

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 287/10
5133166

BETWEEN RIZWAN AHMED KHAN
 Applicant

AND RESTAURANT BRANDS
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Applicant in Person
 Robyn Commins, Counsel for Respondent

Investigation Meeting: 28 April 2010

Submissions Received: 28 May 2010 from applicant
 17 May and 3 June 2010 from respondent

Determination: 17 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Rizwan Khan, commenced employment on 29 November 2005 as the Store Manager at the Pizza Hut Mt Albert store. His employment was terminated on 23 April 2008. Mr Khan says he was unjustifiably dismissed. The respondent says that the dismissal was justifiable.

[2] Mr Raman Pathipaka, the Pizza Hut Area 2 Manager, said that he became aware in early April that the company had had a complaint from the Mt Albert store that Mr Aaron Haabjoern, the Pizza Hut Loss Prevention Officer, was investigating.

[3] Mr Pathipaka said he knew that Mr Haabjoern was interviewing two shift supervisors who had made complaints about matters at the Mt Albert store. At that stage Mr Haabjoern also ran reports on the systems for that store and identified some

anomalies in the processing of transactions in the system. As a result Mr Haabjoern advised that it was necessary to suspend Mr Khan in order to do an investigation.

[4] On 9 April Mr Pathipaka approached Mr Khan and gave him the letter of suspension. Mr Khan was suspended with pay. Mr Pathipaka did not tell Mr Khan the specifics of the alleged misconduct as he thought they could wait until the meeting proposed for 14 April. He was not given an opportunity to respond to the allegations before the decision was made, although the employment agreement requires this. The suspension letter says the reason for suspension is suspicion of theft. This related to adjustment of payroll records.

[5] Mr Khan made a number of allegations about other staff having been told that he was suspected of theft and that the company would take him to Court. Having heard from the relevant witnesses, I am satisfied that this was not the substance of any conversations regarding Mr Khan.

15 April Meeting

[6] Mr Khan attended together with a lawyer who was there at that stage in the capacity of a witness, not a representative.

[7] Mr Haabjoern asked a number of questions. The issues included leaving the till open for someone else to cash up.

[8] Mr Haabjoern also asked about cashing out drivers which was against company policy. The process they were supposed to follow was that the order was taken at the call centre, the driver delivered the order and took money or there was a credit card to process. The driver returned and confirmed the order had been delivered. The order was then cashed out by the person managing the shift for the day. Drivers should not under any circumstances cash out orders as they were not employees, they were contractors. They were not trained to do that and they also did not and should not have access to the system. However, the transaction in question was done under Mr Khan's login. There were concerns regarding the sharing of tills, IDs, keys or passwords which constituted serious breaches of policy. Mr Khan was alleged to have left the till open after he had finished his shift.

[9] Mr Khan said at the meeting on the 15th he explained that due to there being so many errors on the Pizza Hut computer system, shift managers often required the

store manager's access key to process certain transactions. He also explained at that meeting that he only ever amended payroll hours to ensure that employees were paid correctly for work they had done. They sometimes forgot to clock in or out when shifts begin or end.

[10] An equally serious breach of company policy is changing payroll records.

[11] Mr Khan said that the accusation that he had taken money from other employees was untrue. There was a short period in 2007 when he worked an extra shift every week. That shift could not be covered by either of his shift managers because one of them had a full time job and also studied. The other had a family and was not able to work more hours because it would affect the amount of assistance he received from the government. Due to being paid a salary and not being entitled to more income if he worked extra hours, Mr Khan worked extra shifts under one of the shift manager's names and then the shift manager would in turn give him the money at the end of the week less income tax. The shift managers were happy with that arrangement because they were able to benefit from the annual leave hours accrued. It also meant he did not need to hire another shift manager at the store.

[12] In his view it did not amount to theft from the company or from the employees. He worked for the hours that he received the extra money for. He never took money from employees for work they had done. In any event, he had ceased working extra shifts long before he was suspended.

[13] Mr Pathipaka said he accepted there were times when managers needed to amend clock times for people who forgot to clock in or out. But that was different to changing the payroll records for the reasons given by Mr Khan. He could not justify this action by saying that he worked the shift and then asked the employees to pay him back. He should have asked Mr Pathipaka for a day in lieu or advised him that he was understaffed.

[14] At the end of the first meeting Mr Khan was given the chance to respond. He was then given copies of the meeting minutes and all supporting information.

18 April Meeting

[15] At the second meeting on 18 April Mr Haabjoern asked Mr Khan and his lawyer to sign the minutes of the meeting of the 15th. Mr Khan advised that they believed there were inaccuracies and he was given an opportunity to amend them. However, they both subsequently agreed and signed the minutes as they were given to them without making any changes, although they did note that the minutes were not a full record.

[16] Mr Khan was then given an opportunity to respond to the allegations made on 15 April. His lawyer responded on his behalf and explained that he did not think the breaches, which Mr Khan had frankly and honestly admitted to, were serious and he had reasonable excuses why he had breached the policy. His lawyer advised that he thought the company had breached its policy and Mr Khan would take personal grievance action unless the company gave him an exit package. At that stage there was an adjournment.

[17] Mr Haabjoern then asked Mr Khan questions and summarised the issues raised and Mr Khan signed the minutes of the meeting of the 18th. They then advised Mr Khan that they needed to consider the information and the explanations given at the investigation meeting and would consider whether the matter would be taken further.

[18] In considering his responses, they took into account that he had admitted he had breached company policies; he admitted he knew his actions were against company policy. They decided it had to go to a disciplinary meeting.

22 April Meeting

[19] At the disciplinary meeting held on 22 April Mr Haabjoern put the issue of the breaches in company policy to Mr Khan again and asked for his feedback. Mr Khan said he had already given his feedback and that he had reasons to justify why he had breached company policy. They adjourned to consider matters.

[20] After the adjournment, Mr Pathipaka advised Mr Khan that they had considered his behaviour and that his actions were considered to be serious misconduct. The breaches were not minor; adjusting payroll records for his own gain and sharing tills were clearly serious breaches of policy.

[21] Mr Pathipaka read out the parts of the policy that Mr Khan had admitted to breaching and said they were going to terminate his employment with immediate effect. The respondent said that it had no option but to terminate Mr Khan's employment because of his admission that he had breached the RBL fraud and theft prevention policy.

[22] The policy requires that payroll hours must be recorded accurately and amendment of records must be kept to a minimum. However, Mr Khan manipulated the hours of work of the supervisors, increasing their hours of work on days that they were not rostered and working himself, and then he asked them to pay him the money that had been paid to them. He admitted he did so. His explanation was that it was okay because he did the work and at a lesser rate than he was usually paid, therefore saving the company money.

[23] He breached the policy in that he allowed other people, including the pizza delivery driver, to cash out orders on his register on his return from delivery because he was too busy to do it himself. This is despite the fact that the policy says that ID, keys, swipe cards and passwords are unique to authorised individuals and should never be shared. Physical keys and cards should be kept secure at all times and passwords should be changed at regular intervals.

[24] He also breached the policy by giving other employees system access, shared his password and swipe cards and shared his register. He said he did it because everybody did this.

[25] He breached the policy that all customer orders must be rung through an approved register and all customers should be offered a printed receipt. Mr Khan admitted he did not ring on sales, but he did it to correct system errors, for example he did not process a sales order in order to balance out an imbalance from the day before.

[26] In his submissions Mr Khan continued to maintain that the breaches regarding access keys and swipe cards were necessary to compensate for a computer system that was constantly malfunctioning. If that was the case, Mr Kahn's responsibility was to alert his employer to the problems and leave it to the employer to rectify the situation.

[27] Mr Khan maintained that he should have been given a warning rather than being terminated.

Decision

[28] The test of justification in s 103A is 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 took place.

[29] Mr Khan accepted that he had done the things that he had been accused of. The employer was entitled not to accept his explanations that he had done them because the system was at fault. Mr Khan should have notified his employer if there were system problems. Most serious, and clearly constituting serious misconduct, was logging in under the names of other staff and then asking those people to pay him the money earned under their names. This was done to obtain a pecuniary advantage for himself that he would not have otherwise been able to gain as he was paid a salary.

[30] I find that the employer followed a fair process and that there were substantive grounds for the termination. The dismissal was justified.

[31] I am, however, able to find that the personal grievance is of a type other than that alleged: s122. I find that the suspension was an unjustified action because the respondent breached the employment agreement in not giving Mr Khan the opportunity to comment on that or be consulted about it before the suspension was effected.

[32] I accept that Mr Khan was distressed by the suspension. The respondent is to pay him \$1,000 pursuant to s 123 (1) (c) (1). Mr Khan did not contribute to this situation and there will be no reduction in remedies.

Costs

[33] If the parties are unable to agree the matter of costs, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority