

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 218/10
5281412

BETWEEN JENNIFER JACK
 Applicant

AND AUCKLAND CITY COUNCIL
 Respondent

Member of Authority: R A Monaghan

Representatives: L Darroch, counsel for applicant
 B Griffiths, advocate for respondent

Determination: 10 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jennifer Jack says her former employer, Auckland City Council (the council), dismissed her unjustifiably on the ground that she had used a taxi voucher in breach of council policies. She seeks reinstatement.

[2] The council says the dismissal was justified.

Background

[3] The council employed Ms Jack as an assistant open space planner, commencing in December 2007. The parties had a written employment agreement dated 20 February 2008. Clause 10 of the agreement drew Ms Jack's attention to council policies on disciplinary and other matters, and advised that copies of the policies were available from her manager or could be viewed on the council's intranet.

[4] According to the copy which Ms Jack filed, the code of conduct in the council's human resources policy included this statement:

“All employees are required to familiarise themselves with, and abide by Auckland City Council's Code of Conduct policy. Ignorance is not an acceptable excuse if a breach occurs.”

[5] According to the same document, policies applicable to the use of taxi vouchers were:

“... It is the responsibility of all employees to take good care of all Council property in their possession including ... taxi chits ...

Misappropriating or failing to take reasonable care of Council property and supplies may result in disciplinary action being taken, up to and including dismissal.”

[6] As is common in formal codes of conduct, there was also a section on which types of conduct could amount to misconduct and which could amount to serious misconduct. Both types of conduct were said to be conduct which could result in disciplinary action being taken up to and including dismissal. Both listed failures to comply with or breaches of the Council's policies, procedures and practices. ‘Serious misconduct’ also included: “failure to follow standard cash handling or finance policies and procedures, unauthorised use or handling of funds or Auckland City Council resources.”

[7] As to any other policies and procedures, broad reference was made in the material to the existence of financial policies and procedures, and a policy on the use of taxi vouchers. Save for a mention in submissions of clauses in the policy on the use of taxi vouchers, no specific provision was identified or quoted, and no copies of the policies were provided. There was an assertion that policy on the use of taxi vouchers required that vouchers not be used for personal travel, which appeared to be accepted, so I approach the matter on that basis.

[8] On the morning of 14 April 2009 Ms Jack used a council taxi voucher for a trip from Auckland airport to Dominion Rd. She was returning from a personal holiday, so travelled to Dominion Rd where her car had been left, then travelled on to work by bus. She had obtained the voucher some months earlier to travel to her

home from a staff function, but had misplaced it when she needed it. On that occasion she paid the relevant taxi fare from her own funds.

[9] When reconciling used vouchers with a statement received in or about August 2009 Ms Jack's manager, Emma Golightly, noted Ms Jack's use of the voucher. By letter dated 14 August 2009 Ms Golightly asked Ms Jack to attend a disciplinary meeting concerning her use of the voucher, giving details of the voucher. The letter said Ms Jack may have breached council policy in failing to follow financial policy and process, and using council resources (in the form of the voucher) for personal use without authorisation. This action could amount to serious misconduct.

[10] The letter also advised that Ms Jack could bring a support person or representative but Ms Jack did not take that opportunity, either then or when the opportunity was offered again at the start of the meeting.

[11] The meeting went ahead on 19 August 2009. Ms Jack was asked about her use of the voucher. She explained that she had obtained it for use after the staff function but had not used it at the time because she could not find it in her purse, and had paid cash instead.

[12] Ms Jack's explanation for using the voucher in April was that the person who was to have collected her from the airport was delayed. Accordingly she took a taxi, then found she did not have sufficient cash to pay for it. She found the voucher, and decided to use it for several reasons. One was that she did not believe it would be wrong to use it, and that she would pay the Council back. Another was that she was running late to work, and in taking a taxi at all she sought to minimise her lateness. A third was that, in effect, she was using the voucher to reimburse herself for the earlier trip.

[13] Ms Jack also explained that: she was unaware she was breaching the code of conduct or the 'financial policy and process'; she believed there was a fine line between using the voucher 'without authorisation' and for 'personal use'; and there was a fine line as to what was acceptable in different circumstances. She believed she had used the voucher for 'a similar purpose' to the original purpose, although she also

acknowledged she was wrong to have done so. Finally, she named other individuals whose use of vouchers she queried.

[14] The meeting was adjourned. When it resumed later that morning there was a continuation of the discussion about other people's use of vouchers, with the council explaining that use. Ms Jack was then advised she was to be dismissed on the ground of serious misconduct. The reasons given were that:

- a. the Council had an obligation to ratepayers to be accountable;
- b. Ms Jack had acknowledged what she had done was wrong;
- c. Ms Jack could have sought reimbursement for the fare she paid after the staff function, and advised Ms Golightly of in April of her use of the voucher as well as repaying the money, but had not done so; and
- d. the existence of a managerial discretion regarding the use of vouchers to get home safely from work did not justify what amounted in Ms Jack's case to personal use of the voucher.

[15] The letter of dismissal dated 19 August 2009 stated that the reason for the dismissal was breach of the code of conduct in that Ms Jack failed to follow the council's 'financial policy and process' and used council resources (in the form of the taxi voucher) without authorisation and for personal use. The dismissal was effective immediately.

Determination

[16] Both parties identified the relevant issue as being whether a fair and reasonable employer would have dismissed Ms Jack in the above circumstances - more specifically whether giving a warning was the action a fair and reasonable employer would have taken in the present circumstances.

[17] There was no material dispute as to the facts.

[18] The council cited the following authority in support of its submission that Ms Jack's conduct amounted to serious misconduct:

“It is misconduct for an employee, without permission, to take for his own use the property of his employer. It is misconduct because it is [a] breach of an implied term of the contract to use the employer’s property for the employer’s purposes or in accordance with the employer’s instructions.”¹

[19] The council relied on a breach of the code of conduct in that council policy regarding the use of taxi vouchers was breached, and drew particular attention to its accountability to ratepayers for the expenditure of their money. It said this required it to enforce a higher standard than employers in other sectors. It said further that it considered dismissal was the appropriate outcome because Ms Jack’s failure to return the unused voucher, and her decision to use it for a personal trip in the knowledge of the council’s policy, meant it could not trust her to follow policy and respect its accountability for the use of ratepayer money.

[20] Ms Jack relied on a lack of clarity and looseness in the policy regarding taxi vouchers. That created a difficulty in that neither party had provided a copy of the relevant policy and there was no evidence in support of some of the submissions. For the benefit of both parties I do not give weight to new matters of fact raised in submissions.

[21] However, when giving her explanation at the disciplinary meeting Ms Jack relied on examples of other people’s use of the vouchers in support of her view that there was a ‘looseness’ in the application of the policy. During the same meeting the council explained those examples with reference to the facts of each example. It was not open to Ms Jack to rely on observations of other people’s use without being in possession of the facts about that use. Her observations did not mean she could consider herself justified in using the voucher as she did.

[22] Ms Jack also sought to justify the use on the ground that the trip was work-related in that it was minimising her lateness to work. She said further that, in effect, her travelling home from the work function was similar in kind to her travel in April as both had a personal element and both involved a wide interpretation of ‘council related business’. These attempts were unconvincing. The point is that use of the

¹ **Wellington Road Transport and Related Industries IUOW v Fletcher Construction Co Limited** (1983) SelCas 59, 82 (the ‘Hepi’ case).

voucher for her travel from the work function was authorised, while its use for the travel in April was not and she knew it.

[23] I have considered whether, despite this, Ms Jack's dismissal was an overreaction to an extent that rendered the dismissal unjustified.

[24] In that respect I refer again to the 'Hepi' case. In addressing the question of 'what would the fair and reasonable employer have done in these circumstances' the court said its power was limited to ensuring justice between the parties rather than imposing generosity on one of them, and that it could not weigh in a nice balance whether it would have been as severe as the employer was.² Here, as did the court in Hepi, for the reasons indicated I conclude that the council's action was within the boundaries of fairness and reasonableness

[25] Accordingly I find the dismissal was justified.

Costs

[26] Costs are reserved.

[27] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority

² At p 89.