Mr Edlin adds this was consistent with the training he had received when he had first taken up the role. He says the training involved some direction from the then supervisor about monitoring the screens, where the hot points were and basically being told to keep his eyes on the cameras. He adds:

The manager at the time said the main task was to see what was going on and either report it to checkout staff if minor or if significant act on what was happening.

[12] Mr Edlin goes on to say he could see the supervisor when he spoke to her. He says she then put the phone down and went over to the customer. He says his reaction at that point was *right, job done* and he continued surveillance as normal.

[13] It appears the bar the child was eating was from a multi pack. The customer had given the child one but the box was scanned. It appears the child did not finish the bar and it was put in the customer's handbag. According to the customer she was approached and accused of putting the bar in her bag. She says she told the supervisor she had bought the whole box which was properly scanned. To that the supervisor apologised but notwithstanding that the customer took umbrage at what she considered an accusation of theft and complained.

[14] That led to a telephone call from the security manager, Junior Taramai, to Mr Edlin after she later had finished work. Mr Taramai asked if Mr Edlin recalled an incident where a woman had disguised a lolly or bar or something in her handbag. Mr Edlin says he did not recollect such an event and said so.

[15] The next day it dawned on Mr Edlin that Mr Taramai could have been referring to the child with the muesli bar. Accordingly he sent an email and also said there was no suggestion she had hidden anything in her bag.

[16] Mr Edlin goes on to say that when he came in the next day Mr Taramai advised that due to the complaint Mr O'Sullivan was very very wild and wanted to discuss the incident.

[17] Mr Edlin says Mr O'Sullivan advised he was extremely upset about what had happened and he (Edlin) could see Mr O'Sullivan was *seething*. Mr Edlin thinks he was shown the woman's e-mail and he was given a letter requiring his attendance at a disciplinary meeting. He says Mr O'Sullivan did however add something along the lines of *don't worry you will still have your job*.

[18] The notice advising Mr Edlin of the disciplinary meeting states Beare Haven wished to discuss the complaint and Mr Edlin's actions which appeared, in its view, to be a breach of the security policy. It goes on to note Mr Edlin had been advised in the July memo (incorrectly stated to be dated the 2nd) such a breach could be considered serious misconduct which if proven could result in disciplinary action up to and including termination.

[19] Mr Edlin subsequently requested a copy of his employment agreement but it was not forthcoming. He also sought clarification about the allegations but says the response simply confused him further.

[20] The disciplinary meeting occurred on 29 March 2016. Mr Edlin was accompanied by his wife. Upon commencement Mr Edlin advised he was still waiting for his employment agreement so he could *see exactly what was being alleged and what the requirements were*. He says Mr O'Sullivan replied *oh you won't need it* and as events transpired was not forthcoming until after the dismissal.

[21] Mr Edlin also notes the letter inviting him to the meeting advised it would be conducted by Mr O'Sullivan and Mr Taramai. He takes issue with the fact two further people were there. One was a manager, Ms Bezzant, and the other an advocate who acted on Beare Haven's behalf, Joe Richardson. Mr Edlin says they appeared to be ganging up on him and he was concerned by that.

[22] Mr Edlin says he was asked to explain what he did before Mr O'Sullivan brought out the policy memo and advised he was supposed to watch people 100% of the time. Mr Edlin says Mr O'Sullivan then stated he (Edlin) had *started the whole thing rolling, whatever that meant*. Mr Edlin's response was he had simply reported what he had seen. Mr Edlin says Mr Richardson then described what constituted theft

and stated he had breached the policy having not seen the woman when she picked up the box of muesli bars.

[23] Mr Edlin did not accept that and expressed the view he was capable of determining there was something amiss. It was reasonable and standard for him to raise that with the supervisor on the floor.

[24] Mr Edlin says the four company representatives tried to get an admission that by making his report he was responsible for the complaint. Mr Edlin says he refused to accept that as he had done nothing more than he did on a day-in/day-out basis.

[25] Mr Edlin was also presented with two handwritten notes prepared by the

supervisor and another employee. The supervisor's briefly canvasses the events of

19 March before stating that a few months earlier she had been asked to check a trolley for non-scanned items when it turned out all were properly scanned though this earlier event is not attributed to Mr Edlin. The note finishes by saying:

I have been asked via phone calls to check customers shopping a lot. I find it wrong that I have been asked to do so.

[26] The second handwritten note is from another employee and also alleges Mr

Edlin had asked floor staff to check on customers at various times.

[27] Mr Edlin complains that both Mr Richardson and Mr O'Sullivan continued to

try to get him to admit he was the cause of the whole thing. He say he refused and:

In frustration Mr Richardson said they were going to have a break and immediately they did.

[28] After a break, the four returned. About that Mr Edlin says:

Everybody took up their positions again and Kieran just pulled out a document that said to me "Grant you have made some comments and Philippa you have too. I am terminating your employment with immediate effect and you will get one week's notice of it or payment in lieu of notice" or something like that and walked out of the room, along with everyone else

[29] Mr Edlin was then escorted from the premises by Mr Taramai and the dismissal was confirmed in writing the following day. Amidst other things the letter advises:

... the employer Beare Haven Investments Limited (trading as Pak'n Save Hutt City) has lost trust and confidence in you as an employee because of your breach of company policy as a security officer, with reference to a directive document dated 3rd July 2014 of which you are a signatory. That the document specifically relates to how security staff must perform their duties with reference to 100% observations of potential shoplifters before approaching a potential shoplifter either directly or with assistance.

The document sets out in bullet points, rules which much be observed and states that departure from this policy will not be acceptable. ... Otherwise it is likely your employment will be terminated.

Grant you have breached this directive on at least one occasion whereby a letter of complaint has been received from a very upset customer, causing severe embarrassment to your employer (a breach of duty of fidelity to your employer).

Yours sincerely,

Determination

[30] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a serious thereof, existed to allow a written determination of findings at a later date.

[31] Mr Edlin claims he was unjustifiably dismissed. Beare Haven accepts it dismissed Mr Edlin and in doing so accepts it is required to justify the dismissal. Section 103A of the Act states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[32] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and procedural perspective. While issues of substance and process overlap and there is no firm delineation separation provides a useful means of analysis especially as some of the requirements of s 103A have a procedural focus.

[33] Section 103A requires the Authority consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A

sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[34] Resources are not an issue with Beare Haven having access to, and using, professional advice.

[35] The letter inviting Mr Edlin to the meeting of 29 March states his alleged offence was to breach the security policy. Notes Mr O'Sullivan prepared prior to the meeting show an emphasis on the first and last of the bullet points quoted in [5] above (100% surveillance before approaching an alleged transgressor) along with reference to the second (prohibiting speculative fishing trips) which *may or may not be relevant*.

[36] There-in lies a two-fold problem for Beare Haven. First there must be a serious question as to whether or not the alleged offences warrant dismissal. Here I note Mr Edlin's evidence he was doing what he had been trained to do which went undisturbed. Indeed Beare Haven conceded the training process was somewhat add- hoc. When answering questions Mr O'Sullivan's conceded there was not a *proper policy or procedure as on the job is the best training*. He also accepted there had been considerable concern about how the previous supervisor, who trained Mr Edlin, had operated. In other words there is a concession Mr Edlin was trained by someone who in the employers view did not operate in accordance with the company's wishes.

[37] To that I add Mr Taramai's evidence he was in the process of developing a set of procedures for loss prevention officers though it should be noted Mr Edlin was being consulted as part of that process. Why? Because an officially sanctioned one did not exist.

[38] There was also considerable discussion about various event logs and while there was disagreement about what some of the entries mean I conclude the logs show evidence of staff approaching suspected shoplifters in a way, on the face of it, that contravenes the alleged policy of 100% surveillance. To that I add the evidence from the two written statements that Mr Edlin was acting as he was known to do – i.e.: advising checkout staff of possible issues regarding the misappropriation of stock. If that is the case and Beare Haven considers it wrong then surely advice to that effect should have given to those receiving these improper missives. There is no evidence that is the case.

[39] At another point Mr Taramai conceded Mr Edlin's action were *consistent with the way he operates*. If that is true and Mr Edlin's process wrong but known to his supervisor why the only indisputable evidence of an attempt to address it is a single short two year old document. To that I add evidence at least one other loss prevention officer was acting in a similar way.

[40] There is also Mr Taramai's statement loss prevention officers are expected to use some discretion and Mr O'Sullivan's evidence checkout staff can question people about suspicious behaviour with stock. That is exactly what happened – Mr Edlin advised a possible issue and the supervisor took it up with the customer.

[41] I conclude a fair and reasonable employer would not have concluded there was sufficient substance to its complaints to warrant dismissal given such a poorly articulated and enforced procedure.

[42] That conclusion raises the question of why dismissal resulted and with it a number of procedural issues which undermine Beare Haven's attempts to justify the dismissal.

[43] The letter of dismissal states Beare Haven had lost trust and confidence in Mr Edlin as a result of the breaches. When asked why he dismissed Mr Edlin Mr O'Sullivan's initial response was because he Mr Edlin took no responsibility for what had happened and would not accept he did anything wrong. More than once thereafter Mr O'Sullivan repeated a view the dismissal was due to the fact he had lost confidence in Mr Edlin as a result of Mr Edlin's failure to accept responsibility for his actions. This is a reference to the defence Mr Edlin offered in the disciplinary meeting that he did no more than report what he had seen to the Supervisor and it was she who approached the customer which, as already said, is what actually happened.

[44] When asked whether he put the trust and confidence issue Mr O'Sullivan said he mentioned it when advising the dismissal. He said that during the adjournment Ms Bezzant observed nothing would change and it was then he made the decision to dismiss. Mr O'Sullivan accepted the final part of the meeting was quick and he was operating from prepared notes. In other words Mr Edlin did not have an opportunity to respond to an accusation central to the rationale for dismissal and the procedural requirements of s 103A have not been complied with. Nor did he have a chance to question the view things would not change.

[45] How did this occur? Mr O'Sullivan says the meeting was initially intended to be an inquiry into what had occurred and to get Mr Edlin's side of the story.¹ The nature of the inquiry changed as the meeting developed with Mr O'Sullivan conceding he became upset and angry with Mr Edlin's response. Here it should be noted Mr O'Sullivan stated that if Mr Edlin had conceded his actions were wrong he would not have been dismissed.

[46] Then during the adjournment there were Ms Bezzant's comments and, as Mr Taramai put it, a view Mr Edlin had thrown a pebble into the pond which caused a ripple effect leading to the complaint. The problem was while Mr Edlin accepted he threw the proverbial pebble his mind was closed to the employer's view he was therefore responsible for the complaint caused by the resulting ripple. Again that approach/view was never put to Mr Edlin for comment again evidencing a failure to comply with the requirements of s 103A.

[47] There are other issues which undermine the decision to dismiss. For example key witnesses including the complainant and the supervisor were not questioned and there are indications other assumed infractions influenced the decision to dismiss. For example Mr O'Sullivan attributes a false accusation of theft to Mr Edlin² but his denial and the failure to interview the supervisor means there is no evidence he did that. There is then the fact that having been told two company representatives would

attend the meeting he was faced with four including a professional advocate. There can be little surprise he considered it an ambush and reacted defensively.

[48] Having considered the evidence, the above factors and the submissions I

conclude Beare Haven has failed, by some margin, to justify the dismissal.

[49] The conclusion the dismissal is unjustified raises the question of remedies. Mr Edlin seeks lost wages, \$30,000 as compensation pursuant to s 123(1)(c)(i) and costs. Mr Edlin also seeks a recommendation under s 123(1)(ca) regarding Beare Haven's employment practices and a penalty for alleged breaches of the duty of good faith. The \$30,000 is an amended claim advised on the second day of investigation with

\$20,000 having originally been sought.

¹ O'Sullivan brief at [4] and answers given at the investigation meeting

[50] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. The Authority has discretion to award a greater amount and Mr Edlin asks I do so. He seeks \$20,379.59 being his loss for the total period of 27 weeks and one day which it took to source replacement employment.

[51] I support of his claim Mr Edlin refers to *Trotter v Telecom Corp of NZ Ltd*³ and submits the Court said the purpose of compensation is to return someone to the position s/he would have been in but for the wrong suffered. The discretion should be exercised in favour of the applicant where the evidence supports such an award and the loss is the result of the personal grievance.

[52] The key to exercising the discretion is evidence of attempts to mitigate the loss. The problem I have with exercising the discretion is the evidence regarding mitigation. Mr Edlin provided a schedule of jobs he applied for with a number between dismissal and 4 May. Those are all within the three month period stipulated in s 128. Thereafter there is only one which resulted in Mr Edlin's new job.

[53] Mr Edlin puts the gap down to his rejection for one job which he felt deeply given the position was re-advertised the same day. While that may be the case it does not excuse his failure to apply for jobs beyond the statutory three month period. I have to conclude his attempts at mitigation are not sufficient to justify an award of lost wages in excess of that stipulated in s 128. The loss which shall therefore be

awarded is three month - \$9,812.40.4

[54] Mr Edlin also seeks \$30,000 as compensation pursuant to s 123(1)(c)(i). He supports his claim with evidence of a total state of shock and a resulting requirement he seek medical assistance for stress, heightened anxiety, depression and sleep deprivation. He also spoke of the dire financial state the dismissal put him in and the effect that had on both himself and his relationships. His evidence was supported by medical certification and that of his wife.

[55] Having considered the evidence I conclude it warrants a greater than normal award under s 1123(1)(c)(i). I consider \$12,000 appropriate.

³ [\[1993\] NZEmpC 152](#); [\[1993\] 2 ERNZ 659 \(EmpC\)](#) at 693

⁴ Closing submission at 150(a)

[56] The claim for a recommendation under s 123(1)(ca) was not pursued and will not be considered further. The conclusion reached in this determination should send a sufficient message to Beare Haven about what should be addressed.

[57] Finally there is the penalty claim. The alleged breaches regard an alleged failure to communicate during the disciplinary process. Those issues are part of the reason Mr Edlin has been successful with his personal grievance. It is well known the Authority is reluctant to consider such claims which constitute a form of double jeopardy. The compensation awarded for the successful grievance will suffice.

[58] These conclusions mean I must, in accordance with s124 of the Act, address whether or not Mr Edlin contributed to his dismissal in a way that warrants a reduction in remedies. I have already commented on the fact Beare Haven fell well short of justifying the dismissal and the inadequacy of the policy Mr Edlin allegedly breached, its dissemination and enforcement. These factors lead me to conclude Beare Haven's requirements were insufficiently clear and Mr Edlin cannot be held to have contributed to the dismissal in the way contemplated by s 124.

Conclusion and orders

[59] For the above reasons I conclude Mr Edlin has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondent, Beare Haven Investments Limited, pay the applicant, Robert Edlin;

a. \$9,812.40 (nine thousand, eight hundred and twelve dollars and forty cents) gross as recompense for wages lost as a result of the dismissal; and

b. A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section

123(1)(c)(i). [60] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority

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