IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 530
5339578

	BETWEEN	KRISTINA MOHN Applicant
	AND	SMITHS CITY (SOUTHERN) LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	S Austin, Advocate for Applicant S Wilson, Counsel for Respondent
Investigation Meeting:	13 September 2011 at Whakatane
Determination:	14 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Mohn, says that she was disadvantaged in her employment by an unjustified action by her employer. Ms Mohn also says that she was unjustifiably dismissed, effective from 15th March 2011. She seeks that the Authority find that she has a personal grievance (or grievances) and award her the remedies of reimbursement of lost wages and compensation.

[2] Conversely, the respondent, Smiths City (Southern) Limited (SCL) denies these claims and says that its actions were those of a fair and reasonable employer in all of the circumstances.

Background facts and evidence

[3] Ms Mohn was employed at the Whakatane store of SCL from 3 May 2010 until her dismissal of 15 March 2011. While the employment agreement refers to

Ms Mohn being employed as a sales support person, the evidence is that she was involved with both sales support and administration. The evidence of Mr Mark Powley, the Branch Manager for SCL, is that Ms Mohn's primary role related to administrative duties and responsibilities.

[4] Ms Mohn received training and assistance from Ms Annette Almond, the North Island Administration Support Manager for SCL; based at Whakatane.

[5] As a result of some issues arising during the month of June 2010, Mr Powley and Ms Almond met with Ms Mohn on 30 June 2010. A number of issues were spoken about relating to general administration matters and the importance of following company procedures.

[6] The evidence of Ms Almond is that when she returned from a period of leave, while conducting the monthly audit, she was concerned to discover that Ms Mohn had not completed the banking on a daily basis for the period 3 to 31 August 2010. Ms Almond says that it also appeared that Ms Mohn had not properly completed other transactions and tasks, particularly those related to credit transactions. This was a matter that had been discussed with Ms Mohn during the meeting on 30 June 2010.

[7] On 7 September 2010, Ms Almond met with Ms Mohn, along with the staff representative, Ms Kathleen Rose. There was some discussion about the details of various transactions and tasks that Ms Almond says appeared not to have been properly completed, or not completed at all. A meeting was subsequently scheduled for 10 September 2010. Ms Mohn was given a copy of the issues that would be discussed then.

[8] On 10 September 2010, Ms Mohn attended a meeting with Ms Almond and a human resources consultant for SCL Mr Russell Watson. Also present was the staff representative. Issues relating to credit transactions and banking were discussed. The evidence of Ms Almond is that she asked Ms Mohn if she required any further training in order to ensure that there was no confusion about the required procedures. Ms Mohn indicated that she would need further training on credit processing and she thought that two half hour training sessions would be appropriate. Ms Almond says that she also reinforced that if Ms Mohn was ever not sure of how to do something, she could ask for assistance from Mr Powley, any of the supervisors, Ms Kathleen Rose (the Credit Controller), or Ms Almond.

[9] Subsequent to the meeting on 10 September, Ms Mohn received a letter dated 15 September 2010. She was informed that:

> Further to our discussions last Friday with Annette Almond, Russell Wilson (consultant) yourself and Kathleen Rose, (staff representative) we advise that in view of the concerns we expressed then and still hold, that we must formally warn you that any repeat of your actions will result in the termination of your employment.
>
> Specifically we refer to your continued failure to properly process credits despite repeated and acknowledged training with Annette and your ongoing failure to comply with instructions to ensure banking is done every day. Since Friday we have provided you with the training on the subject and duration you asked for and we have advised you who is available to provide you with advice going forward. We do not expect as a consequence to find further errors or delayed banking. If you have any questions or require any clarification then please do not hesitate to ask the writer or Annette.
>
> Jason Langdon
> North Island Regional Manager

[10] It seems that Ms Mohn carried out her duties and responsibilities without further incident until some time early in 2011. The evidence of Mr Powley is that in late January or early February 2011, he went into the administration office one particular morning and noticed that money had been left on a desk. Mr Powley says that Ms Mohn was at work that day but not in the administration office at the time. He says that he put the money in his pocket and went about his business. On returning to the administration office in the afternoon, he asked Ms Mohn if there were any issues with the banking that day. Upon Ms Mohn confirming that there had not been any issues, Mr Powley removed from his pocket the money that he had picked up earlier and gave it to Ms Mohn and reminded her not to leave money around when the office was unattended. Mr Powley attests that he thought that this was a one off-incident.

[11] However a few days later, Mr Powley was informed by a sales supervisor that this person had gone into the office and discovered that the safe key was in the lock of the safe and the office was unattended. As Ms Mohn was responsible for keeping the safe and monies secure, there was a discussion with her about the need for proper security measures. Mr Powley says that he informed Ms Mohn that it was unacceptable to leave the safe unsecured and he received an assurance from her that she would improve her security practices.

[12] The further evidence of Mr Powley is that, on the morning of 15 February 2011, he was informed by a supervisor (Ms Hall) that she had gone into the administration office at approximately 9.30am that morning and she had found the safe door wide open and money lying on the floor in front of the safe. Mr Powley says that Ms Mohn was working that day and she would have been required to access the safe to do the banking for the business first thing that morning.

[13] The evidence of Mr Powley is that apart from himself, Ms Almond and Ms Mohn, there were three other employees (Ms Hall, Mr Wylie and Ms Calcott) who had access to the safe; and a security code and a key are required to open the safe. Mr Powley says that generally, Ms Mohn would keep the key in the till or on her person and a password was needed to access the till. Mr Powley made some enquiries which revealed that none of the other authorised people had accessed the safe that morning. Mr Powley reached the conclusion that it appeared that Ms Mohn had left the safe open as she was working that day and would have, or should have, attended to the banking that morning; requiring her to access the safe.

[14] Mr Powley then spoke to Ms Mohn on 16 February 2011 and informed her that the circumstances relating to the open safe were viewed as serious and that she should arrange for a representative to accompany her to a meeting the next day.

[15] On the morning of 17 February 2011, a meeting took place with Ms Mohn along with the staff representative, Ms Rose. Mr Powley was accompanied by Ms Almond. As with the previous meetings, notes of the proceedings were compiled and have been produced to the Authority. The incident whereby the safe was left open on 15 September 2010 was discussed with Ms Mohn and the past concerns about her lapses in security procedures were also raised. Ms Mohn gave an explanation of her perception of these matters.

[16] The meeting was adjourned that morning and later there was some further discussions about other matters that Ms Mohn had indicated she wished to raise. There was some discussion about Ms Mohn's role and the weekly split between administration (15 hours) and sales support (25 hours) as well as various administration matters and general housekeeping matters.

[17] The outcome was that Ms Mohn received the following letter dated 17 February 2011:

> Thank you for explanation regarding the open safe in the office and your part in that event. As you are aware that is the second time in a few days the safe and its contents have been left insecure, the first time you have agreed it was your fault and the second time you believed someone else may have left it open. We consider that the security of the safe in so far as keeping it locked during working hours is concerned is yours and that you must ensure that it is locked at all times and that the key is kept in a secured place. We believe that is not too onerous and just part of the role of the store administration staff member as much as sales staff are responsible for ensuring point of sale cash drawers are kept secure. We must therefore advise that any future occasions where the situation occurs again and you are found responsible will result in the company seeking to enforce the disciplinary policy in relation to failure to follow a reasonable and lawful instruction. That is normally regarded as serious misconduct which can lead to summary dismissal. If you have any questions or need any clarification in regard to this letter then please do not hesitate to discuss that with the writer.
>
> Mark Powley
> Manager

[18] It is the view of SCL that this letter constitutes a further warning to Ms Mohn, albeit the term warning is not used. Nonetheless, it seems to me that given Ms Mohn had been informed that this was the second time in a few days that the safe and its contents had been left insecure, and the fact that Ms Mohn was informed that if the situation occurs again and she is found responsible, a finding of serious misconduct could lead to summary dismissal under the disciplinary policy, she should have been under no illusions that SCL viewed her actions seriously and that her employment could be in jeopardy.

[19] The letter also makes mention of the company's disciplinary policy in regard to a failure to follow a reasonable and lawful instruction. The SCL *Disciplinary Procedures* set out various matters that constitute serious misconduct for which the sanction of summary dismissal may occur. Relevant to the circumstances of Ms Mohn are the following provisions:

- Failure to account for Smith City stock, money or property in the manner set out in the appropriate policy;

And

- Failure to carry out normal and reasonable instructions of duties.

[20] The procedures also inform that:

- In the event of alleged serious misconduct the staff member involved will be advised and warned that they are subject to summary (or instant) dismissal. They will be suspended on pay for 24 hours to seek advice and consider what, if any, explanation they may have in response to the allegation.

[21] The evidence of Ms Almond is that a few days later it came to her attention that Ms Mohn had not completed the electronic banking on 18 and 19 February 2011. Ms Almond says that she was concerned by this because on 17 February, there had been a discussion about the daily administration tasks to be carried out by Ms Mohn. This discussion included reinforcement of the need to complete the banking on a daily basis.

[22] Subsequently, Ms Mohn attended a disciplinary meeting with Mr Powley and Mr Langdon on 15 March 2011. She was accompanied by a representative, Mr David Sparks. Notes of the meeting have been provided to the Authority. They record that Ms Mohn was given an opportunity to explain why the banking was not done on 17 and 18 February 2011. But this would appear to be an incorrect record as the evidence of Mr Powley, Mr Langdon and Ms Almond refers to their concerns about the failure of Ms Mohn to carry out the banking for the days of 18 and 19 February 2011. Indeed Ms Mohn's evidence (and her explanation) relates to the days of 18 and 19 February period.

[23] The explanation given by Ms Mohn for not doing the banking on 18 and 19 February 2011; is that on 18 February, there was a problem with a payment made on the Alectra[1] till and that the afternoon was too busy to get the banking done. In regard to her explanation for not doing the banking on 19 February, Ms Mohn said due to there only being a small amount of cash ($10.00) she did not think it was worth doing the banking for such a small amount.

[24] There was an adjournment of the meeting to allow Mr Powley and Mr Langdon to consider Ms Mohn's explanations and upon resumption of the meeting, Ms Mohn was informed that her explanations were not acceptable. The evidence of Mr Langdon is that:

> *I considered that Nina's failure to complete the banking was not a one off incident. Nor did I accept her explanation that she was too busy. I was mindful that she had been trained to complete banking daily and received a number of reminders about this, including as recently as 17 February. She had also received a formal written*

[1] There are two businesses which are operated by SCL; one of which is Alectra.

> *warning about similar conduct and been given a clear instruction in that letter that such conduct would not be tolerated. Nina did not prioritise her administrative tasks despite Mark's constant reinforcement that her administrative tasks needed to be complete first and foremost. It was not her decision to make about whether or not the banking would be completed due to the small amount. She was aware that banking was to be completed daily irrespective of the amount. This was for cash flow and security purposes.*

[25] The further evidence of Mr Langdon is that he reached the view that Ms Mohn's failure to complete the banking on 18 and 19 February was serious and constituted serious misconduct in that she had failed to follow lawful and reasonable instructions. Mr Langdon pointed out that a failure to carry out normal and reasonable instructions or duties, constitutes serious misconduct under Smith City's disciplinary procedures.

[26] Mr Langdon says that he considered alternatives to dismissal and whether a written warning was appropriate. He says that he considered that Ms Mohn was given a written warning in September 2010 for the same conduct, that is, failing to complete the banking daily, and was also given a written warning on 17 February 2011 for her failure to follow lawful and reasonable instructions.

[27] Mr Langdon states that he believed that Ms Mohn's conduct had irreparably damaged the trust and confidence that underpinned the employment relationship; and that SCL needed to have confidence that Ms Mohn would follow lawful and reasonable instructions. Mr Langdon attests that:

> *I did not believe that the relationship of trust and confidence could be restored given the nature and extent of Ms Mohn's conduct.*

[28] Mr Langdon therefore reached the view that dismissal was the only option open in all the circumstances, albeit he says that this was not an easy decision for him to make.

[29] The meeting then resumed and Ms Mohn was told that her employment was to be terminated.

[30] The termination of Ms Mohn's employment was confirmed in a letter dated 15 March 2011; thus:

> This letter is to inform you that your employment with Smith City has been terminated as of 14 March 2011 at 4.40pm due to you not following lawful and reasonable instructions.
>
> Mark Powley
> Branch Manager

[31] However it would appear that there is a mistake in this letter (14 March), because the meeting took place on 15 March and that was the date that Ms Mohn was informed that her employment was to be terminated. It appears that Ms Mohn did not receive the letter terminating her employment until 25 March 2011. But there has been no suggestion that the dismissal of Ms Mohn was predetermined.

Analysis and conclusions

[32] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied to a dismissal. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, whether the employer's actions and how the employer acted, were what a fair and reasonable employer would[2] have done in all the circumstances at the time the dismissal or action occurred.

[33] As was held by the Employment Court in *Air New Zealand v. Hudson* [2006] ERNZ 425:

> However, the s.103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer's actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer's actions by that objective standard. It may mean that the Court [Authority] reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

[34] The meaning of s.103A was again clarified by a full bench of the Employment Court in *Air New Zealand Limited v V* [2009] ERNZ 185:

[2] Because the dismissal of Ms Mohn occurred prior to 1 April 2011, the new provisions of the Employment Relations Amendment Act 2010 are not applicable.

> The meaning of the text of s.103A is clear on its face and in the light of its common law antecedent. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.

[35] As stated in *Air New Zealand v V*, in determining whether or not the actions of the company were those of a fair and reasonable employer in the circumstances, the Authority is required to objectively review all of the actions of the employer up to and including the decision to dismiss. The circumstances applying to Ms Mohn were:

(a) In a letter dated 15 September 2010, Ms Mohn was warned that as a result of her continued failure to properly process credits and an ongoing failure to comply with instructions to ensure banking is done every day, any repeat of such actions would result in the termination of her employment;

(b) Via a letter dated 17 February 2011, Ms Mohn was informed of her responsibilities in regard to security matters. Ms Mohn was effectively advised that in the event of the situation occurring again and she was found responsible, the company would seek to enforce its disciplinary policy relating to failure to follow a reasonable and lawful instruction, and, this would normally be regarded as serious misconduct, which can lead to summary dismissal;

(c) Ms Mohn failed to do to the banking for the days of 18 and 19 February 2011 and her explanation for not doing so was not accepted by SCL and her employment was terminated as a consequence.

[36] The question then arises:

Was the company entitled to treat the failure of Ms Mohn to carry out her responsibility to do the banking on a daily basis, as serious misconduct?

[37] In arriving at an answer to this question, I conclude that there are several factors that should be taken into account. Firstly, under the SCL disciplinary procedures, there are a variety of actions which are deemed to be serious misconduct warranting summary dismissal. Relevant to the circumstances of Ms Mohn are two particular matters:

(a) Failure to account to Smith City stock, money or property in the manner set out in the appropriate policy;

(b) Failure to carry out normal and reasonable instructions or duties.

[38] Ms Mohn was well aware of her employer's concerns about her failure to implement proper security measures in regard to company monies and this included the requirement to carry out banking on a daily basis, regardless of the sums involved. While it has been argued for Ms Mohn that she did not receive adequate training and that the warnings of 15 September 2010 and 17 February 2011 were unjustifiable, I do not accept that either of these arguments is valid. The evidence is that Ms Mohn received extra training in her duties. Further, she had carried out those duties on many occasions without any issues arising and she has acknowledged that she knew was what required of her.

[39] In regard to the two warnings and the claim of unjustifiable disadvantage relating to the 15 September 2010 warning, I can find nothing in the overall evidence to suggest that this warning was unfair or unreasonable. In regard to the warning dated 17 February 2011, while ideally, the wording of this letter could have somewhat more explicit about how Ms Mohn's employment was becoming tenuous, I conclude that Ms Mohn would have, or should have, been well aware that her employment was in jeopardy in the event of a proven further transgression relating to the security of company's monies.

[40] Therefore, I conclude that SCL were entitled to treat the failure of Ms Mohn to carry out the banking requirements on the days in question, as serious misconduct.

Was the dismissal of Ms Mohn the action of a fair and reasonable employer in all the circumstances?

[41] Apart from the arguments from Ms Mohn that have already been addressed, it is also posited that the sanction of dismissal is out of proportion to the nature of the misconduct. Had this been the first incident relating to security matters and the handling of SCL monies, then this may have been valid argument. But the conclusive evidence, including the two warnings, reveals that Ms Mohn had some difficulty consistently complying with the relatively simple procedures that SCL had in place in order to ensure that the management of its daily receipts was secure and not open to any misappropriation.

[42] Given the overall events, and in particular, the regular lapses by Ms Mohn, for which she received two written warnings, I find that the termination of her employment was what a fair and reasonable employer would have done in all the circumstances; hence the dismissal of Ms Mohn was justifiable. It follows that she does not have a personal grievance and her claims are dismissed.

Costs

[43] Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the daily tariff approach of the Authority, the outcome reached and that the investigation meeting was completed within one half day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority