

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 445
5439557

BETWEEN

YVETTE FROGGATT
Applicant

A N D

THE WAREHOUSE LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Bryce Quarrie, Counsel for the Applicant
Penny Swarbrick, Counsel for the Respondent

Investigation Meeting: 06 August 2014 at Kaitaia
18 September 2014 (by telephone conference)

Submissions Received: 22 September 2014 from the Applicant
25 September 2014 from the Respondent

Date of Determination: 31 October 2014

DETERMINATION OF THE AUTHORITY

A. The Warehouse Limited's dismissal of Ms Froggatt for serious misconduct is justified.

Employment relationship problem

[1] Ms Froggatt was employed by The Warehouse Limited (The Warehouse) from March 2009 until her dismissal for serious misconduct on 9 January 2013. Ms Froggatt worked as a team member at the Kaitaia Warehouse store.

[2] Ms Froggatt claims her dismissal is unjustified. The Warehouse says it was justified in dismissing Ms Froggatt for serious misconduct.

[3] On 18 December 2012 The Warehouse offered a promotion to customers in which purchasers received a free car phone charger when they purchased a mobile phone valued at more than \$50.

[4] The Warehouse says Ms Froggatt did not comply with the terms of the promotion because she gave away car phone chargers to customers who had purchased phones valued at less than \$50. It says Ms Froggatt continued to give away two phone chargers to purchasers who had not spent more than \$50 after she was told not to do so by a manager, Kathy Cruickshank, Senior Team Manager.

Issues

[5] The following issues are to be determined:

- (a) Was Ms Froggatt's dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) What if any costs should be awarded?

Was Ms Froggatt's dismissal justified?

[6] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether The Warehouse's actions, and how The Warehouse acted, were what a fair and reasonable employer could have done in all the circumstances at the time Ms Froggatt was dismissed.¹

[7] In assessing justification the Authority must consider whether the four procedural fairness tests in s.103A(3) of the Act have been complied with. The Authority may also consider any other factors it considers appropriate² such as compliance with statutory good faith requirements.

[8] Mr Quarrie advised the Authority at the outset of the investigation meeting that The Warehouse had complied with its statutory obligations (the four procedural fairness tests in s.103A(3) and its good faith obligations in s.4(1A) of the Act) and that no issue was taken over the disciplinary process it had adopted.

[9] The key issues relating to justification in this case are therefore:

- (a) Could a fair and reasonable employer have concluded that serious misconduct had occurred?

¹ Section 103A(2) of the Act
² Section 103A(4) of the Act

(b) If so, was dismissal within the range of responses available to a fair and reasonable employer in all the circumstances?

[10] The Warehouse says that Ms Froggatt was dismissed for failing to follow a reasonable instruction from a manager on 18 December 2012 because she gave away two free car phone chargers to purchasers who had spent less than \$50 after being told not to.

[11] Ms Froggatt admits a manager told her to stop giving away free phone chargers to purchasers who had spent less than \$50. However Ms Froggatt says she followed that instruction. Ms Froggatt says the two free phone chargers she was dismissed for giving away were given away before her manager instructed her not to do so.

[12] I consider it was open to The Warehouse, based on the information available at the time it made its decision, to fairly and reasonably conclude that Ms Froggatt:

- a. was told at 8.10pm not to give away free car phone chargers;
- b. gave away free phone chargers at 8.19pm and 8.21pm;
- c. had engaged in serious misconduct by giving away two free car phone chargers after her manager had instructed her not to.

[13] Ms Froggatt's evidence about the timing of the instruction was inconsistent. In a response at the disciplinary meeting and in her written statement for that she says that she received the instruction at around 8.20pm. She also claims the instruction was given to her when she was on the shop floor. However, in her brief of evidence to the Authority, Ms Froggatt claims the instruction was given at about 8.40pm. That cannot be correct given that the special pricing deal ended at 8.30pm.

[14] I heard detailed evidence about the timing of events on the day in question. I consider it was open to The Warehouse to reject Ms Froggatt's explanation that the instruction was yelled at her across the room because this contradicted evidence given by other witnesses and this account by Ms Froggatt was not corroborated by any of the other witnesses who were working at the material time.

[15] I consider that it was open to The Warehouse to prefer the evidence given by Ms Cruickshank about the timing of her instruction to Ms Froggatt because that was

corroborated by another employee. Mr JT Laurence says he heard Ms Cruickshank giving Ms Froggatt the instruction while they were in the staff room just before Ms Froggatt returned to work from her tea break. The evidence established that Ms Froggatt returned from her tea break at 8.10pm.

[16] I find that The Warehouse was entitled to make the assessment that it did of the factual situation and prefer the version of events provided by Ms Cruickshank and Mr Laurence over that given by Ms Froggatt. I find that The Warehouse had good reasons based on reasonable grounds for reaching the conclusion that the instruction was given to Ms Froggatt at 8.10pm. The till receipt tapes show two free car phone chargers were given away, one at 8.19pm and one at 8.21pm.

[17] The Warehouse House Rules identify that “*refusal to follow reasonable instructions of management*” is an example of serious misconduct which may result in dismissal. Ms Froggatt signed a copy of the House Rules.

[18] The Warehouse’s House Rules provided that goods were not to be moved without proper authority.³ I accept Ms Swarbrick’s submission that an instruction not to move property in a particular way (i.e. not to give away free car phone chargers on purchases valued at less than \$50) means there is no authority for Ms Froggatt to continue doing so.

[19] I also accept Ms Swarbrick’s submission that refusing to comply with the requirement not to move goods (in this case, the phone charger with a phone on special) fell within house rule 22 which identified that refusal to follow reasonable instructions of management could result in dismissal for serious misconduct.

[20] Giving away free phone chargers was not an express term of Ms Froggatt’s employment agreement which she was entitled to challenge or refuse. I also find that the instruction Ms Cruickshank gave Ms Froggatt not to give away free car phone chargers to purchasers who spent less than \$50 was not an unreasonable or unlawful instruction.

[21] It was also open to The Warehouse to conclude that Ms Froggatt’s conduct specifically breached House Rule 22 because she had been instructed not to give away

³ Rule 2

further phone chargers on purchases valued at less than \$50 but then proceeded to do so on two more occasions.

[22] Ms Froggatt's actions also breached House Rule 2 which related to the unauthorised possession, removal or movement of company property. I accept Ms Swarbrick's submission that Ms Froggatt was not authorised to take actions which resulted in two phone chargers being removed from The Warehouse without payment by the customers who had received them.

[23] I find that it was open to The Warehouse to conclude that Ms Froggatt's actions when she gave away the free car phone chargers at 8.19pm and 8.21pm were in breach of the House Rules and amounted to serious misconduct.

[24] The House Rules expressly state that refusal to follow a reasonable instruction of management is an example of serious misconduct which may result in dismissal. As previously identified, the incident involved stock integrity (and stock loss of two phone chargers which were given away contrary to a manager's instruction) which is of the utmost seriousness in The Warehouse's retail business.

[25] The decision-maker, Ms Joanne Marsden, Store Manager, concluded that Ms Froggatt's failure to listen and follow through on Ms Cruickshank's instruction was a serious matter. Ms Marsden concluded that it was not an inadvertent error but was a breach following an explicit instruction which resulted in stock loss (two phone chargers) to The Warehouse.

[26] Ms Marsden concluded that she was unable to trust Ms Froggatt to carry out her role properly in future. In particular Ms Marsden says she had lost trust and confidence in Ms Froggatt in relation to respecting managers and complying with instructions given by management. That lack of respect was clearly flagged as being an issue from The Warehouse's perspective during the disciplinary process so Ms Froggatt had an opportunity to respond to it. Ms Froggatt was also already on a warning at the time the serious misconduct conduct occurred.

[27] I find that The Warehouse's finding of serious misconduct and decision to dismiss Ms Froggatt were findings which were available to a fair and reasonable employer in all of the circumstances. I conclude that Ms Froggatt's dismissal was justified so her dismissal grievance claim is not upheld.

Costs

[28] The parties are encouraged to resolve costs by agreement. If that is not possible then The Warehouse as the successful party is entitled to a contribution towards its costs.

[29] The Warehouse has 14 days from the date of this determination within which to file its costs memorandum. Ms Froggatt has a seven days thereafter to file his costs memorandum. The Warehouse has three working days within which to file a reply costs memorandum.

[30] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The parties are therefore invited to identify any factors which they say should result in an adjustment to the current notional daily tariff of \$3,500.

Rachel Larmer
Member of the Employment Relations Authority