

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 414
5356417

BETWEEN BETH AVONNE LYNCH
 Applicant

A N D THE FARMERS TRADING
 COMPANY LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: The Applicant in person
 M McGoldrick, Counsel for Respondent

Investigation Meeting: 2 May 2013 at Hamilton

Submissions Received: 7 June 2013 from Applicant
 16 May 2013 and 14 June 2013 from Respondent

Date of Determination: 13 September 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mrs Beth Lynch, claims that she was unjustifiably dismissed on 9 August 2011. Mrs Lynch asks the Authority to find that she has a personal grievance and award her various remedies. Conversely, the respondent, The Farmers Trading Company Limited (Farmers) rebuts the claims of Mrs Lynch and says that her dismissal was justifiable due to a loss of trust and confidence pertaining to serious misconduct involving a breach of the company's rules and policies.

Background

[2] From June 2010, Mrs Lynch was employed as a sales consultant. Upon the completion of one month's service she was provided with a staff discount card.

Mrs Lynch was entitled to nominate one other member of her family to be issued with a staff discount card; providing the family member is a spouse, partner, mother, or father. The nominated family member must also reside at the same dwelling as the employee. Mrs Lynch nominated her husband to receive a staff discount card and he was duly issued with one.

[3] There is a comprehensive *Staff Discount Policy* (the Policy) that applies in regard to the use of a discount card. Particularly relevant to the matters before the Authority is the following:

2.3. Key Business Rules

- **NO card, NO discount** – the card must be presented at the Point of Sale (POS) to obtain the discount.
- A Team Member requesting discount at a POS must have signed their staff discount card prior to presenting it; and must sign the sales receipt.
- Team Members must NOT complete a document for any other family member or member of their household; or authorise or transact their own purchase or that of a family member.
- Team members must pay for the purchased goods themselves; it is considered serious misconduct to have a friend or family member pay for the goods using the Team Member's staff discount card.

[4] And then at clause 5 of the Policy, there are comprehensive provisions in relation to the conditions of use of a card that applies to all Farmers stores. These will be referred to later in this determination.

The basis of the dispute

[5] On Thursday 21 July 2011, Mrs Lynch came to work as usual. Her evidence is that she discovered a large hole in the hosiery she was wearing and in order to comply with the Farmers dress standards, she needed to replace them.¹

[6] Mrs Lynch picked out some suitable black hosiery (tights) from the Farmers retail stock and then subsequently, changed into them. Her evidence is that she was

¹ The written statement of Mr Kerry Pearce is that Mrs Lynch was wearing grey hosiery (rather than black) and replaced these with the appropriate black hosiery. However nothing rests on this as it is commonly accepted that Mrs Lynch needed to, and did, obtain replacement black hosiery.

busy with customers for the rest of the day and the “payment issue did not arise” until the next day. In other words, Mrs Lynch did not pay for the tights on the day that she obtained them. The next day (Friday, 22 July 2011) was a rostered day off for Mrs Lynch.

[7] On Saturday morning, 23 July 2011, (another rostered day off) Mrs Lynch says that she went into the Farmers shop “especially early” for the purpose of paying for the hosiery that she had obtained on the Thursday. The evidence of Mrs Lynch is that two other staff were present at the serving counter at the time, one of these being Mr Kerry Pearce. Mrs Lynch says that she apologised to both of the staff for not paying for the hosiery sooner² and that Mr Pearce said “that’s OK”. It is the evidence of Mrs Lynch that Mr Pearce was “the appointed counter manager” and she appears to accord him some management or supervisory authority. But the evidence of Ms Lesley Rutherford, the Store Manager at the Farmers, Te Rapa Store (at that time), is that she had never heard of a counter manager in a health and beauty department where Mrs Lynch worked. And while Ms Rutherford appears to acknowledge there is a position of counter manager within Farmers stores, she says there is no management decision making authority attached to the role.

[8] According to Ms Rutherford, the role of Mr Pearce seems to be that of a sales person without any line management authority at all. But in any event, it is evident that Mr Pearce was not “OK” with Mrs Lynch’s actions regarding the late payment for the hosiery, as on or about 27 July 2011, he informed Ms Rutherford of his concerns in regard to this.

[9] The evidence of Ms Rutherford is that Mr Pearce told her that he was “uncomfortable” with the actions of Mrs Lynch and he conveyed the sequence of events whereby Mrs Lynch had obtained the hosiery and worn it home on Thursday 21 July 2011, but did not pay until Saturday 23 July 2011. Upon being informed by Ms Rutherford that he should do so, Mr Pearce provided to her a written statement (dated 27 July 2011) of his observations. Mr Pearce also records that when Mrs Lynch obtained the new hosiery she had informed him that she intended to pay for them during the lunch break that day, but she failed to do so.

² Mrs Lynch did not use her store card to obtain a discount, or attempt to obtain the more substantial discount accorded to staff for uniform clothing purchases.

[10] After reading the statement of Mr Pearce, Ms Rutherford contacted Mr Paul Carston, the Regional Loss Prevention Manager for Farmers. Apparently, when a staff purchasing issue arises, a full investigation of all previous purchases by the staff member is undertaken. Ms Rutherford attests that she was concerned about the information received from Mr Pearce as it indicated that Mrs Lynch may have breached the Farmer's Staff Purchasing Policy and that she may have created a situation where stock (the hosiery) may not have been able to be accounted for. Ms Rutherford says that it also concerned her that Mrs Lynch had not used her staff discount card to obtain the staff discount, or ask a manager to authorise a more substantial discount off an item of hosiery as a uniform purchase, which Mrs Lynch was entitled to. Ms Rutherford alludes to Mrs Lynch not using her card or obtaining the higher discount, as having the appearance that she might have been trying to hide the purchase: but this is inconclusive.

[11] The further evidence of Ms Rutherford is that the investigations into Mrs Lynch's purchases from Farmers, revealed apparent breaches of the staff discount policy in a number of respects.

[12] Via a letter dated 1 August 2011, Mrs Lynch was requested to attend a disciplinary meeting. The allegations that Mrs Lynch was required to respond to related to the matter of obtaining the hosiery on Thursday 21 July 2011 and the subsequent late payment. There were further allegations relating to:

- (a) A purchase made on 15 December 2010 on a staff shopping day and the purchase being paid for by two Eftpos cards that did not belong to Mrs Lynch.
- (b) A purchase made by a person, other than Mrs Lynch, on 7 July 2011,³ which attracted a staff discount of \$12.20 that this person was not entitled to. Payment was made on a bank card not owned by Mrs Lynch or Mr Lynch.⁴

³ A correction was subsequently made as the sales docket shows that the purchase was made on 5 July 2011.

⁴ As the nominated holders of the Farmers staff discount cards.

- (c) A purchase made on 10 July 2011 that attracted a staff discount of \$17.50 that the purchaser was not entitled to and the use of a Farmers card for the purchase that did not belong to Mrs Lynch or Mr Lynch.

Termination of employment

[13] Following disciplinary meetings on 4 August and 9 August 2011, via a letter dated 15 August 2011, the dismissal of Mrs Lynch was confirmed. The pertinent content of the letter informs Mrs Lynch that:

During the meeting we sought an explanation from you and we found:

1. That you failed to follow staff purchasing procedures.
2. That you wore an item of hosiery that you had not paid for.
3. That you removed company property without authorisation or payment.
4. That Kay Scott and Juliette Lynch paid for goods which attracted your staff discount information.

After serious consideration of your explanation we have found it to be unacceptable and as a result deemed you to have breached Work Rule #1 – Property, #6 – Point of Sale Procedures, #4 – Staff Purchases and the Staff Discount Policy.

Your actions have led to a breach of trust between yourself and the company to the extent that the relationship can no longer continue. Therefore it was our decision to terminate your employment effective Tuesday 9th August 2011.

[14] Mrs Lynch says that she was “improperly and unjustifiably” dismissed.

Analysis and conclusions

[15] In determining, on an objective basis, whether a dismissal was unjustifiable, the Authority must apply this test:

.... whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.⁵

[16] And then in applying this test, the Authority must consider:

⁵ Section 103A (2), Employment Relations Act 2000.

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.⁶

[17] I note that Mrs Lynch alleges that she was “improperly dismissed” by which I take it she is suggesting that the process adopted by Farmers was flawed. But having perused the evidence closely, I am satisfied that the process used by Farmers was appropriate and that each of the essential criteria (above) was met.

[18] In regard to the substance of the dismissal, the reasons given by Farmers for the dismissal of Mrs Lynch effectively fall into two categories: albeit it is noted that all of the allegations applying to her related to the inappropriate use of the Farmers discount card or a breach of the company's purchasing rules.

1. ***The removal and late payment for the hosiery***

[19] The evidence of Mrs Lynch is that she was not attempting to conceal obtaining the hosiery. Neither was she attempting to defraud the company; particularly given the minimal value involved. This may be so and perhaps Mrs Lynch simply made an error of judgment. However, as is entirely understandable and appropriate, given the nature of Farmers business; as a substantial retailer with many employees, the rules pertaining to the possession and/or purchase of goods are specific, important to the operation of the business, and firmly applied.

⁶ Section 103A(3)

[20] Particularly relevant to the circumstances in regard to the removal of the hosiery by Mrs Lynch, are the following provisions of the employment agreement and the Farmers works rules and disciplinary procedures:

10.4 Company Rules, Policies and Procedures

The Farmers work rules and disciplinary procedures apply to your employment (see Appendix 1).

The company may vary, counsel or introduce rules, policies and procedures.

[21] The work rules and disciplinary procedures are found at Appendix 1 of the employment agreement and are introduced as follows:

Any business requires clear rules and procedures governing personal conduct to ensure the efficient operation of the business and to make clear to employee[s] what is expected.

The following behaviours amount to **Serious Misconduct** and are most likely to result in summary dismissal, however while the following list contains examples only, it is not exhaustive and other matters not specified may also amount to serious misconduct resulting in summary dismissal:

1. Property

Unauthorised possession, unauthorised removal or unauthorised wilful movement of company property or the property of other persons. This includes scraps/waste/damaged items etc regardless of value.

The manager or his/her representative shall be entitled, without prior warning, to inspect an employees locker or bags but this shall only be carried in the presence of the employee concerned, and in the presence of a witness.

[22] And then:

6. Point of Sale Procedures

Failure to follow the Point of Sale Procedures including rules for cash register operation and the rules for beauty card use.

[23] Clearly, Rule 1 relating to “unauthorised possession, unauthorised removal of company property” applies to the circumstances. Mrs Lynch has attempted to portray that Mr Pearce had some ostensible authority within Farmers and that he was aware that she was in possession of the hosiery without paying for it. Mrs Lynch also alludes

to Mr Pearce being “OK” with the payment being made two days later and she also suggests that he was implicated in the circumstances in some way.

[24] However, I accept the evidence of Ms Rutherford that Mr Pearce did not have any authority, implied or otherwise. Furthermore it is clear that Mr Pearce was not happy with the actions of Mrs Lynch and reported such to Ms Rutherford accordingly. I find that the removal of the hosiery by Mrs Lynch was an action that fell squarely within the category of behaviour that is considered to be serious misconduct, likely to result in summary dismissal, under the Farmers Work Rules and Disciplinary Procedures. And these were a fundamental component of the terms and conditions of Mrs Lynch’s employment agreement.

[25] It follows that I find that the dismissal of Mrs Lynch for removing an item of hosiery without making payment, when required, was an action that a fair and reasonable employer could take in all the circumstances.

2. *The misuse or abuse of the staff discount card*

[26] Given my findings in regard to the above matters, whereby the dismissal of Mrs Lynch has been found to have been justifiable, further analysis applying to this issue could be said to assume somewhat less relevance. But given the unequivocal language used in the Farmers Discount Card Policy, it is difficult to understand how Mrs Lynch could have had any doubt that it simply was not permitted to allow anyone other than her or her husband to obtain a discount on purchases from Farmers, and pay for such accordingly.

[27] On the weight of the evidence I am satisfied that Mrs Lynch would have, or most certainly should have been, aware of the requirements pertaining to the appropriate of the staff discount card, as set out in the *Staff Discount Policy* document. In particular:

- A team member must pay for the purchased goods themselves, it is considered to be serious misconduct if a friend or family member pays for the goods on the team member’s behalf.
- Any misuse/abusive of the card (or the policy) will result in disciplinary action up to and including dismissal.

[28] In regard to the allegation pertaining to the purchase on 5 July 2011, the explanation of Mrs Lynch was that the bank card used belonged to her husband. But upon being asked to provide the details of the card during the disciplinary investigation, Mr Lynch informed that his bank had advised him not to disclose the details of his cards to Farmers. But given that Mrs Lynch was involved in a disciplinary investigation with dismissal being a possible outcome, one would assume that it would have been a very simple matter for Mrs Lynch/Mr Lynch to have allowed Farmers to have viewed the details of Mr Lynch's card on a confidential and secure basis.

[29] Mrs Lynch is also critical of the investigation conducted by Farmers in regard to the shop assistant named Jess and the explanation given by Mrs Lynch's daughter regarding being offered a discount because she was "family." However, I find the evidence of Ms Rutherford and Mr Carston regarding this matter to be acceptable and that the investigation was conducted fairly accordingly.

[30] Also Mrs Lynch, and a witness for her, Mr Ben Ballantyne-Jones, has been critical of the behaviour of Mr Carston during the disciplinary meetings. While I accept that it is possible that in his role as Regional Loss Prevention Manager he is required to take a reasonably pragmatic approach pertaining to breaches of Farmers policies and procedures and that he may have exercised his role with some forcefulness; on the weight of the evidence, I am unable to conclude that there was any behaviour visited upon Mrs Lynch by Mr Carston, during the investigation, that resulted in her being treated unfairly.

[31] Finally, Mrs Lynch has alluded to the existence of an atmosphere on the shop floor and some disharmony emanating from other staff. Mrs Lynch says that a "personal vendetta" was orchestrated to create a situation where other staff had influenced management to "get rid" of her. In the absence of any substantive evidence to support this proposition, it can be given little credence.

[32] While the circumstances surrounding the dismissal of Mrs Lynch are most unfortunate, regrettably I am left to conclude that following a fairly conducted investigation, Farmers were entitled to treat the total circumstances and actions of Mrs Lynch as serious misconduct leading to a loss of trust and confidence in her as an employee.

[33] The Court of Appeal in *W & H Newspapers Ltd v Oram*⁷ confirmed that there may be more than one correct response open to a fair and reasonable employer. And while, to some, the dismissal may have seemed a harsh sanction, the real issue is whether it was open to Farmers, acting fairly and reasonably, to have concluded that dismissal was the appropriate response to Mrs Lynch's conduct.

Determination

[34] I find that having conducted a proper investigation and having met the other essential criteria set out in s.103A(3) of the Employment Relations Act 2000, the dismissal of Mrs Lynch was what a fair and reasonable employer could have done in all the circumstances; hence the dismissal was justifiable.

Costs

[35] Costs are reserved. The parties are invited to resolve this matter. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file a memorandum with the Authority. The applicant has a further 14 days to file a memorandum in response.

K J Anderson
Member of the Employment Relations Authority

⁷ [2000] 2 ERNZ 448