

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Yvonne Logan (Applicant)
AND Hagal Company Limited (Respondent)
REPRESENTATIVES Joanne Watson, for Applicant
Penny Swarbrick, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 7 April 2005
28 April 2005
SUBMISSIONS RECEIVED 11 May 2005 from Applicant
16 May 2005 from Respondent
DATE OF DETERMINATION 13 July 2005

DETERMINATION OF THE AUTHORITY

Preliminary matter

[1] At the outset of the investigation meeting it was agreed that a wage recovery claim by Ms Logan would be put to one side until further information had been made available by the respondent which would allow the applicant to properly calculate and make out her claim.

Employment relationship problem

[2] Hagal Company Limited (“HCL”) owns and operates three Health 2000 stores in Hamilton. Ms Yvonne Logan was employed by HCL in January 2002 as a retail assistant and was subject to a written individual employment agreement.

[3] Ms Logan was dismissed summarily on 6 May 2004 for removal of product from the respondent’s premises without authorisation and without satisfactory explanation. Ms Logan says the dismissal was unjustified and that she was interrogated and not given a reasonable opportunity to respond to the allegations. Ms Logan also claims the use of video surveillance without her knowledge was unlawful and unfair.

[4] In response, Ms Monica van de Weerd, Managing Director of HCL says a full and fair investigation was undertaken after video surveillance showed some apparent anomalies with the way in which Ms Logan dealt with some stock. HCL says the dismissal was justified in all respects.

The issues for determination are:

- Was the use of video surveillance lawful and fair?
- Did the employer carry out a full and fair investigation into the misconduct?
- Was the decision to dismiss one that was open to a fair and reasonable employer?

Was the use of video surveillance lawful and fair?

[5] In recent years it has become more common for employers to utilise covert video surveillance to detect crime occurring in the workplace (see *Kirk (t/a Country Rest Restaurant) v Thomas*, unreported, Palmer J, 22 December 1994 CEC 50/94). The use of such surveillance is an accepted practice provided the employer does not breach the privacy rights of individuals.

[6] In October 2003 and November 2003 Ms van de Weerd was required to inject significant funds into the Ward Street store as a result of financial discrepancies.

[7] In January 2004 Ms van de Weerd was starting to question staff about discrepancies found between stock levels and takings at the Ward Street outlet, where Ms Logan was employed. Ms van de Weerd told me she was concerned that the computer indicated that adequate stocks were being maintained, while the shelves seemed to be relatively empty.

[8] Ms van de Weerd arranged for staff to undertake a stock take during January/February 2004. Ms Logan assisted with the stock take in the Ward Street store.

[9] In March 2004, without notifying staff, Ms van de Weerd arranged for video surveillance cameras to be installed into the Ward Street store. Ms van de Weerd told me she did this to try and find out whether it was customers taking stock and not paying or something else.

[10] Ms Michelle Dillistone, another employee working at the Ward Street shop until June 2004 told me that each Monday, a computer stock printout would be provided to the branch and staff would reconcile the stock recorded on the printout against the stock present on the shelves. She confirmed that the stock on the shelves never tallied with what was recorded in the computer.

[11] I am satisfied on the evidence that the video surveillance was set up in response to Ms van de Weerd's concerns about stock and financial discrepancies which could not be explained. Ms van de Weerd had genuine concerns that stock was somehow being taken out of the shop without being accounted for in the proper manner.

[12] The video cameras were set up to view two distinct areas. One camera viewed the sales counter and another viewed a large portion of the retail shop, while a third camera was concentrated in the back office. I am satisfied that the position of the cameras did not infringe on the privacy rights of any employees or customers of Health 2000.

I find that the use of the covert video surveillance was neither unlawful nor unfair.

Did the employer carry out a full and fair investigation into the misconduct?

[13] Fairness and reasonableness requires that an employee is given an understandable account of the allegations of misconduct with sufficient particulars and enough time to provide the employee with a real as opposed to a nominal opportunity to refute the allegations or mitigate the conduct (*NZ (with exceptions) Food Processing etc IUOW v Unilever NZ* [1990] 1 NZILR 35).

[14] The Court of Appeal in *Man O'War Farm Limited v Bree, CA*, 169/02, 31 July 2003, para 30 stated:

In order to justify a dismissal an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered (with an open mind) that explanation before making the decision to dismiss (Mazengarb's Employment Law (6ed, 2003) para 103.57)."

[15] During March and April 2004 Ms van de Weerd viewed the video from each day. When viewing the tapes she became concerned at the actions in respect of her employees. Ms van de Weerd became concerned that the videos showed staff were not following procedures when dealing with stock. On 25 April 2004 Ms van de Weerd wrote to all staff setting out her expectations and stated that procedures were to be followed at all times.

[16] In addition to her concerns over lack of procedures, Ms van de Weerd was alarmed about the specific actions of Ms Logan and another employee, Ms Kowhai Poroa.

[17] Ms van de Weerd was concerned that Ms Logan had either removed product or arranged for product to be removed from the store without following correct procedures. In particular there were four events which caught Ms van de Weerd's attention:

- Boxed product taken out of the shop on 16 March 04
- Post Haste courier incident on 2 April 2004
- Tui B Balm going missing from the back office on 2 April 2004
- Supercal being removed from the shop by Ms Logan on 24 April 2004

[18] During April 2004 Ms Logan's father was ill. Ms Logan received news that her father's condition had worsened on 27 April 2004. She was given permission to leave work so that she could take her mother up to the hospital to visit her father. As Ms Logan left work Ms van de Weerd handed Ms Logan an envelop which contained a letter inviting Ms Logan to a disciplinary meeting on 30 April 2004. The letter was handed over with no discussion or advice to Ms Logan about what was contained in the letter.

[19] The letter advised Ms Logan that an investigation had been undertaken by the company into "*..apparent unauthorised handling or mishandling of cash and/or product belonging to the company.*" Ms Logan was encouraged to bring a representative with her to the meeting and was advised the matters may constitute gross misconduct, the penalty for which was dismissal.

[20] The letter contained no details of the specific concerns Ms van de Weerd had picked up on the video tapes. In answer to questions at the investigation meeting Ms van de Weerd said the meeting was to be a general meeting to get answers to the questions she had and that she thought it better not to tell Ms Logan of the specific details.

[21] Unfortunately Ms Logan's father passed away. Ms Logan's partner, Mr Colin Windleborn contacted Ms van de Weerd and the meeting scheduled for 30 April 2004 was postponed. The funeral for Ms Logan's father was held on 4 May 2004.

[22] One of Ms Logan's complaints about the disciplinary process is that the meeting was held the day after her father's funeral. Ms van de Weerd told me she advised Mr Windleborn that she would set a new date for the meeting once Ms Logan was back at work, however Mr Windleborn was clear that he would like it to go ahead on 5 May 2004.

[23] I am satisfied on the balance of probabilities that Ms van de Weerd did not set the meeting up for 5 May 2004 in isolation. I am satisfied that the meeting date was readily agreed to by Ms

Logan's representative, Mr Windleborn. Mr Windleborn was Ms Logan's partner and was in a good position to assess whether Ms Logan was fit to attend a disciplinary meeting than Ms van de Weerd.

[24] After viewing the tapes Ms van de Weerd arranged for those parts of the tapes relating to Ms Logan, to be dubbed onto another tape to be used for the disciplinary meeting. Another of Ms Logan's complaints about the disciplinary process is that during the meeting Mr Nix kept changing tapes in order to show full information for Ms Logan's response.

[25] I am satisfied that while the tapes were played to Ms Logan during the disciplinary meeting a full explanation as to what was being viewed on the screen was provided to her. When further information was required, the dubbed tape was replaced with the full version tape for the respective day and the relative time found and played. Ms Logan was then provided with an opportunity to provide her explanations. This finding is consistent with Ms Logan's own evidence that there were times when she asked to see a video clip a couple of times and that this request was always granted. I accept that this would have made the process of viewing the tapes for the first time disjointed, but there was no unfairness in that.

[26] The disciplinary meeting was originally planned to be held in a motel room. With the change of dates, the meeting was held in the upstairs room of the store premises. Ms Logan complained that the room was too small and that the interview was handled like an interrogation.

[27] I am satisfied that the room was probably smaller than would have been preferable. However, I'm not convinced the room was so unsatisfactory that any disadvantage arose. Ms Logan was aware before the meeting, where the venue was and was familiar with it, including its size. At no stage during the disciplinary meeting did she or any of her three support people raise the matter about the room size with Ms van de Weerd. In relation to Ms Logan's complaint that the meeting was conducted as an interrogation, I have had the benefit of reviewing the notes taken by both parties during the disciplinary meeting and I am satisfied that the meeting itself, was conducted in a fair manner.

[28] Each incident was discussed separately:

- *Boxed product taken out of the shop on 16 March 04*

On 16 March 2004 Ms Logan left the shop with a box of product at or about 1601 hours. She then returned with the box at 1602 hours. At 1727 hours Ms Logan could be seen

leaving the shop with the same box. After checking the sales tapes for that day Ms van de Weerd could not find any sales which could equate to the possible contents of the box with which Ms Logan left.

Ms Logan initially refused to answer any questions about this matter and later advised that she could not recall it. Ms van de Weerd's further enquiries about this failed to produce any additional information.

- *Post Haste Box*

On 2 April 2004 a Post Haste Courier entered the shop and delivered a carton. Ms Logan is seen picking up another carton and filling it with stock from the shelves. The carton is sealed and Ms Logan writes on the carton. The Post Haste courier returned to the shop and picked up the newly filled carton. Post Haste is not the courier company normally used by Health 2000 stores. No sale was recorded on the sales tape, nor any records entered into the computer to account for the amount of product leaving the shop.

Ms Logan was unable to provide any explanation as to where this box was going or what its contents were. Both Mr Windleborn and Ms van de Weerd, undertook to carry out further investigations with the Courier Company. Mr Windleborn was to report any findings to Ms van de Weerd. Ms van de Weerd, made her own further enquiries with the courier company but these failed to provide any insight to where the package had been delivered.

- *Tui B Balm*

On 2 April 2004 a bottle of Tui B Balm went missing from the back room – Ms Logan is seen leaving with a plastic bag which contains an item about the same size as the Tui B Balm container.

The video tape showed a container of Tui B Balm sitting on a shelf in the office. After viewing the tape Ms van de Weerd returned to the store to check if the container of Tui B Balm was still in the office where. It was no longer there.

Ms Logan denied taking the Tui B Balm out of the shop, but could provide no explanation as to where the Tui B Balm had gone. Ms Logan told Ms van de Weerd that she had

purchased some bowel cleanser and that was what was in the bag she was seen leaving with.

- *Supercal*

On 24 April 2004 Ms Logan is seen removing two containers of Supercal from the shop without paying for them.

Ms Logan explained that she had made a note on the whiteboard about the Supercal and had dropped an envelope containing the payment for the Supercal into Rachel at the Hamilton East shop. Ms Logan admitted that she had not paid for the product before removing it from the shop, and that she thought making a note on the whiteboard would suffice. During Ms van de Weerd's further enquiries she was able to confirm that Rachel had received an envelop from Ms Logan, but did not know what was in it, and that she [Rachel] had handed it to Ms Poroa as Ms Logan had requested.

[29] The disciplinary meeting lasted about 2 ½ hours. At the end of the meeting it was agreed that Ms van de Weerd would continue her enquiry and contact Ms Logan the next day to advise her of the outcome. Mr Windleborn also undertook to make further enquiries regarding the courier company.

[30] Following the meeting Ms van de Weerd rechecked company records and reviewed the tapes. Ms van de Weerd spoke with Rachel and she contacted Post Haste to see if they were able to shed any light on the package uplifted by their courier on 2 April 2004 and which could not be accounted for. They were unable to assist with her enquiries.

[31] On 6 May 2004 at approximately 4.00pm Ms van de Weerd telephoned Ms Logan at home and advised her she was dismissed. As Mr Windleborn had not come back to Ms van de Weerd regarding his enquiries with Post Haste, Ms van de Weerd assumed his enquiries had drawn the same result as hers had, although she never checked to confirm that her assumption was correct.

[32] The dismissal was confirmed in writing that same day.

[33] The process of investigating the allegations against Ms Logan did not allow for a full and fair investigation to be undertaken. Ms Logan was never told before the meeting on 5 May 2004 what the specific allegations were that she was expected to respond to. She was then shown each incident, for the first time at the disciplinary meeting, and asked to provide her explanations. As

already stated in this determination, the process of working through each of the video clips became very disjointed.

[34] Ms van de Weerd had had the benefit of watching the tapes many times before coming to her conclusions. It seems only fair that Ms Logan be given more opportunity for her to consider properly what was being shown to her and to think through what had happened on the days in question.

[35] Ms van de Weerd, herself, told the Authority that the meeting on 5 May was to be a “*general meeting*” to get answers. In relation to the most recent incident, the Supercal incident, Ms Logan provided a clear explanation which, when checked by Ms van de Weerd, was substantially confirmed by Rachel.

[36] There is no evidence that Ms van de Weerd took into account the fact that Ms Logan had said her final farewells to her father the previous day. This was a situation which required a little more sensitivity than was shown by Ms van de Weerd.

[37] Ms Logan was deserving of a further opportunity to respond to the allegations, following an opportunity to think about the video tapes she had seen. It may well be that no further information would have come to light, but that is something Ms van de Weerd will never know. At the very least, Ms van de Weerd should have met with Ms Logan to discuss the further enquiries she had made and the information which came to light through those further enquiries.

[38] I am satisfied that the process followed by Ms van de Weerd lacked in procedural fairness. In coming to my conclusions I have had regard to the requirement not to subject the employer’s procedure to pedantic scrutiny (*Drummond v Cocal Cola Bottlers NZ* [1995] 2 ERNZ 229).

Was the decision to dismiss one that was open to a fair and reasonable employer?

[39] It is a well accepted principle that there is a need to have a relationship of trust and confidence in an employment relationship. The decision to dismiss was based on Ms van de Weerd’s assessment that Ms Logan’s explanations at the disciplinary meeting were unsatisfactory. Ms van de Weerd concluded that the trust could never be restored.

[40] The Authority must have regard to the nature and degree of the alleged misbehaviour and its significance in relation to the position held by the employee and the business of the employer.

What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZILR 176).

[41] Ms van de Weerd's conclusion that Ms Logan was guilty of serious misconduct must be reached on reasonable grounds. I have already found that the process used by Ms van de Weerd was lacking in fairness. Given that, it is difficult to hold that a conclusion of serious misconduct could be found (*Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* [1990] 3 NZILR 584).

Ms Logan was unjustifiably dismissed.

Remedies

[42] For the reasons outlined above I have found that Ms Logan was unjustifiably dismissed by her employer. She is therefore, entitled to remedies.

[43] Section 124 of the Employment Relations Act requires the Authority to take into account the extent to which the actions of the employee contributed towards the situation giving rise to the grievance and, if the actions so require, for the remedies to be reduced accordingly.

[44] Ms Logan was in a position of trust. The workplace was not closely supervised, and staff were trusted to deal with the employers property in accordance with the procedures set down. This required Ms Logan to account for all items of stock which left the store on her watch. Ms Logan's failure to adhere to the standard procedures was incompatible with her employment in the store. Ms Logan's failure has contributed significantly to the actions giving rise to her dismissal.

[45] I am satisfied that it is just to reduce the remedies available as a result of Ms Logan's conduct by 50%.

Lost wages

[46] Sections 123 and 128 of the Employment Relations Act provides a discretion for the Authority to award either the lesser of a sum equal to the whole of any part of the wages lost or to 3 months ordinary time remuneration.

[47] Ms Logan claims reimbursement of wages for the period from the date of her dismissal until the date of this determination.

[48] I decline to extend the loss of earnings beyond the three month period. Evidence of job search efforts did not satisfy me that Ms Logan did everything she could to obtain employment following her dismissal.

Hagal Company Limited is ordered to pay to Ms Logan \$3,471.00 gross being \$578.50 multiplied by 12 weeks, less 50% contribution within 28 days of the date of this determination.

Compensation

[49] Ms Logan seeks a payment of \$20,00 under this heading. There was no evidence of humiliation and loss of dignity advanced to the Authority by Ms Logan that would support a high award for compensation. The Authority can not assume that because a dismissal has occurred, humiliation and distress necessarily follows.

[50] The dismissal has had an impact on Ms Logan. Not only did she have to contend with being dismissed, but shortly after her dismissal she was required to attend interviews with the New Zealand Police. No criminal charges have been laid against Ms Logan as a result of the criminal investigation.

[51] However, I accept Ms Swarbrick's submission that the preponderance of evidence surrounding this claim relates to the police issue rather than the actual dismissal.

[52] I have set the award of compensation at \$5,000 which will be reduced by 50%.

Having regard to all the circumstances Hagal Company Limited is ordered to pay to Ms Logan \$2,500 pursuant to section 123(c)(i) within 28 days of the date of this determination.

Damages

[53] Ms Logan has claimed damages associated with the employment of a Barrister to assist her with the police enquiry. The claim has not been quantified. In support of her claim Ms Watson, on behalf of her client, referred me to *Medic Corporation Ltd v Barrett* (No 2) [1997] 3 ERNZ 977. The Court in *Barrett* makes it clear that consequences must not be too remote from the actions of the employer. In this matter Ms Logan's claim must relate to the dismissal as that was the action of her employer.

[54] An employer is entitled to put in the hands of police, evidence it considers should be investigated and which may amount to criminal activity. It is up to the Police to determine whether or not they undertake an investigation and then proceed with charges. This is not a matter for the employer.

[55] Ms Logan's decision to instruct a Barrister to assist with the Police enquiry is too remote from the actions of her employer to sustain her claim.

No award will be made under this head.

Costs

Costs are reserved.

Summary of Orders

Hagal Company Limited is ordered to pay to Ms Logan within 28 days of the date of this determination:

- Lost wages in the amount of \$3,471.00 gross; and
- \$2,500 pursuant to section 123(c)(i).

Vicki Campbell
Member of Employment Relations Authority