

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number
AA 99/08
File Number 5113306

BETWEEN SUSHMA WATI LUXTON
 Applicant

AND ASB BANK LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Mark Ryan for Applicant
 Simon Dench for Respondent

Investigation Meeting: Auckland 28 February 2008

Submissions From the Respondent 4 & 11 March 2008
 From the Applicant 7 March 2008

Determination: 18 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an employment relationship problem about an alleged missing sum of \$500 from a deposit processed by the Applicant. The Applicant was dismissed on the grounds of serious misconduct for dishonesty. She has raised a personal grievance seeking reinstatement, but withdrew that claim upon submissions being made, lost wages (added at the investigation meeting) and compensation and costs.

[2] Prior to the Authority's investigation meeting an agreement was reached by the parties to attend mediation provided by the Department of Labour and an arrangement made for the Applicant to be paid. These arrangements dispensed with the need for an interim application for reinstatement needing to be heard.

[3] I have included in the following outline of the facts a level of detail that I would ordinarily not include but have done so to explain my understanding of the discrepancy and Mrs Luxton's explanations and the Bank's conclusions.

The Facts

[4] Mrs Luxton commenced her employment with ASB Bank Limited (the Bank or ASB) as a Customer Services Officer (CSO) on 19 June 2000. She was paid a salary of \$44,600 per annum.

[5] On 28 November 2007 the Applicant was working at the Bank at a teller's station (called a pod) on her own. At approximately 4 00pm a customer came in to the bank to deposit cash. The customer had a deposit slip filled out for \$1,000. Mrs Luxton says that the customer told her she had had an argument with her husband about their counting the cash at home. The customer handed Mrs Luxton the deposit slip and cash made up totally of notes. Mrs Luxton says that she pressed TAB on the deposit screen to bring up the cash specification screen to count the notes. Mrs Luxton put all the notes into the input compartment of the counting machine (TCR). There was no requirement for her to count the cash manually before using the TCR. The count is automatically included in the cash specification screen and Mrs Luxton says the TCR counted \$500 extra notes.

[6] She says she asked the customer if she wanted the extra \$500 returned. She says at first the customer did want the money back and Mrs Luxton says she made an entry to pay it back by gold coins of \$500 for Cash Back, and entered \$500. Mrs Luxton says she was then told to deposit the money by the customer. The customer signed the amended deposit slip for \$1,500 and Mrs Luxton reversed the transaction that she had started and included \$1,500. She says she had to do this because a mistake came up on the computer in a pop up box with a message that the fixed total did not match the deposit screen because she had entered \$1,000. The Bank says no reversal was needed as the transaction was made for \$1,500 in the first place that is supported by the transaction details. Mrs Luxton pressed OK on the pop up box believing that the "mix amount" was correct and she says without looking at the details she then pressed "apply" on the deposit screen and the deposit went through for \$1,500. The Bank says Mrs Luxton had another option, which was to cancel the transaction to correct the deposit if she entered \$1,000 and she elected not to do this.

[7] Shortly after the transaction had been made for \$1,500 the customer returned saying that the deposit should have been \$2,000. According to the Bank the customer was adamant that \$2,000 was involved. Mrs Luxton says she showed the customer that there was \$1,500. Mrs Luxton says

she explained to the customer that if more had been deposited her tally would be over by \$500 at the end of the day when she balanced. There was no discrepancy found by Mrs Luxton when she balanced out at the end of the day, including the deposit she had made for \$1,500 and the Cash Back of \$500.

[8] Mr Brent Courtney, Assistant Manager, says he thinks Mrs Luxton told him at the end of the day there was a problem with a customer who said she had deposited \$2,000 with Mrs Luxton but was only credited with \$1,500 and showed him the deposit slip. He agreed that if the customer was correct it would show up at the end of the day balance. Mrs Luxton balanced at the end of the day with nothing over. Her balancing included \$267 culled notes in her drawer and \$16 gold coins. Three days later when the cash was counted from the TCR's safe it balanced which meant it held the notes it was supposed to hold and the count was accurate. Mrs Luxton says there was no difficulty identified, although she argued that the TCR may have made a mistake that the Bank did not accept and says that any over counting and undercounting to account for a discrepancy over consecutive days before the machine's notes were counted would be inconceivable.

[9] The next day the customer's husband went in to the bank over the matter but remained dissatisfied. Mr Courtney says he received a telephone call from the husband and he decided to check his facts before replying to him.

[10] Mr Courtney checked the customer's deposit on the browse screen, which showed \$1,500. It was described as Instant Cash, because the TCR had counted notes and there was a breakdown of the notes being: \$1,400 of \$20 notes; \$500 of \$50 notes; and \$500 gold coins as Cash Back. He says he did not understand the breakdown and the deposit differences. He read that there had been \$1,900 counted by the machine and the deposit was \$1,500. The TCR does not count rejected notes (called culled notes) and she had entered \$100 for the culled notes. He asked Mrs Luxton for an explanation.

[11] He says Mrs Luxton got excited and he decided to ask the branch manager to see if he could understand. He requested Mrs Luxton to put her explanation in writing, which she did.

[12] Mr Courtney says at some point he thinks Mrs Luxton told him there was an extra \$100 that the TCR had rejected. This was consistent with the documentation submitted for the Authority's investigation including the reconstruction of the transaction that I will comment on shortly. The rejected notes or culled notes are returned to the output compartment at the top of the TCR where

they are counted by the CSO and the amount is entered and then put in the CSO's drawer. Mrs Luxton told me that she put five culled \$20 notes that had been rejected by the TCR back into the TCR and it counted them after the customer decided not to take them. Mr Courtney says this was the first time he had heard this. He says he still could not find an explanation for the discrepancy, but on the information he had \$500 seemed to be unaccounted for because of the deposit for \$1,500 and the Cash Back entry.

[13] It is common ground that there was never any issue over whether or not the customer was given back any money, despite Mrs Luxton's entry for five hundred dollars' worth of gold coins that would reduce the amount of the deposit calculation if any money was returned to the customer. Mr Courtney says the customer's husband was adamant the deposit should have been \$2,000. Mr Courtney concluded that he was not in a position to explain to the customer's husband why he (the customer) was wrong when the Bank records supported a deposit of \$2,000. Thus, he subsequently approved the \$500 to be paid to the customer's account.

[14] The customer wrote requesting the bank investigate the transaction. A copy was not provided to Mrs Luxton.

[15] Mr Courtney then arranged by email a further check and trace to be done by the Bank's National Operations department. The customer's request was then sent to the Bank's Bank Investigations department. Mr Logan Munro, Regional manager became involved.

[16] Mr Munro attended a meeting held on 14 December with the Investigations department. Tony Senior, Project Manager was asked to look at the transactions as he is an expert on the use of the bank's TCR machines. At the time he confirmed orally the information received and that there was a discrepancy and produced a reconstruction of the transaction. It was concluded that there seemed to be a strong case that Mrs Luxton had taken \$500. He never interviewed or talked to Mrs Luxton on his findings.

[17] An investigation meeting was arranged. A letter dated 17 December 2007 was sent to Mrs Luxton and handed to her by the Branch Manager in the morning requesting her to attend a meeting at 9.00am on 18 December. The letter informed her that there were concerns about her adherence to the code of conduct, she had a right to have a support person or a representative and any action could include termination of employment. She was told the specific concern was a discrepancy in transaction and she should be prepared to respond. Mrs Luxton says she read the letter in the lunch

room and went back to work. She worked that day and after work arranged for her husband Paul Luxton to attend the meeting.

[18] Before that meeting occurred Mrs Luxton says she had a “one on one” meeting with her manager, Mr Courtney, who she says told her that he accepted her explanation and the matter had been resolved (her evidence 52). He denied giving her any reassurance. The record of that meeting cannot be located. But in any case I am satisfied Mrs Luxton cannot possibly be correct in her recollection because Mr Courtney handed the matter over and an investigation was being undertaken. It is more probable that his role had ended and he omitted to tell her he had handed the matter over.

[19] Also, Mrs Luxton says she understood that once she was told by Mr Courtney the \$500 would be written off and he authorised the write off to pay the customer \$500 she says she understood that that would be the end of the matter and he had accepted that it was an error. I am not satisfied this was the case because Mrs Luxton says she only *understood* that, whereas Mr Courtney says he believed he did not indicate the matter was over and his concern was to find out what had happened to provide an explanation to the customer. Also that is consistent with his role ending and handing the matter over to the Regional Manager.

[20] I am satisfied that Mr Courtney had sufficient information that there was a deposit of \$2,000 and \$500 had not been credited to the customer. He approved \$500 being paid to the customers account and this was done on 12 December. The “one on one” meeting between Mr Courtney and Mrs Luxton had a different purpose. The purpose of the “one on one” was to cover and track sales targets. Furthermore, Mr Courtney did not have the authority to carry out an employment investigation and disciplinary meeting that might lead to dismissal or any other action. I am also satisfied Mr Courtney had a responsibility to report the sum he thought was missing. If he did not tell Mrs Luxton that he had passed the matter on to his superiors any omission on his part would not have been fatal. This is because other bank officers had become involved and who had authority over employment matters. I am not satisfied that he deliberately or maliciously misled her if he had omitted to tell her he had passed the matter on.

[21] The meeting of 18 December was attended by Mr and Mrs Luxton, Mr Munro and Ross Anderson, Investigator for the bank. An explanation was received from Mrs Luxton where she confirmed that there was \$100 in unprocessed notes and she entered \$500 in gold coins to pay the customer back before the customer decided to proceed with the transaction. She acknowledged to

me that she was shown the screens saved and Mr Senior's reconstruction. However, she was contradicted by her husband on what he thought she had seen. Mr Munro says Mrs Luxton then admitted she must have received \$2,000. If not she certainly accepted the Bank's information but was adamant she had not taken the money. She could not explain what had happened, but says she added that the TCRs are sometimes wrong. Also Mr Luxton says that Messrs Munro and Anderson threatened Mrs Luxton to coerce an admission from her. They denied this claim. There was an adjournment and Mrs Luxton decided she needed legal advice and wanted to get a solicitor for the first time. The meeting ended for the Bank to consider the matter and for Mrs Luxton and her husband to arrange a lawyer.

[22] The Bank's Human Resources department then became involved to arrange a meeting quickly.

[23] The next meeting occurred on 20 December 2007 by agreement and Mrs Luxton had her lawyer present. The Bank sent Mrs Luxton's lawyer a letter dated 18 December accusing Mrs Luxton of dishonesty, but no other details were provided. At the meeting an outline of the last meeting was provided and Mrs Luxton and her lawyer were asked if they had anything to offer and if they had any new information. They were provided with a copy of the deposit slip as requested. They could not have been under any misapprehension that the matter involved the missing \$500. Mr Munro made the decision to dismiss Mrs Luxton when he discussed it with Mr Anderson during an adjournment when they were standing in the corridor, if she had nothing else to offer when the meeting was reconvened. Mrs Luxton and her representative had nothing else to add and she was advised that she was dismissed and a letter confirming her dismissal was sent on 21 December. That letter, which adequately summarises the events reads as follows:

Dear Sushma

On 17 December 2007 we notified you of an allegation that had been brought to our attention, regarding a serious breach of the code of conduct. We gave you written notice of a formal meeting to investigate the matter further. You were made aware that the matter was serious, and that disciplinary action, including dismissal, may result.

On 18 December 2007 you attended a formal meeting attended by Ross Anderson and myself and your husband attended the meeting as your support person.

At this meeting we went through the details of the allegation, specifically a discrepancy within a \$1,500 cash deposit made into a client's account, \$1,500 was credited and \$2,000 was deposited into the cash dispenser. Separately, the client contacting the bank stating the deposit was \$500 short.

You have had the opportunity to respond to this allegation. Your explanation to the allegation was that the customer had only given you \$1,500, however after we produced evidence that \$2,000 was handed over the counter, you agreed to that figure. No explanation was given as to where the missing \$500 went.

We had a second meeting with you and your legal representative on 20 December, where no further information was provided.

After going th[r]ough a thorough process, considering your responses and the information presented to you, we have reached the view that serious misconduct has occurred.

ASB expects and relies on all its employees to be absolutely honest in all activities. You have not met this commitment and I no longer have faith in your integrity and as a consequence you were summarily dismissed from the bank's employment. Your termination was effective from the 20 December 2007, as outlined yesterday.

...

The Issues

[24] Under s 103A of the Act I am required to assess whether or not a fair and reasonable employer would have decided in all the circumstances from an objective basis to dismiss Mrs Luxton for serious misconduct for dishonesty. There was a belief that Mrs Luxton had taken the money. Would a fair and reasonable employer have reached this conclusion? What was the process followed by the employer?

[25] I have decided that a starting point must involve identifying what the discrepancy was.

Determination

[26] The discrepancy was \$500 that the customer claimed had not been deposited in the customer's account. The Bank has concluded that Mrs Luxton's entry of \$500 gold coins was done to reduce the TCR total of \$1,900 notes and the \$100 culled notes to reconcile \$1,500 instead of a \$2,000 deposit.

[27] I am satisfied that the information the Bank had from the actual transaction was more reliable despite Mrs Luxton's evidence that the customer who made the deposit was apparently agitated, that the customer told her that she and her husband had difficulties counting the money at home, the money was not correctly added and the deposit slip was wrong. I am satisfied that as Mr

Courtney said he could only tell the customer's husband, who made the complaint, that he could not explain why they were wrong when they said their deposit was \$2,000. In other words the Bank's information that it had \$2,000 worth of notes was consistent with the customers' claim that they had deposited \$2,000 and their deposit was entered only for \$1,500.

[28] It was open to ASB to conclude there was \$500 missing from a deposit transaction after Mrs Luxton processed it for the customer. She accepted the Bank's information that the deposit was \$2,000 and that the TCR counted \$1,900 notes. She now says that that included the five 20 dollar culled notes when she put them back through the TCR and they were counted by the machine. Previously, all the information suggested she had accepted that \$100 involved culled notes, and this is supported by the record that she never directly challenged and she never put it in her written explanation, her statement and the statement of problem. This conclusion is further supported by my earlier finding that Mrs Luxton was not correct in believing Mr Courtney had accepted her explanation.

[29] Mrs Luxton provided three explanations on the allegation. The Bank rejected her explanations with plausible reasoning. It was not fatal that Mr Senior did not have any contact with Mrs Luxton because his information was put before her to consider. Furthermore the Bank found her explanations difficult to follow and she had every opportunity to clarify the situation at the meeting of 18 December being fully aware of the allegation and the issue. This means that Mrs Luxton did not provide an adequate explanation on what happened.

[30] The Bank does not rely on the deposit slip that the customer signed because any calculation for cash is computed and a transaction completed electronically. Also the Bank says that the use of a deposit slip is not always necessary because of electronic transfers that Mrs Luxton did not challenge. It is enough to infer that the responsibility rested with Mrs Luxton once the transaction had been made. Thus, the Bank relied entirely on the reliability of the TCR and the computer. It was open to Mr Munro to find that Mrs Luxton's explanation made no sense, particularly considering that the Bank's expert Mr Senior was asked his opinion and completed a reconstruction of the transaction.

[31] Also, Mrs Luxton now says it was unfair that she was not given a copy of the customer's written request that the bank investigate the transaction. This was not fatal because Mrs Luxton understood clearly what the issue was and that a complaint had been made. There was nothing contained in the customer's request that was in any way prejudicial to Mrs Luxton.

[32] I am satisfied the Bank did not need to investigate the customer because it was open to the Bank to conclude that the deposit was made for \$2,000 from the details the Bank had. Indeed once Mrs Luxton saw the Bank's information she accepted that the deposit was \$2,000.

[33] Mrs Luxton submitted that there was no investigation. I am satisfied that there was an investigation by the Bank that involved Messrs Munro, Senior and Anderson that culminated in Mrs Luxton accepting there probably had been a deposit of \$2,000.

[34] The Bank's procedure satisfied the main requirements of fairness, despite not being perfect. Mrs Luxton was afforded the opportunity for representation, she was put on notice of the seriousness of the employer's concern, she was informed of the allegation generally and told her employment could be in jeopardy.

[35] The Bank's decision to permit Mrs Luxton to continue working in the face of a serious allegation and its concern about Mrs Luxton's reliability is understandable when it moved quickly to get an outcome. Also letting her continue to work was a sign that it was genuinely looking for her to provide an explanation, and for that reason I reject any claim that Mr Munro had made his mind up. The Bank was amiss in not actually providing Mrs Luxton with a copy of all the documentary information to enable her to properly prepare, but this was not fatal where she was shown the information and she acknowledged she understood the information the Bank was relying on and accepted the \$2,000 was probably deposited.

[36] In responding to Mrs Luxton's complaints about the procedure I find that:

- She elected to take her husband to the 18 December investigation meeting as a support person. No decision was made at that meeting by the Bank. She had a further opportunity to get representation.
- She obtained a lawyer to represent her at the meeting held on 20 December. The lawyer wrote to the Bank without specifying Mr Luxton's complaints about what he said transpired at the meeting. Also Mr Luxton contradicted Mrs Luxton's evidence on what she was shown. For these reasons I reject Mr Luxton's claims that Messrs Munro and Anderson tried to coerce an admission from Mrs Luxton.
- Mrs Luxton knew what the detail of the allegation was on the alleged missing \$500.
- She had written an explanation.

