

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 172A/10
5295545

BETWEEN QUINTIN HAPUKU
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Joanne Watson, counsel for Applicant
 Penny Swarbrick, counsel for Respondent

Investigation Meeting: 28 April 2010

Submissions Received 9 and 28 May 2010

Determination: 14 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the dismissal of the applicant Mr Quintin Hapuku by the respondent company The Warehouse Limited.

[2] Following several meetings held in January 2010 at which The Warehouse inquired into the conduct of Mr Hapuku, he was told on 3 February 2010 of the decision made to dismiss him from that day.

[3] Mr Dave Eaton, Manager of the Cambridge store in which Mr Hapuku had been employed as Assistant Store Manager, confirmed the decision in writing on 4 February. Mr Eaton advised that The Warehouse was satisfied Mr Hapuku had engaged in the following misconduct:

- *Using another team member's logon*
- *Authorising your own database adjustments*
- *Failing to verify the validity of the database adjustments*

- *Removal/movement of property (BBQ) belonging to the company without following the correct process and making payment*
- *Failing to follow company process relating to use of the charity BBQ*

[4] Mr Eaton advised in his letter that individually particular aspects of Mr Hapuku's conduct was considered serious misconduct in terms of the company's policies and procedures and could warrant dismissal. Cumulatively his conduct was considered to have given rise to an even more serious situation which had resulted in the employer losing trust and confidence in Mr Hapuku.

[5] In response to his dismissal Mr Hapuku promptly raised a personal grievance. At the beginning of March 2010 he applied to the Authority for interim reinstatement but was unsuccessful.

[6] Mediation undertaken by the parties prior to the investigation meeting did not resolve the employment relationship problem.

[7] At the meeting held on 28 April 2010, the Authority took evidence from both Mr Hapuku and Mr Eaton as well as several other witnesses who had been involved in the investigation into alleged misconduct. Submissions were made by counsel Ms Watson and Ms Swarbrick, the former in support of Mr Hapuku's claim that his dismissal was not justifiable and that, accordingly, he was entitled to remedies under the Employment Relations Act 2000. The remedies sought for him include reinstatement to the position of Assistant Store Manager at Cambridge, reimbursement of lost wages and compensation for hurt feelings, humiliation and loss of dignity.

[8] Ms Swarbrick for The Warehouse submitted that the dismissal was justified and accordingly there was no basis for awarding any remedies to Mr Hapuku.

[9] When the Authority is required to resolve an employment relationship problem in the nature of a claim that a dismissal has been unjustified it must judge justification against the test provided at s103A of the Employment Relations Act, which is as follows:

... the question of whether dismissal.....was 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.

[10] The allegations found established by The Warehouse following its inquiry into Mr Hapuku's conduct were that he had removed company property - a kitset barbeque - from the Cambridge store without authorisation, used another employee's computer logon, and used the store's charity barbecue without following correct procedures.

[11] The first and second of those allegations were found to amount to serious misconduct under the employer's House Rules. The third allegation was found to amount to less than serious misconduct under the employer's Code of Conduct.

[12] While the third allegation, using the charity barbeque without following correct procedures, was not disregarded by The Warehouse in opposing the personal grievance claim, it was the first and second allegations, individually and cumulatively, that were mainly relied upon by the employer as providing justification within the test of s103A for the dismissal of Mr Hapuku.

Unauthorised removal of BBQ

[13] I find that after conducting a fair and thorough inquiry into the allegation made in this regard, Mr Hapuku's employer reasonably concluded that without authorisation he had removed from the Cambridge store the kitset barbecue which was company property. Further, I find in the circumstances that The Warehouse reasonably concluded that Mr Hapuku's actions amounted to serious misconduct as defined by the company's House Rules.

[14] Applying s 103A, I find that 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. Accordingly, the Authority determines that Mr Hapuku's dismissal was justified as a disciplinary response to his conduct in mishandling company property.

[15] The reasons for my findings in relation to this particular allegation of misconduct are as follows. There is no dispute that Mr Hapuku removed the barbecue from the premises of The Warehouse store at Cambridge and did not at any time pay for it or offer any payment.

[16] Mr Hapuku's explanation was that he understood permission had been given to him to remove this property without first paying for it, and he had taken it away to assemble so as to be able to assess the extent of the defects in the item that had caused the barbecue to be removed from sale to the public in the store.

[17] Mr Hapuku explained during the first disciplinary meeting that there had been no set time within which he had to make payment for the barbecue, by way of a donation to The Warehouse social club, but that he had wanted to assemble it at the beginning of his period of leave.

[18] In giving his explanation Mr Hapuku acknowledged that he had been fully aware of a primary rule of The Warehouse - 'Retail law' - that stock was not to be removed from the store without payment.

[19] After taking the barbecue on 23 December 2009, prior to going on holiday, Mr Hapuku made no attempt to pay for it and made no arrangements for payment in the period of time before he returned from leave about three weeks after removing it.

[20] There is no dispute that Mr Hapuku knew that the process for acquiring goods such as the damaged barbecue was by making a donation to the social club. The amount contemplated was \$20-25 in this case, payable to the third-in-charge at the Cambridge store, Ms Carolyn Martin.

[21] If Mr Hapuku had intended to assemble the barbecue to assess its defects at the start of his days off, he did not do so then or at any time over the period of his Christmas/New Year holidays before he returned to work on 12 January 2010.

[22] It was put to him at the conclusion of the employer's investigation that he had had 21 days after removing the barbecue to make a donation or discuss with Mr Eaton, the store manager, or anyone else, payment for the property. The employer viewed Mr Hapuku as having removed the barbecue without following what he knew to be the proper procedures for making payment.

[23] When giving evidence for The Warehouse at the investigation meeting held over three months after the inquiry had taken place, Mr Eaton accepted that Mr Hapuku had misunderstood what he had been permitted to do in relation to removing the barbecue from the store without paying for it first. Mr Eaton did not go so far as to acknowledge that anything he said or did had caused Mr Hapuku to

misunderstand. I took Mr Eaton to mean that he accepted in his evidence that Mr Hapuku had not acted with dishonest intent.

[24] Any hesitation or uncertainty by Mr Eaton in his written and oral evidence given at the investigation meeting on 28 April 2010 about what was established during the inquiry in January 2010 must be considered in the light of the record of the inquiry made at the time it took place.

[25] The explanation given on 20 January (from mid-page 17 of the Record) was that Mr Hapuku had seen the barbecue in a skip ready to be thrown out and had wanted to buy it but had also wanted to put it together and decide what a fair donation for it would be.

[26] Mr Hapuku acknowledged his understanding had been that permission was needed to take stock away from the premises without payment. He said that Mr Eaton had given him that permission. Mr Eaton, however, denied at any point saying to Mr Hapuku that he could take the barbecue away. His assumption had been that Mr Hapuku would assemble it at the store to assess its serviceability.

[27] Mr Hapuku had also explained his understanding of the donation process, which would have resulted in him making payment to another responsible employee such as Ms Martin and receiving, if not a receipt, some form of proof that he had made payment before taking the property from the store.

[28] Mr Hapuku acknowledged that he had followed the same process recently and considered that he was “very aware” of the rules in this regard.

[29] When asked by Mr Glen Sinclair, the security manager for The Warehouse, why he had not assembled the barbecue at the store Mr Hapuku replied:

... understood could take home to make up and make informed decision on how much to pay.

[30] Mr Sinclair then asked:

Did Dave [Eaton] say specifically could take home to make up?

[31] To which Mr Hapuku replied:

No said okay when I said could I take it and make it up.

[32] Mr Eaton then commented:

Take it and make it up I would have said yes because like the barbecue you tested outside in the yard thought you would do the same.

[33] Ms Watson or Mr Hapuku then said, “misunderstanding then.”

[34] Mr Hapuku said he could not recall ever before taking stock home without paying for it. He confirmed his understanding that permission was needed to take stock from the premises when it had not been paid for. He was then asked whether he had specifically asked to take it home and replied:

Not 100% sure - I thought I had.

[35] He confirmed that as Assistant Store Manager he would not approve the taking of stock without payment before discussing it with the Manager.

[36] Mr Hapuku confirmed that after taking the barbecue home he had not started assembling it and had not further discussed payment of it with Mr Eaton or anyone else. He regarded the decision as to payment as having been left in his hands and dependent on his finding time to assemble the barbecue. He thought this would have been done on his first available day off although he did not think there was any timeline as part of the arrangement.

[37] Mr Hapuku was asked why he had not simply just made a donation and replied that he had wished to make a fair donation, being one that was not considerably less or more than the barbecue was worth. Mr Hapuku agreed that he could have assembled the barbecue at the store, although it was a busy place at that time of year.

[38] Mr Hapuku also said that he had not made or offered a donation once advised there was to be an inquiry into his conduct, as he had thought that to do so would not have been a “good look.”

[39] Mr Eaton’s conclusions as to why Mr Hapuku’s conduct in relation to removal of the barbecue had amounted to serious misconduct were expressed in writing on 4 February 2010 as follows:

1. *Allegation of removal/movement of property namely a BBQ, whilst it is acknowledged that you did discuss the BBQ with me that conversation outlined the need to make a donation for the product in order to ‘take it’. You have explained that you understand the process in place in Cambridge for such purchases and have subsequently used that process, you also outlined that you have never removed product before and*

would not as an ASM authorise anyone to take product without payment which we believe supports what we put to you that 'Retail law' means that product is never removed from the store without payment. You also had 21 days after taking the BBQ to make a donation or discuss with me or someone else that you had not, I consider this more than a reasonable amount of time to do so. It appears to me that you have removed the BBQ without following what you know to be the proper procedures for payment, and without paying.

[40] Mr Eaton concluded in his report that the removal of the barbecue incident by itself was viewed as being sufficiently serious for him to consider dismissal.

[41] Part way through the employer's inquiry an objection was made on behalf of Mr Hapuku to Mr Eaton being involved in it, because he was also to be the decision-maker as to whether Mr Hapuku had been guilty of misconduct. The ground of the objection was that Mr Hapuku's explanation that there had been a misunderstanding implicated Mr Eaton in the circumstances or events that had surrounded the removal of the barbecue. Mr Hapuku had said he thought that Mr Eaton had given him permission to take the barbeque away from the store without first paying for it.

[42] This objection was not made at any time during the first disciplinary meeting held on 20 January, at which Mr Hapuku had given his explanation in the knowledge that if the allegation was established against him the consequences of misconduct could include summary dismissal. In my view it is likely that no objection was taken to Mr Eaton's involvement for most of the investigation because no issue was seen to arise about his credibility and because there had been no issue that payment for the barbecue was required but had not been made at any time, even after the disciplinary inquiry was notified to Mr Hapuku.

[43] In the circumstances, I consider there was no unfairness to Mr Hapuku in the way the inquiry was conducted with Mr Eaton being a witness as well as the decision-maker. It had been accepted that Mr Hapuku had acted through a misunderstanding and not dishonestly, but the question was whether that explanation was reasonable given Mr Hapuku's position and his admitted knowledge and experience of 'Retail law.'

[44] The Company House Rules of the employer provide that an employee may be dismissed without notice for serious misconduct if there has been an unauthorised removal of property belonging to the company. Such property expressly includes items which may be termed "scrap" or "damaged." The rules in this regard go on to

provide that all personal purchases require a sales receipt which must be provided for inspection on request. Mr Hapuku did not dispute that he known those rules before he removed the barbeque.

[45] I conclude that the dismissal was what a fair and reasonable employer would have done in all the circumstances. This is because Mr Hapuku's position as Assistant Store Manager was a senior one. It required him on regular occasions to stand in for the store manager, Mr Eaton, and take charge of the Cambridge store. Also, Mr Hapuku knew the House Rules with regard to removal of property belonging to the company. From both his position and his prior experience as an employee of The Warehouse he was familiar with the retail sales environment, including security measures universally accepted as necessary to limit stock loss and maximise revenue from sales. He knew the fundamental importance attached to 'Retail law,' that stock was not to be removed unless paid for. Such conduct by a senior employee in breach of primary and fundamental rules could reasonably be considered serious misconduct by the employer, in all the circumstances.

[46] The employer reasonably considered that Mr Hapuku had ignored the rules or policies relating to stock handling or had shown himself "disinclined to adhere to procedures," as a matter of attitude towards his responsibilities. This elevated the conduct above being a single instance of carelessness or inattention and was, I find, capable of being serious misconduct, especially in the case of a senior employee such as Mr Hapuku occupying a position of considerable responsibility.

[47] Therefore I find that Mr Hapuku does not have a personal grievance arising out of the removal of the barbecue incident, a ground on its own relied upon by the Warehouse to justify his summary dismissal.

Using another team member's logon, and breaching requirements for database adjustments

[48] This was the second stand-alone reason relied on by The Warehouse for the justified dismissal of Mr Hapuku.

[49] Rule 9 of the Company House Rules lists as serious misconduct "using another Team Member's password or PIN number at POS [point of sale] or elsewhere."

[50] During the inquiry carried out by the employer into Mr Hapuku's conduct in this regard, there was no dispute that, through his actions, he had broken clear and important rules. This was in two respects. First, his access to a particular screen on the store computer had been obtained through another employee's logon, that of Ms Carolyn Martin. Second, having gained access in that way, contrary to clear rules he proceeded to use the computer to approve his own requests for stock pricing to be adjusted.

[51] During the employer's inquiry Mr Hapuku explained that because he shared the use of the computer with Ms Martin he had not realised that the screen he used to authorise adjustments had been opened by her earlier using her logon or that the adjustments he found on that screen waiting to be authorised had earlier been loaded for approval by him. It was not until Ms Martin pointed out what he had done and told him that he should not have approved the authorisations, Mr Hapuku said he realised what his conduct had been.

[52] Almost from the start of the inquiry Mr Hapuku accepted that he had accessed the computer through Ms Martin's logon, although he explained he had not been aware of that at the time. He accepted that he had not paid sufficient attention to the adjustments he found on the screen waiting to be made and which he approved, contrary to clear rules.

[53] Mr Hapuku could not explain why he had not checked to ensure that the adjustments to be made were not his own. When asked why he had not looked to see what he was adjusting, Mr Hapuku could give no explanation. He agreed that before making adjustments it was a fundamental process to first clarify what was being adjusted.

[54] Mr Hapuku said he realised that he had used Ms Martin's logon when, shortly afterwards, she inquired about the adjustments he had made. He agreed that even then he did not bring his conduct to the attention of anyone else. Mr Hapuku agreed that his actions in approving his own adjustments in the circumstances had been negligent.

[55] Mr Hapuku explained that he had been under pressure from doing many adjustments on the day, but when the employer checked by running a report of the computer's activity that day it was found that the only adjustments Mr Hapuku had

made were in relation to the six items for which he had sought approval to adjust and had then adjusted them himself, using Ms Martin's logon.

[56] Although there was no suggestion that Mr Hapuku had acted with dishonest intent in using Ms Martin's logon and approving his own adjustments, as Mr Hapuku was in a leadership role and position of trust as a person in charge of the Cambridge store responsible for the administration of employer's policies and procedures, which he was fully familiar with, it was reasonable for The Warehouse to conclude in all the circumstances that it could not continue to have the necessary trust in him to carry out his position.

[57] The extent to which he had disregarded established procedure was further revealed during the investigation meeting when Mr Hapuku explained that he had corrected the mistake he had earlier made of approving his own adjustments. This was a further breach of procedure drawing attention to the fact that Mr Hapuku had not told anyone such as Mr Eaton what had occurred, so that steps could then have been taken to stop the errors compounding. This subsequently discovered matter cannot be taken into account in considering justification but does serve to illustrate the importance the employer attaches to its procedures and the need for strict compliance with them.

[58] Applying the test of justification at s 103A of the Act, the Authority concludes that a fair and reasonable employer in its actions and the way it acted would have in all the circumstances decided to dismiss Mr Hapuku for his failures with regard to logging on the computer and the use made of it to self-approve adjustments to stock.

[59] Although a number of points were made about the procedure generally followed by the employer in investigating the conduct of Mr Hapuku, I do not consider any of them are valid to the extent that there was no justification for dismissal in relation to the removal of the barbecue incident and the logon and adjustment incident, jointly or severally. I do not consider that there was any failure to the extent that Mr Hapuku was disadvantaged during the disciplinary investigation and that as a result justification for the dismissal decision was absent.

[60] Some of the points made about procedure were getting away from the inquiry into alleged misconduct and Mr Hapuku's explanation in that regard. An example was his insistence that he be told the name of the person who had used the employer's

confidential 0800 number to first bring the attention of management to some of his conduct. The identity and possible motives of the caller became irrelevant once The Warehouse considered it had cause to inquire into Mr Hapuku's conduct. That inquiry was a fair one, I find, and the conclusions reached from it were those that a fair and reasonable employer would have made.

[61] I agree with the submission of Ms Swarbrick that if there were any defects in the process followed, they were not material to a fair consideration of Mr Hapuku's circumstances and conduct, and they did not prevent the employer from acting in the way that a fair and reasonable employer would have in all the circumstances. I also agree with counsel that the misconduct engaged in by Mr Hapuku was serious in terms of the employer's well known and consistently applied rules, which Mr Hapuku as a senior manager was quite familiar with, and that dismissal was an appropriate outcome.

Determination

[62] For the above reasons, the determination of the Authority is that Mr Hapuku does not have a personal grievance arising out of his dismissal, which the Authority has concluded was a justified dismissal.

Costs

[63] Costs are reserved. If counsel are unable to resolve the issue, application may be made in writing by The Warehouse within 21 days of the date of this determination for an order from the Authority. Mr Hapuku shall have a further 21 days in which to respond to the application.

A Dumbleton
Member of the Employment Relations Authority