

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Ryland McKee (Applicant)  
**AND** General Distributors Limited (Respondent)  
**REPRESENTATIVES** Mr McGovern for applicant  
Mr Langton and Ms S Delamare for respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 23 November 2005  
**DATE OF DETERMINATION** 16 January 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

The applicant submits he was unjustifiably dismissed from his employment with the respondent. To remedy his alleged grievance he seeks lost remuneration and compensation pursuant to s.123 (1) (c) (i).

The respondent denies the claim and submits the applicant's employment was terminated for serious misconduct i.e. unauthorised consumption of company product.

**Background**

At the time of his dismissal Mr McKee was employed as Asst. Bakery Manager at Woolworths Lynmall. He had been employed by the company for approximately three years and was expecting to be confirmed in the role of Bakery Manager in the near future.

On 5 October 2004 Mr McKee signed a Security Memo confirming a number of the company's policies. Among other things this memo addressed the company's policies that prohibit (without authorisation) the consumption and sampling of company product.

Despite the recent emphasis on security policies the Store Manager (Richard Hay) had lingering concerns that staff were not adhering to the rules prohibiting the consumption or sampling of company product. He went to the Bakery Department one day and glimpsed (from the corner of his eye) an employee raising his hand to his mouth. He approached the employee and observed flour around his mouth. He took this up with that employee and he also took the matter up with Mr McKee in a discussion held with him during the week of 6 October 2004.

As a result of his concerns he met with the company's Regional Security Manager, Mr Swan. Mr Swan proposed that hidden security cameras be installed in the Bakery Department and they were installed on 15 October. Movements in the department were recorded for a period of 10 days. The footage revealed five bakery employees (including Ryland McKee) consuming product during their shifts.

The company wrote to Mr McKee on 8 November 2004 requesting that he attend a meeting on 10 November. The company's concern was spelt out as "*the possible unauthorised consumption of company product in the Bakery Department on 24 October*". Mr McKee was advised the company viewed the issue seriously and that it could result in disciplinary action including termination. Mr McKee was advised of his right to representation and told he would be given the opportunity to give an explanation.

In the event, the company held three meetings with Mr McKee who was represented by his Union organiser, Mr McGovern.

Mr McKee viewed the company's video recording. He commented and provided explanations. The evidence shows the company considered his explanations and carried out further inquiries before it arrived at the view that serious misconduct had occurred. It was the company's position that this conduct warranted immediate dismissal. This was communicated to the employee on 16 November 2004.

### **Provisions of the Collective Employment Contract (CEA) and Company Policy Documents.**

Mr McKee's employment was covered by the Foodtown Countdown Woolworths Supermarket Bakery Collective Employment Agreement. At Cl. 8.7 it is provided:

*'The Company Work Rules and Disciplinary Procedures apply to an employee's employment. The Company may introduce new rules, policies and procedures or vary or cancel existing ones'.*

Work Rules are set out in Appendix 1 to the CEA. Cl. 4 Property reads:

*'Unauthorised removal or unauthorised consumption of company property or the property of other persons is not permitted'.*

On 5 October 2004 Mr McKee met with Mr Hay (Store Manager) to discuss a new Security Memo. The memo contains the following introduction.

*'Once again there is a need to raise some specific Company Policies with Staff so as to avoid any confusion. The following Policies are considered to be serious where breaches occur and will result in disciplinary action which may result in termination of employment'.*

Among other issues addressed in this Security Memo are the following:

#### *Unauthorised Possession*

*Any person found consuming or removing products or property from the premises without payment or authorisation will be subject to disciplinary action which may lead to dismissal.*

### *Product Sampling*

*Only the store manager can authorise the sampling of product by other staff members. Staff are to be aware they are not permitted to sample product in their departments, (e.g. quality control) without this authority. Department managers are to be reminded they cannot authorise sampling in their departments without the express authority of the Store Manager.*

On 5 October Mr McKee signed this memo as a staff member.

Staff are also made aware of company policies through the *Welcome to Woolworths* booklet. The section covering Loss Prevention confirms that staff are not permitted to take, consume or give away company product. It is also advised that samples of food may only be consumed if approved by the store team leader/departmental team leader.

## **Positions of the parties**

### Applicant

Mr McKee submitted it was his duty as Asst. Manager of the Bakery to ensure that substandard product was not put out for sale and he had been taught to taste test anything he thought was not up to standard. He submitted he had a standing authority from the Store Manager to taste test product when necessary. Mr McKee also argued that he had a standing authority from former managers at Woolworths New Lynn.

Further, it was Mr McKee's position that Mr Hay's specific instructions (given to him on 6 October 2005), which prohibited taste testing, applied only to his staff and not to himself.

He said that on the day in question the Danish seemed undercooked and he *taste tested* it for quality. When he *taste tested* it, he looked at the Danish, broke it, ate a piece and then walked over to another baker to discuss its appearance. He then ate another piece from a different part of the Danish and decided it was fit for putting out for. He discarded the remainder of the Danish.

With respect to the apricots, he explained the Bakery was out of the usual apricots used for baking apricot buns and apricots had to be sourced from the shelves. Another baker was chopping them and he thought, on looking at the apricots that they might be too hard, for use so he taste tested them. He decided they were satisfactory for use.

It was argued by and for Mr McKee that he was *taste testing* the products in question not *sampling* or *consuming* them. Taste testing not covered by the Security memo which deals with unauthorised consumption and sampling.

It was also argued for Mr McKee that the respondent was confused between sampling and taste testing in that sampling product referred to specific arrangements made to demonstrate to staff the qualities of products, particularly new products that were to be sold to consumers. Taste testing on the other hand was necessary to determine problems with products.

It was accepted that while Mr McKee signed the 2004 Security Memo on 5 October, he signed only that he had received the Memo. It did not signal that he accepted the Memo. It was also noted that a new Memo issued in 2005 after Mr McKee had left his employment specifically referred to unauthorised tasting. This confirms that tasting was not prohibited by the 2004 Memo and that the company had moved to close was it recognised as a loophole.

Focussing on the procedure adopted by the respondent it was submitted by and for Mr McKee that the company's investigation concentrated more on the *sampling* than the *consuming* of product. However, the employer dismissed Mr McKee for unauthorised *consumption*. It was also argued that the respondent based the decision to dismiss solely on the evidence of the videotape and then failed to produce that tape for the Investigation.

It was also argued that the respondent had not treated employees equally in the matter – two were dismissed, one was given a final warning and no action was taken against two others. This disparity of treatment alone made the dismissal unjustified.

### Respondent

For the respondent it was submitted that the Collective Agreement that covered Mr McKee states the company's rules and policies covered his employment. Mr McKee had signed a Security Memo on 5 October 2004 which clearly stipulated conduct the respondent considers serious, breaches of which may lead to the termination of employment. Further to this, during the week beginning 6 October Mr Hay, the Store Manager, had spoken to Mr McKee in relation to his lingering disquiet about possible unauthorised consumption of product by Bakery staff. It was reiterated to Mr McKee that the policy which applied to all staff was that only the Store Manager could authorise the consumption or sampling of company product.

In spite of this the videotape of Mr McKee's actions on 24 October showed him selecting a Danish from a baking tray, putting it in his mouth and eating the whole product. He also grabbed a handful of apricots and ate them as he worked. He did not taste test the product, he ate it. It was also noted that even if it were found he was taste testing the product he did not have authority to do so.

It is the company's position that it takes loss prevention very seriously as loss through theft and unauthorised consumption (by staff and customers) is a significant cost to the company. For this reason it has a zero tolerance towards unauthorised consumption and sampling.

It was submitted for the company that it had carried out a fair and thorough investigation which included meeting with Mr McKee and allowing him the opportunity to explain. This led the company to further inquiries. At the conclusion of the investigation the decision maker reviewed all the information revealed as a result of inquiries and gave unbiased consideration to Mr McKee's explanations. However, it had been concluded there had been serious misconduct on Mr McKee's part. The decision to dismiss him was reached on reasonable grounds.

Lastly, it was noted that each employee was dealt with strictly in accordance with the merits of each situation.

### **Issues to be Decided**

In determining this matter I have had to keep in mind the following legal principles (*W & H Newspapers Ltd v Oram* [2002] 2 ERNZ 448).

Was the decision to dismiss Mr McKee one that a reasonable and fair employer could have taken?

For me to be able to answer this question in the affirmative the respondent must satisfy me, not that it can prove serious misconduct on Mr McKee's part, but that it has conducted a full and fair investigation that disclosed conduct capable of being regarded as serious misconduct.

However, the employer's conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements to be imposed.

*“Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person” (New Zealand (with exceptions) Food Processing Etc IUOW Unilever NZ Ltd [1990] 1NZILR 35.*

The issues to be decided in relation to this matter:

1. Did the employer carry out a thorough and fair investigation?
2. Was the decision that serious misconduct had occurred a reasonable decision open to the employer on the basis of the investigation undertaken?
3. Was dismissal an option reasonably open to the respondent on the basis of the inquiry undertaken?

## **Discussion and Findings**

**Note:** The Authority has not seen the videotape in question. This is because it was mislaid during renovations to the store. The representative for the applicant sought to have the matter struck out because the videotape was not available. After hearing from both parties I have declined the application. It is the quality of the employer's decision that is at issue here. The evidence reveals that the decision was arrived at as a result of an investigation which included a review of the footage contained in the videotape but which also relied on other information including the admissions/information provided by the applicant, inquiries of other employees and other information available to the employer. It is unfortunate the tape was not available to assist in the investigation but in itself the absence of the tape is not fatal to the investigation and determination of the matter.

### Credibility

Mr McKee's evidence (and that of his witnesses) was contradictory and more importantly it was contravened by the weight of the evidence on some very important points e.g. that tasting is an important aspect of the training given to company bakers. This is simply not the case in respect to the training provided by the Progressive Group which excludes from its bakery apprentice training those modules involving sensory evaluation skills. Trainees are required only to “demonstrate knowledge” of the relevant baking technology and no training assessment includes taste testing or sampling of product. Further, Mr McKee's submission that taste testing is a common practice and his submission that he had a standing authority to taste test is not substantiated in light of strong evidence to the contrary.

The evidence of the respondent's witnesses was on the other hand, consistent, corroborated and supported by documentary evidence.

As a result where the evidence of the parties differs it is the evidence of the respondent's witnesses that I prefer.

## Findings

I find that Mr McKee was well aware of the company's policies that, among other things, prohibited the unauthorised consumption or sampling of company product. He specifically confirmed his understanding of these rules when he signed the Security Memo on 5 October 2004. The memo applied to all staff including the Store Manager. That memo spelt out the possible consequences of a breach of company's rules.

Mr Hay reiterated the rules relating to unauthorised consumption and sampling of company product to Mr McKee in the week beginning 6 October. Mr Hay reiterated the rules to Mr McKee because he was the senior Bakery employee. It was his responsibility to ensure those employees he managed complied with the company rules.

I find, specifically, that Mr McKee had no standing authority from the Store Manager, Mr Hay to taste test for quality control purposes. And certainly, in light of the recent confirmation of the company's rules he did not have continuing authority to taste test products from a former bakery manager, fresh food manager or store manager.

I find that shortly after these rules were confirmed by him and reiterated to him, Mr McKee was recorded on videotape consuming a whole Danish and consuming a handful of apricots. Mr McKee did not taste test these products for quality control purposes. He ate the products. Even if I am wrong on this point, Mr McKee did not have the required authority to taste these products.

Prior to concluding my findings in this matter I must address some of the submissions made by and for Mr McKee.

Much was made of a claimed distinction between '*taste testing*' and '*sampling and consuming*', the argument being that taste testing was not covered by the company's security memo. There is no valid distinction to be made, I find, as the prohibition on the consumption or sampling of company product by definition encompasses tasting, trying, testing and eating – all being words which mean and/or are substitutable for the words of the memo *consumption* and *sampling*. The fact the word *tasting* has been specifically included in latest security memo does not evidence that it was excluded in previous memos. It simply strengthens the clear meaning of the memo.

In respect of the claim that the respondent concentrated its investigation on Mr McKee having *sampled* product but that it then dismissed him for unauthorised *consumption* of product I find the allegation against Mr McKee was that he consumed company product without authorisation. The allegation was framed as unauthorised consumption because Mr McKee ate an entire Danish and he ate a handful of apricots. He did not reflect on the products to test them. He ate them. The respondent focussed on unauthorised consumption throughout the investigation and widened its description of the activity observed only in response to the distinction Mr McKee made (and continues to make) that he was taste testing for quality control purposes. The respondent never varied in the nature of its allegations against Mr McKee or in the conclusions it reached that gave rise to his dismissal. It rejected Mr McKee's explanation that he was taste testing product and concluded he had consumed company product without authorisation. Consistent with this conclusion Mr McKee was dismissed for this reason.

I also find that it is not the case that the company based its decision to dismiss Mr McKee on the evidence of the videotape alone. The decision to dismiss Mr McKee was based on the findings of a broad inquiry which included inquiry of the worker and an unbiased consideration of those findings and the worker's explanations.

Lastly, I am satisfied there has been no disparity of treatment in this case.

### Conclusion

In concluding my findings on this point I have reminded myself that an employer considering allegations of serious misconduct is not required to conduct a criminal or civil trial or to employ a judicial process (*The Warehouse Ltd v Cooper* [2000] 2 ERNZ 351). Nor does the employer have to show beyond reasonable doubt that serious misconduct occurred. As noted, it must show that following a thorough and substantially fair investigation it has reason to believe there has been serious misconduct on the part of the worker.

I find the investigation into the conduct complained of was thorough and fair in all respects. It disclosed conduct by Mr McKee - a senior employee who had the duty as a departmental manager to ensure compliance with company rules - that was capable of being seen as serious misconduct. Having arrived at that position the company was entitled to elect to dismiss Mr McKee.

### **Determination**

The respondent has demonstrated that dismissal was an option open to it following a thorough and fair investigation. I must therefore decline Mr McKee's application. He is not entitled to the remedies he seeks.

### **Costs**

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott  
Member of Employment Relations Authority