- She understood the Code of Conduct (evidence given by her at the Authority's investigation meeting).
- She accepted the Bank's breakdown of the transaction, including at the time there was \$100 of culled notes. What she did not make clear is what she now says she did with those notes: that she put them back to be counted and the TCR accepted them.
- She was represented by her lawyer on 20 December. The Bank's position was put and the information the Bank was relying upon was referred to at that meeting.
- Mrs Luxton had a further opportunity on 20 December to provide further information on what else the Bank could explore. Indeed while it was submitted that it was unfair that Mrs Luxton was not given a copy of her own written explanation this is the first time that that has been raised. Mrs Luxton did not raise this during her evidence as a criticism or that she was disadvantaged. Also Mrs Luxton accepted that there was an outline of the matters discussed at the previous meeting. I am satisfied she understood the detail. She raised an issue about the accuracy of the TCR and breakdowns and jams occurring. The Bank's evidence on the accuracy and reliability and the operation of the TCRs countered this allegation and it was entirely within reason for the Bank to rely on the accuracy of the TCRs. Mrs Luxton's claimed that there were other errors and mistakes and produced evidence of teller under and over balances, including a \$40 under balance on one occasion that related to her balancing. I am satisfied that the Bank adequately explained this where money was accounted for whereas in this case money was missing and had to be paid to a customer.
- No other possible explanation or areas of inquiry were raised by Mrs Luxton and her representative.

[37] Also, Mrs Luxton claimed that the branch manager did not give her any opportunity to have time to go and prepare and get representation during 17 December because she stayed at work for the rest of the day I conclude this has more to do about the Bank being insensitive than being potentially unfair. Also, I have not had an opportunity to hear from the branch manager for his side of the story given that Mrs Luxton only belatedly raised this at the investigation meeting when she could have reasonably raised it much earlier for him to reply. The fact that there was a second meeting on 20 December mitigates any question of unfairness on 17 and 18 December.

[38] I conclude that in all the circumstances it was open to a fair and reasonable employer to dismiss Mrs Luxton for dishonesty where the bank rejected her explanations that it considered were

not plausible and did not make sense in reaching its conclusion. The difficulty with this case is that there is no proof that Mrs Luxton took any money. The Bank did not have to make such a finding because it was not relying on a reason of theft and did not have to prove beyond reasonable doubt that she took the money. The Bank's justification related to an issue of honesty on the balance of probabilities that her actions left it open for it to conclude she probably took the money.

[39] However, I am not satisfied that Mrs Luxton had sufficient opportunity to try and mitigate the Bank's decision to dismiss her. My reason for this is that Mr Munro made the decision at an adjournment before returning to the meeting on 20 December without any proper prior notice to Mrs Luxton other than to rely on the disciplinary letter that her employment was in jeopardy. I hold that that was not good enough. Mr Munro did not inform Mrs Luxton that he would be making such a decision during the adjournment. He did not tell her she had an opportunity to mitigate and raise any other options for consideration before a decision to dismiss her was made. It is not always necessary for an employer to have a separate meeting for this purpose before making the decision but of course it is prudent to do so to allow mitigation and some input on the employer's possible outcome. Although Mrs Luxton clearly understood that her employment was in jeopardy (letter of 17 December), she was denied the right for a proper consideration of her previously accurate cash handling, that she drew her manager's attention to the problem voluntarily at the first opportunity and that she had provided a written explanation and her employment history was unblemished. Mr Munro accepted that he did not put such matters to her because of his conclusion that she had been dishonest, and thus, it was open to him to dismiss her. I do not accept that. A fair and reasonable employer would still have given Mrs Luxton the opportunity to mitigate the employer's decision before it was made.

[40] Mrs Luxton has a personal grievance that related to one procedural point on the Bank's failure to allow her an opportunity to mitigate and comment on the decision, which it should have informed her that it was considering making, instead of making the decision and informing her of it.

Mrs Luxton's Contribution and Conduct

[41] The grave pity for Mrs Luxton if she is correct and she did not take the \$500 leaves the question as to where the money is, accepting that the customer was correct to claim the deposit was \$2,000, and in completing the electronic transaction Mrs Luxton has made a mistake in leaving the entry for \$500 worth of gold coins to reduce a \$2,000 transaction to \$1,500 without cancelling the transaction and starting again or reversing the Cash Back. The only other explanation that is

possible if Mrs Luxton did not take \$500 is that she did not look at how much in culled notes and gold coins she held, just like she says she pushed the OK button on the screen without looking at the calculation. This still does not account for the missing \$500 that she was responsible for.

[42] The Bank says it does not know where that money went to and it had a reasonable expectation that Mrs Luxton would account for it because she was the teller.

[43] I conclude that given the findings that the Bank made on the substantive issue Mrs Luxton's explanations have left her open to a criticism of gross negligence in not being able to account for the missing \$500 that she was responsible for. I find her evidence was not reliable enough, compared to that of the Bank's witnesses. In such a situation where the Bank relies on its employees to be reliable her action makes her fully culpable and responsible. Mrs Luxton withdrew her claim for reinstatement upon filing submissions. In the circumstances Mrs Luxton is 100% at fault through her actions that are linked to her personal grievance. Thus there are no remedies ordered.

[44] Mrs Luxton's claims for remedies are dismissed.

[45] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority