

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 269  
5352338

BETWEEN                    KARLA GILDER  
   Applicant

A N D                            COMBINED RURAL TRADERS  
   SOCIETY INCORPORATED  
   Respondent

Member of Authority:        M B Loftus

Representatives:            Peter Churchman, Counsel for Applicant  
   Diana Hudson, Counsel for Respondent

Investigation meeting:      8 and 9 March 2012 at Balclutha

Submissions Received:      19 March 2012 from Applicant  
   26 March 2012 from Respondent

Date of Determination:      12 December 2012

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     The applicant, Ms Karla Gilder, claims she was unjustifiably dismissed by the respondent, Combined Rural Traders Society Incorporated (CRT), on 14 March 2011.

[2]     CRT accepts it dismissed Ms Gilder but contends its actions were justified.

**Background**

[3]     CRT is a national co-operative offering products and services to the rural sector. At the time of her dismissal Ms Gilder was employed as Retail Manager in the Balclutha store. She had been so employed since January 2008, though there were two absences during which she had been seconded to other stores.

[4]     The dismissal resulted from Ms Gilder's treatment of what is known as *bonus stock*. This is stock which was not ordered by CRT yet provided by a supplier for a

range of reasons, both deliberate and inadvertent. It is not normally invoiced to CRT. Ms Gilder says bonus stock is then used to offset deficiencies in the same or similar stock for stocktaking purposes or for promotional purposes.

[5] CRT has a different view. It notes its policy which states:

- *As a rule bonus stock should always be placed into stock. Only in exceptional circumstances, and then only with written approval from a Regional Manager, should any bonus stock be gifted to a social club or CRT employee.*
- *The Farm Centre Manager is to show how this free product is to be handled ...*

[6] CRT denies bonus stock may be used to offset losses with similar stock or that it could be retained for other use without proper approval.

[7] In early March Ms Gilder was on leave. While she was away another employee performed a stock-take. He found 51 *boost* items when records suggested there should only be 31. The 20 additional units had been acquired in November 2010. He telephoned Ms Gilder who, in accordance with her understanding of the treatment of bonus stock, told him to record the lower number. The employee then advised there was a shortfall with respect to a similar item and Ms Gilder said he should use some of the surplus *boost* to cover that deficiency and complete the record accordingly.

[8] The Regional Manager was in the store at the time and became aware of the issue. He made inquiries and these included an approach to the supplier, Dow, who denied there was a problem. The Regional Manager discovered Dow had copied Ms Gilder into its response. He requested a retraction but denies doing so for any improper reason.

[9] Ms Gilder returned on 7 March and was asked to meet the Regional Manager for a *quick chat*. She claims it was actually an unannounced disciplinary meeting about a claim she deliberately manipulated stock numbers. Notes were taken by CRT but there is a dispute about their accuracy.

[10] The following day, 8 March, CRT sent a letter to Ms Gilder thanking her for assisting its investigation into *Alleged Stock Manipulation in Balclutha FarmCentre* and to advise its conclusions. In essence CRT concluded Ms Gilder had deliberately

manipulated stock and inventory records; that Ms Gilder as aware of what she had done and that it was wrong.

[11] Ms Gilder was then advised of another meeting scheduled for 13 March. It was to allow Ms Gilder to provide any further explanation she may have before CRT made a decision as to its course of action which could include dismissal. The meeting occurred on 14 March.

[12] Ms Gilder denies making the bald admissions implied by the letter. She says she made it clear she treated the bonus stock as she had been taught and as she had seen done by others. Her response to questions about whether she was familiar with the policy was *no* - it had been distributed while she was relieving at another branch. She had not received it and it had not been drawn to her attention. Again there are notes of the meeting but they contain disputed content.

[13] The meeting concluded with verbal advice dismissal would result and this was confirmed in writing the following day. Again, the letter's content is disputed.

### **Determination**

[14] As already said, CRT admits it dismissed Ms Gilder. It therefore accepts it must justify its decision.

[15] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least used to state, that 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 would have done in all the circumstances at the time the dismissal ... occurred.*

[16] The above test is used as the cause of action arose prior to the present s.103A coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect.* Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless they specifically provide otherwise. As there is no suggestion in the Act the new s.103A has retrospective effect, the earlier test must apply.

[17] Having just said the test of justification applicable as of 1 April 2011 is not to be applied here, I believe it appropriate it be referred to. I do so as its content, or at

least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The test now requires that:

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

...

- (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.*

[18] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and a procedural perspective. Whilst it is clear issues of substance and process overlap and there is no such thing as a firm delineation, separation still provides a useful means of analysis, especially as the elements referred to in 17 (b) to (d) have a procedural focus.

[19] Ms Gilder was dismissed for her treatment of the bonus stock. While she acknowledged stock records were inaccurate she tendered explanations which, the evidence suggests, were disregarded without serious consideration. Indeed, the evidence shows a reluctance to interview witnesses Ms Gilder identified as pertinent and when her pressure to do so prevailed, the evidence suggests the interviews were superficial. Had the explanations been considered it is likely a different conclusion may have been reached and, as a result, I doubt this dismissal can be justified substantively. Even if that was not the case, there are other issues which undermined the substantive decision.

[20] Ms Gilder was absent when the bonus stock policy was disseminated and CRT now accepts that to be the case. CRT attempts to argue its failure to ensure Ms Gilder saw the policy is irrelevant as its content is paraphrased in the House Rules schedule appended to her employment agreement. That is true but I disregard the approach for the following reasons. Ms Gilder's claim the house rules were a guide and applied flexibly withstood scrutiny but, more importantly, its content was superseded by the training she received.

[21] She claims her training about processes such as the handling of bonus stock came through *on the job* training and observation of others. This claim went undisturbed by cross-examination, as did her evidence others both taught and practiced the processes she applied in this instance. Her evidence in this respect was supported by two witnesses and a written statement from her predecessor.

[22] Here it should be noted one of those responsible for the decision to dismiss disputes that. He says he checked with the predecessor and claims he denied it. In this regard I accept Mr Churchman's submission the evidence is unconvincing. It was not mentioned in either the written brief or subsequent orally led evidence in chief. The claim emerged during cross-examination when the witness appeared cornered and I also note he failed to tell others assisting him in his investigation of the alleged statements. I discount the claim.

[23] There is then the fact it is clear the person to whom Ms Gilder thought she reported on a day to day basis, the Balclutha based District Manager, was clearly appraised of the bonus stock and did not act (though this was most likely because she was new to the role and had no knowledge of the process herself). The evidence is she told Ms Gilder to act as she normally did. That, of course, Ms Gilder claims she did. CRT responds by claiming Ms Gilder did not report to the District Manager but the Regional Manager. Again I disagree. Ms Gilder's job description does not specify to who she reports and lists both the District and Regional Managers as people with whom she must establish and maintain a strong relationship. The evidence leads me to conclude she was entitled to consider the District Manager her boss and the incumbent of that position effectively gave her *carte blanche* to act as she thought fit.

[24] The evidence is, I hold, that all engaged in Balclutha were unaware of the policy and the alleged requirements. They continued to apply processes that had been adopted and handed down through informal on the job training. That is the approach Ms Gilder applied. In such circumstances a dismissal must be unjustified.

[25] If policies and procedures are to be enforced employees must have a working knowledge of them (*NZ Freezing etc Clerical Officers IUOW v Huttons Kiwi Ltd* [1990] 3 NZILR 504, Colgan J.) and they must be properly enforced (*Otumarama Private Hospital v Bell* [1995] 2 ERNZ 491). Here the evidence shows neither knowledge nor proper enforcement. The worst that can be said is Ms Gilder's alleged omission was accidental. There is no evidence of malice or an attempt to deceive. An

accidental breach of rules will not normally justify a dismissal (*Glengarry Hancocks v Madden* [1998] 3ERNZ 361).

[26] Even if the above conclusion is wrong, there are at least three serious procedural deficiencies. Each would, on its own, most likely render the dismissal unjustifiable. The presence of all three leaves no room for dispute.

[27] The first relates to the content of the employment agreement between CRT and Ms Gilder. It provides that if serious misconduct, which CRT claims this to have been, has, or is suspected to have, occurred CRT shall commence an investigation and advise the employee of the investigation. Once CRT concludes, as a result of the investigation, misconduct may have occurred it is required put the employee on notice they will be required to attend an interview at which the specifics of the allegation must be put.

[28] Here the evidence is the Regional Manager concluded there was possible misconduct no later than 3 March. By then he had made a number of inquiries and gathered written statements – indeed he had gone so far as to ask one informant to change the statement. Notwithstanding that, he chose to have an *informal chat* with Ms Gilder on 7 March when the required procedure demands he should have taken another more formal course.

[29] CRT tries to argue it was not required to do so as the matter did not become disciplinary until the meeting of 14 March. I do not accept that. The policy says certain things shall occur once misconduct is suspected and as already said, there was an allegedly informed suspicion well before the meeting of 7 March.

[30] It is well established that when an employer fails to follow its own procedure any resulting dismissal must be unjustified (*Nutter v Telecom NZ Ltd* [2003] 2 ERNZ 234 and *Goodman Fielder NZ Ltd v Ali* [2003] 2 ERNZ 565. If, for no other reason, this dismissal must be unjustified.

[31] There is also the fact the decision to dismiss was made by a committee of four yet Ms Gilder did not have a chance to address two of the decision makers including, arguably, the most important – CRT's Chief Executive who claims to have recommended her dismissal (paragraph 14 of his written brief).

[32] Again it is well established an accused employee must be allowed to face the decision makers. A failure to allow this will again render any subsequent dismissal unjust (*Irvin's Freightlines Ltd v Cross* [1993] 1 ERNZ 424).

[33] Another issue that arises from this situation is summarised by one of Mr Churchman's submission with which I agree. He says:

*One of the consequences of this process of "dismissal by committee" is that it is now not clear exactly why the applicant was dismissed as, when questioned by the Authority on this point, the respondent's various witnesses gave different responses. This is just not good enough.*

[34] The third point is that, as said in paragraph 17 above, it is a minimum requirement that an employer put its concerns, allow the employee an opportunity to respond and consider that response with an open mind. Those requirements are reflected in CRT's own procedures. Again it is clear from the evidence this did not occur. Ms Gilder was not appraised about key allegations and conclusions about them influenced the decision makers. The situation was perhaps aggravated by the fact at least two of those decision makers were receiving information second hand and having heard the evidence I find the advice they received was coloured by the conclusions and prejudices of those reporting them.

[35] As would be expected from a two day investigation, followed by lengthy submissions totalling some 38 pages there were a number of other issues traversed in evidence and submission which are not discussed or determined here. That is not necessary. The deficiencies outlined above are more than sufficient to reach a conclusion CRT will not be able to justify the dismissal. There are serious questions about the substantive justification and the procedural deficiencies are, for reasons outlined above, such that I conclude this dismissal must be unjustified.

### **Remedies**

[36] The conclusion the dismissal was unjustified raises the question of remedies. Ms Gilder initially sought reinstatement but chose not to pursue the claim. She now seeks wages lost as a result of the dismissal and compensation pursuant to s.123(1)(i) of the Employment Relations Act 2000.

[37] Ms Gilder supported her claim for lost wages with evidence she did not work for some three months. She cites three applications and attributes her failure to even get a response for one to the fact she was honest in her application and advised she had faced disciplinary action in her last job. She adds her attempts to mitigate were affected by the embarrassment she felt which made her afraid to even leave her house let alone face prospective employers. After three months her father came to her assistance and sourced some temporary work. Soon thereafter she obtained some part time work, albeit with limited hours. However she claims to have been unable to source a full time replacement job and after balancing her earnings against the amount she would have received had she remained with CRT, quantifies her loss at \$18,532.80. Since preparing her brief that amount is said to have increased by another \$1200.

[38] Section 128(2) of the Employment Relations Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. For Ms Gilder, three months wages was \$10,748.40. A greater award is then discretionary and while the Authority often considers such claims, there must be a serious attempt to mitigate the loss to be eligible for an increased award.

[39] I am satisfied the loss has been incurred and the calculations are not disputed by CRT - see paragraph 45 of their submissions. I am also satisfied Ms Gilder has attempted to mitigate her loss, though her attempts are hindered by limited opportunities being available in a small town. In these circumstances I conclude she is entitled to be compensated for the total loss - \$19,732.80 gross.

[40] Ms Gilder also seeks a considerable sum as compensation pursuant to s.123(1)(c)(i). While she gave evidence of the hurt she felt especially given the nature of CRT's business and the need to interact with ex-clients in the community, her evidence was not extensive. It was also undermined to some degree by that of one of her witnesses who appears to have discussed the issues and fuelled the proverbial fire. That can not be visited upon CRT. Having considered the evidence I conclude an award of \$8,000 is appropriate.

[41] The conclusion remedies accrue means I must, in accordance with the provisions of s.124, address whether or not Ms Gilder contributed to her demise in any significant way. My conclusion CRT can not provide a substantive justification for the dismissal means the answer must be no.

### **Conclusion and Orders**

[42] For the above reasons I conclude Ms Gilder has a personal grievance in that she was unjustifiably dismissed.

[43] As a result the respondent, Combined Rural Traders Society Incorporated, is ordered to pay the applicant, Ms Karla Gilder, the following:

- i. \$19,732.80 (Nineteen thousand, seven hundred and thirty two dollars and eighty cents) as reimbursement of wages lost as a result of the unjustified dismissal. PAYE is to be deducted before payment; and
- ii. A further \$8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[44] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority