

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 541
3063883

BETWEEN WEI XIA LI
 Applicant

AND KIWI PLAZA (2014) LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Teresa Brown, advocate for the applicant
 Alex Wallace, counsel for the respondent

Investigation Meeting: 30 October and 2 December 2019

Submissions and further At the investigation meeting, 3 December 2019 and 4
information received: March 2020 from the applicant
 At the investigation meeting and 10 March 2020 from the
 respondent

Date of Determination: 24 December 2020

DETERMINATION OF THE AUTHORITY

- A. Wei Xia Li was unjustifiably dismissed by Kiwi Plaza (2014) Limited.**
- B. Ms Li contributed to the situation giving rise to her dismissal and a deduction of 40% has been made from what would otherwise have been the remedies. Kiwi Plaza (2014) Limited is ordered to pay Ms Li within 28 days of the date of this determination:**
- (a) \$5,700.00 gross as lost wages; and**
(b) \$9,000.00 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.
- C. Costs are reserved and a timetable set.**

Employment Relationship Problem

[1] Wei Xia Li (also known as Mary Li) worked as a sales assistant for Kiwi Plaza (2014) Limited (Kiwi Plaza or the company). Kiwi Plaza operates several Auckland stores

selling New Zealand made specialty goods including health and beauty products, primarily to the Asian market.

[2] Ms Li was initially employed by Kiwi Plaza's predecessor for a year in 2002 when the business was owned and operated by Paul Liu. In 2014 the business was sold to investors who incorporated the respondent company. Mr Liu and his son have authority from the investors to manage the business.

[3] In 2014 Ms Li returned to the business. She had not been subject to any disciplinary action until she was dismissed on 12 November 2017 for theft of a tube of hand cream.

[4] Ms Li strongly denies any theft and claims that she was unjustifiably dismissed. Kiwi Plaza maintains that it acted as a fair and reasonable employer could have done and that if it did not, Ms Li is not entitled to any remedies.

[5] An investigation meeting was held on 30 October and 2 December 2019. I heard evidence from Ms Li, Mr Liu, and four sales clerks I refer to as Mei, A-Feng, A-Ping and DoDo. Ms Li also filed, without objection, letters from a former sales clerk and from the wife of a former Kiwi Plaza manager. I was assisted at the investigation meeting by an interpreter of the Mandarin language.

[6] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act 2000 (the Act) was applicable.

[7] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

What are the issues?

[8] The issues for determination are:

- (a) Was Ms Li unjustifiably dismissed by Kiwi Plaza?
- (b) If so, what remedies (if any) should she receive?

What happened on 10 November 2017?

[9] Ms Li was working in the Kiwi Plaza Auckland city store. She took a tube of hand cream from under the counter in the centre of the shop. She went through to the kitchen or tea area at the back of the shop. She put the tube in her lunch box which was sitting on a bench.

[10] A-Feng saw Ms Li take a yellow tube into the kitchen area and return with nothing in her hands. A-Feng was concerned that Ms Li may have taken a product so she went into the kitchen and saw the tube inside Ms Li's lunchbox.

[11] A-Ping was the duty manager that day. A-Feng told A-Ping that she had seen Ms Li take the product out the back. Together they went to the kitchen. The lid of Ms Li's lunchbox was open and they saw inside a yellow tube of Alpine Silk Manuka Honey hand cream.

[12] Although both were in the shop, A-Ping texted Ms Li asking what the item in her lunchbox was and saying that if the boss saw it, Ms Li would not be able to explain herself. She told Ms Li to put it back where it belonged. Ms Li texted in reply that it was given by the previous store manager, naming him. A-Ping replied that people should act with integrity and not to let other people have bad things to say about them. A-Ping continued that:

Regardless of what company property, all cannot be taken as personal possession.

[13] Ms Li replied "Yes. I like".

[14] A few minutes later A-Feng and A-Ping, who were at the counter, saw Ms Li go into the kitchen area and come out holding the tube. Ms Li came to the counter, said that it was an expired product and threw the tube into the rubbish bin.

What occurred the next day?

[15] On 11 November 2017 A-Feng was at another Kiwi Plaza branch. She was working with a colleague who is Mei's husband and told him about what she had seen. He told his wife. In addition, A-Ping messaged Mr Liu's wife about what had happened. The two sometimes worked together.

What happened on the day of the dismissal?

[16] On 12 November 2017 Mr Liu was informed by Mei when she arrived at work that A-Feng had seen Ms Li take a hand cream, put it in her lunch box and then later throw it in the bin.

[17] Ms Li arrived at the shop around 10.30am to start work. Before she had settled in, Mr Liu said that he had been told by another duty manager that A-Feng had seen Ms Li take company property last Friday. Ms Li's sense was that a statement was being put to her that she had stolen the hand cream, rather than that she was being asked a question about it. She was shocked.

[18] There is a dispute about whether the conversation started in the public part of the shop before moving into the kitchen or whether it was entirely in the kitchen. In any event staff in both areas were able to report at least parts of the conversation. Dodo was in the kitchen area and realising that this would be a sensitive conversation, walked out into the shop.

[19] Ms Li told Mr Liu that she had thrown the tube out. At some point she also told him the cream was expired. Mr Liu asked where she threw it away. Ms Li checked the cashier's bin but the rubbish bag had been changed. She thought the bag would now be in the wheelie rubbish bins that were kept in the bathroom.

[20] Ms Li started to get rubbish bags out of a wheelie bin. Ms Li says that she found a very dirty tube of hand cream which was similar to the one that she had thrown away. It had a lot of rubbish stuck to it.

[21] Ms Li gave the tube to Mr Liu, telling him this was the cream that she had thrown away. Mr Liu went to wash the tube and said it had not expired yet. Mr Liu lifted the lid. He says the protective foil was still partially attached to the nozzle of the tube. He believed it was a new tube, as he thought the foil was removed before a product is put out as a tester. However, he did not show this to Ms Li nor tell her about it.

[22] Mr Liu says for this conversation they were sitting on the couches next to the kitchen area. However, in his statement he refers to the fact that Ms Li "stood there" when

he “demanded” an explanation.¹ I am not confident that they were sitting down. Ms Li did not say anything but according to Mr Liu “she looked stunned” and lowered her head. She did not answer.

[23] Ms Li says that Mr Liu did not give her time for an explanation. She says she was crying badly at this time although others did not notice this. She acknowledges that she did not mention the former store manager’s name or that she had been given the tube. She did tell Mr Liu at one point that she did not steal anything and that she thought the cream had expired.

[24] Mr Liu told Ms Li that she did steal the product and she was dismissed. She left shortly after this.

[25] Ms Li described the event as taking around 15 to 20 minutes. Mr Liu estimates the discussion between himself and Ms Li to be around 20 to 30 minutes. I find that unlikely on the basis of the content he describes, unless most of the time was taken looking through the rubbish and washing the tube. Even on his version of events, he and Ms Li said around eight things in total to each other.

What is Ms Li’s explanation about the hand cream?

[26] Ms Li strongly denies that she stole the hand cream and seeks to have her name cleared. She has provided an explanation to the Authority. The explanation was not given to Mr Liu on 12 November 2017. However, it was given at least in part to the duty manager A-Ping. Mr Liu was not aware of that at the time he made the decision to dismiss.

[27] Ms Li’s explanation for having the hand cream is that she was given the partially used tube in early 2016 by the store manager and it was an old tester.

[28] She put it with her personal belongings under the counter. She describes each staff member having a clear box. She describes the cream as being visible to other staff and being there for over a year. Ms Li says she forgot the cream was there. Other staff did not accept that personal items were kept under the counter. They did agree that new testers were kept there.

¹ “Demanded” is the word used in Mr Liu’s oral evidence.

[29] I adopt some caution with the evidence of the other sales clerks. Mr Liu's son, a Kiwi Plaza manager, assisted those staff with the development of their evidence, translating what they were saying into their witness statements in English. There was a certain character to their evidence which seemed to reflect a desire to provide evidence which would assist Kiwi Plaza.

[30] Ms Li reports that the store manager gave testers to anyone who asked for them. She says she received a number.

[31] Ms Li says that the store had over 100 testers and that suppliers would provide testers and that the manager had the discretion to dispose of a tester, to give it to anyone or throw it away. I found that possible, particularly given Mr Li's evidence that testers were regularly supplied free by the suppliers, who sent them through without them being ordered.

[32] The other sales clerks did not report the same experience. They thought managers generally threw out old testers, one saying that this was because they were not clean. The sales clerks' evidence of not receiving any products seemingly contradicted Mr Liu's evidence. He spoke of trying to get staff to take expired cans of milk powder but no one wanting them. He also referred to staff occasionally being given products to try, although this was on an all-staff basis rather than the individual situation described by Ms Li.

[33] The manager identified by Ms Li worked at Kiwi Plaza for 18 years. The letter from his wife refers to events in his working life which she identifies as unfair. There is no reference to the hand cream matter. He appears to have left New Zealand although contact was able to be made with his wife in November 2018. Neither party filed evidence from him related to the hand cream.

[34] Ms Li says that on 10 November 2017 she was to go on annual leave and was cleaning out her box. She found the cream and thought it was expired. At some point she smelled it and decided to throw it out. Ms Li is not sure whether she checked the expiry date.

What documentary and other evidence is there?

[35] There was no letter inviting Ms Li to a disciplinary meeting. There was no letter of dismissal. Mr Liu took no contemporaneous notes. Neither did Ms Li. There were no written statements obtained by Kiwi Plaza from witnesses as part of its investigation. The first written account was sought six months after the event.

[36] Mr Liu brought a tube to the investigation meeting which he says was the one Ms Li gave him from the wheelie bin. It has an expiry date on the crimp of 03/20 (taken as April 2020). The foil was stuck into the top of the lid so was no longer attached to the tube itself.

[37] Both parties also helpfully offered drawings of the shop.

What is the test?

[38] Under s 103A of the Act I must consider whether a fair and reasonable employer could have acted as Kiwi Plaza did.

[39] In cases such as this, the Authority's role is not to make a finding about whether someone has committed the alleged criminal offence. The focus in employment cases is whether the employer, having conducted a sufficiently thorough, fair and reasonable investigation, genuinely believed that the employee had stolen or taken its property without authorisation. My consideration of the evidence is based on the 'balance of probabilities' standard of proof, rather than the criminal 'beyond reasonable doubt' standard.²

[40] I record that Ms Li very strongly denies that she stole the hand cream.

[41] Kiwi Plaza summarily dismissed Ms Li. I look at whether the conduct found by the employer to have occurred was such a serious nature as to deeply impair the basic confidence which must exist between employer and employee.³

[42] Theft is a serious matter, particularly in the retail setting where staff are trusted with goods and with cash. Mr Liu and his son were unable to be in all the shops at all times. Kiwi Plaza had identified to staff that it regarded honour and integrity as important and that theft was unacceptable. This was done via staff meetings and in the new employment

² *Honda New Zealand Ltd v New Zealand Boilermakers' etc Union* [1991] 1 NZLR 392 (CA).

³ *BP Oil NZ Ltd v Northern Distribution Workers Union* [1989] NZLR 580 (CA).

agreements. The new agreements in 2016 included in the description of serious misconduct:

Theft of the company's property, cash or merchandise regardless of value.

[43] In his witness statement Mr Liu acknowledges the prospect of this situation being described as 'misuse' rather than theft. It is clear that the hand cream did not leave the store and that on 10 November Ms Li did not ultimately keep the hand cream for herself. However, if she had intended to take the cream but was thwarted by being seen by other staff that could potentially justify a dismissal. In addition, throwing away the cream of itself was potentially problematic.

[44] By way of comparison, an examination of s 219 of the Crimes Act 1962 reveals that from a criminal standpoint the concept of theft is defined more widely than just taking property off the premises. Under that section theft includes dishonestly and without claim of right taking with intent to deprive the owner permanently of that property⁴. Theft is defined as being committed by the taking of the property when the offender moves the property or causes it to be moved.⁵

[45] I have to look at two questions:

- (a) Did Kiwi Plaza follow a fair and reasonable process in coming to the conclusion that it should dismiss Ms Li?
- (b) If so, was Kiwi Plaza's decision to dismiss substantively justified, in that it reached its conclusions about what Ms Li did and decided to dismiss her in a way that a fair and reasonable employer could have done? If there is more than one action which the employer could reasonably have taken and dismissal is one of them, then the dismissal will be justified.

[46] One of the difficulties in this case with the significant absence of documentation is that it is not always clear what information was obtained during the investigation and whether it was put to Ms Li.

Did Kiwi Plaza conduct a fair and reasonable investigation?

⁴ Crimes Act 1962, section 219(1)(a) and (2).

⁵ Crimes Act, s 219(4).

[47] Can Kiwi Plaza say that, having conducted a fair and reasonable investigation, it got to the point where it genuinely believed that Ms Li had stolen or taken its property without permission?

[48] I accept that Mr Liu genuinely thought that Ms Li had intended to steal the tube but the question remains whether he had undertaken a full and proper investigation and thus had a proper basis on which to reach that conclusion.

[49] Mr Liu heard second or third-hand about what had happened. He did not speak to either A-Feng or A-Ping to find out directly from them what they had seen or heard on 10 November 2017. He himself had limited knowledge of the running of the shop, largely working behind the scenes doing accounting. He did not know the state of the supplies of this product or when, for example, the oldest or the newest one in stock expired or was ordered.

[50] All I can be satisfied that Mr Liu knew about 10 November was that A-Feng and A-Ping had seen Ms Li “take” a tube of hand cream and had thrown it away saying it was expired. He did not know where the tube had been taken from or taken to, although the implication of theft or intended theft was there. He did not know the state of the tube when thrown away. He did not know the state of the counter rubbish bin.

[51] Mr Liu suggested in his evidence that Ms Li had deliberately put some kind of cream and/or rubbish on the tube in an attempt to conceal it. In the absence of having some very sticky substance, paint or harsh chemical to hand, it seems unlikely that an attempt at concealment on the outside of the tube would have seemed feasible to Ms Li. In addition, Mr Liu accepts that he had no information about the state of the tube on 10 November. He says that he thought Ms Li was being dishonest about the expiry date, rather than having made a mistake about it because of the state of the tube. Mr Liu believed she had tried to cover up the expiry date. He says this was part of what he mixed to make decision.

[52] He did not put that to Ms Li.

[53] It could be suggested that in cases of theft the employer is concerned to progress matters promptly in order to ensure that any employees who may be involved in such behaviour are removed from the work environment. However, the employment agreement

permitted Kiwi Plaza to suspend Ms Li whilst an allegation of serious misconduct was being investigated.⁶

[54] When asked about the possibility of suspension, Mr Liu said that the issue had been discovered by Ms Li's colleagues (on 10 November) and her colleagues and the duty managers were waiting for his decision on the issue. He said "I have to make a decision". I do not agree. He could have initiated a suspension process in order to provide time to properly investigate.

[55] In assessing the employer's actions I have considered the size of the business. While Kiwi Plaza is not a large employer, the company has four shops as well as a warehouse with around 15 employees. It was capable of carrying out a more thorough investigation.

Were Kiwi Plaza's concerns sufficiently raised with Ms Li?

[56] Ms Li had no advance notice of what Kiwi Plaza's concerns were. She came into the shop with no awareness of possible disciplinary action. As a result she had no warning of a possible dismissal and no opportunity to seek support or representation.

[57] Kiwi Plaza did raise its concern with Ms Li however, not in a very thorough way. For example, Mr Liu considered that the fact the foil was still partially attached to the nozzle may have indicated it was a new tube, not a used tester. This was not put to Ms Li. Mr Liu's belief that this was a new product and that a tester from the shelf would be in what he describes as a "totally separate condition" was not put to her.

[58] One of the matters which Mr Liu identifies in his witness statement matters he knew at the time (of deciding to dismiss) was that Ms Li had been "dishonest with me and her colleagues about whether the product was expired, without any explanation". He appears not to have considered the possibility of other explanations. He not did put to Ms Li that she had been dishonest by saying the cream was expired and he not consider whether an innocent explanation (such as relying on the previous manager's word) might exist.

⁶ Clause 13.1 of the employment agreement.

[59] Mr Liu did not ask why she had thrown the hand cream in the bin nor if she had made the tube messy to cover the expiry date not why she thought it had expired.

Did Ms Li have an opportunity to respond?

[60] Ms Li was given a limited opportunity to speak but this was in the undesirable context of coming into work and being confronted unexpectedly by a very serious allegation.

Did Kiwi Plaza consider Ms Li's explanation?

[61] Ms Li's explanation given to Mr Liu was effectively limited to thinking the cream had expired.

[62] I understand Kiwi Plaza's submission that it is not for the employer to speculate on possible explanations. However, it is for the employer to provide a proper process which gives the employee a reasonable opportunity to think about what is being alleged and to provide a considered response. That did not happen here.

Was this a fair and reasonable process?

[63] This was an unfairly swift process. Ms Li was informed of the allegation for the first time and dismissed within at most 30 minutes.

[64] The investigation was minimal. Mr Liu knew little about the circumstances on 10 November 2017. Had there been a more thorough interview with witnesses, Mr Liu would most likely already been aware of the explanation offered by Ms Li to A-Ping that the tube was given by the previous manager. Mr Liu could then have followed up with the former manager to check on Ms Li's explanation. Conclusions were jumped to without being raised with Ms Li.

[65] Theft is a serious matter and being dismissed for it can have significant effects on a person's life and future employment. It behoves the employer to investigate sufficiently thoroughly and that was not done here.

[66] The process was very informal with nothing at all put in writing either before or afterwards. Ms Li was not given advance warning that her employer wanted to have a disciplinary discussion with her nor told what the allegation was. She was not offered the

opportunity to have a representative or support person present. Mr Liu's mention, after she had been told of her dismissal, of her being able to find a lawyer if she did not agree, was too late.

[67] I accept Ms Li was not provided with an ideal situation in which to provide a justification or offer an explanation. She says she could not think straight and described her mind as going cloudy.

[68] The discussion took place in the store. At least some of it was in the back kitchen area but there was no door between the store and the kitchen. Although there were no customers present, staff were. The shop was open and there was the prospect of a customer coming in at any time.

[69] When asked why his office in a separate and private room at the store was not used, Mr Liu's explanation was that it only contained his desk and chair. The evidence was that the office was free. Unsatisfactorily other staff were present during parts of the process and could hear the discussion.

[70] I have considered whether these can be regarded as minor matters which did not result in Ms Li being treated unfairly.⁷ While there were some flaws which could come within that description, I cannot conclude that they all do. Ms Li had an explanation about how she had got the cream. She had given that explanation to A-Ping two days before by text. And yet she did not mention it to Mr Liu. This was a critical matter. I can only conclude that she felt overwhelmed by the suddenness and swiftness of the process.

[71] There are a substantial number of shortcomings, some serious, and I cannot conclude that they did not result in any unfairness to Ms Li.

Was the dismissal justified?

[72] I have concluded that the disciplinary process was not a fair and proper one which could have lead Kiwi Plaza to be in a position to rely on a belief that Ms Li had stolen the hand cream. From that comes the position that the decision to dismiss her was not one

⁷ S 103A(5) of the Act.

which a fair and reasonable employer could make at that point and the dismissal was not substantively justified.

[73] Ms Li was unjustifiably dismissed by Kiwi Plaza.

What remedies should Ms Li receive?

Lost wages

[74] Ms Li claims lost wages for the four and a half months she was without work. Her gross monthly pay at the time of her dismissal was \$3,166.67.

[75] Ms Li did not try to find other work in the same industry because she felt word would spread in the industry about her stealing a product. She applied for jobs in other industries. She says that she had many applications but these were not successful as she did not have experience in those industries. She was able to obtain other work starting from 1 April 2018.

[76] Under s 128(2) of the Act I must award the lesser of the lost remuneration and three months' remuneration, subject to the consideration of contribution. I have a discretion under s 128(3) to order a greater sum, reflecting the lack of other earnings for a period longer than three months. However, in this situation I am not minded to exercise my discretion.

[77] Before consideration of any contribution by Ms Li I conclude that three months' pay which is \$9,500, would be an appropriate lost wages remedy.

Compensation

[78] Ms Li seeks compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act. She describes being deeply hurt and humiliated by her dismissal with a sense of injustice. She feels aggrieved and mistreated by Kiwi Plaza. She says she found the situation more embarrassing because her colleagues were within hearing distance. The accusation that she had stolen something was very upsetting to her. I do however take into account that Ms Li chose to tell some staff about her dismissal. For example, she texted A-Ping on 12 November 2017.

[79] Ms Li describes her behaviour to her family as deteriorating. For a week she did not eat. Her son ended up taking her to the doctor. Ms Li was unable to sleep.

[80] Ms Li provided a brief doctor's letter referring to her suffering from insomnia since she was accused of stealing and having been on medication for that. She has also been seeing a counsellor who her doctor referred her to. At the time of the investigation meeting she was still keeping in contact with her counsellor over the phone.

[81] Before considering Ms Li's contribution I would consider \$15,000 a suitable compensation figure.

Contribution

[82] I have considered whether Ms Li can be said to have contributed to the situation giving rise to her dismissal. There are several possible ways in which this could have occurred.

[83] However, I will deal first with information which was obtained by Kiwi Plaza after the dismissal, in preparation for this case. This was not considered in the discussion about whether Ms Li was unjustifiably dismissed as it was not information known to Kiwi Plaza at the time of her dismissal.

[84] The company sought information from the supplier of the hand cream which appeared to have thorough records. The supplier indicated that Kiwi Plaza had not been sent an expired unit of this particular hand cream in November 2017. The range was newly launched in 2014 and had a shelf life of four years therefore no version of the product had an expiry date prior to 2018. A large number of tubes were ordered by Kiwi Plaza in 2014. The most recent order of the product was a single unit in June 2016 as a tester. It would thus have been marked with a tester label. That tube expired in 2020. In the absence of any other explanation, it seems that was the tube which Ms Li threw away was that was the only one ordered by the shop which would have expired in 2020.

[85] This evidence establishes that Kiwi Plaza did not have this type of hand cream with an expiry date in 2016 or 2017. Ms Li was therefore wrong about the tube having expired. It is possible that she misread the tube although usually expiry dates on the crimp of tubes are relatively easy to read. She may have been relying on what she says the previous store

manager told her about expiry, which would have fitted with him giving her the hand cream.

[86] I cannot rule out that the manager gave expired products to Ms Li. Mr Liu offered staff a large amount of expired product on at least one occasion. He also offered staff new products so that they would try them out. Mr Liu was a step up the management ladder from the previous manager. However, Mr Liu says that he gives his full authorisation to (whoever is) the manager. The managers handles the testers, replaces the new ones and “keeps the tester”. There is no written policy that used testers may not be given to staff.

[87] Ms Li did not offer to Mr Liu the explanation which she offered to A-Ping the day before, namely that the previous manager had given her the tube. This could be seen to have contributed. However, I have accepted that she felt overwhelmed by the process.

[88] In a retail context, Ms Li’s action of putting the tube in her lunch bag without first making it clear to the duty manager what she was doing, was most unwise. Clearly other staff and then Mr Liu assumed she was stealing. Kiwi Plaza had made it clear to staff that theft was unacceptable.

[89] I have considered whether Ms Li’s actions were so egregious that she should be disentitled from any compensation. I am not satisfied that they are. However, her actions were blameworthy and culpable and did contribute substantially to the situation and I assess her contribution at 40%.

[90] After making that deduction, I order Kiwi Plaza to pay Ms Li the following sums as compensation for her grievance within 28 days of the date of this determination:

- (a) \$5,700.00 gross as lost wages; and
- (b) \$9,000.00 as compensation under s 123(1)(c)(i) of the Act.

Costs

[91] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Li shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Kiwi Plaza shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a

breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[92] The parties could expect the Authority to use its notional daily tariff as a starting point and consider adjustments upwards or downwards from there.

Nicola Craig
Member of the Employment Relations Authority