

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 240
3041654

BETWEEN NICOLE MOORE
Applicant

AND THE WAREHOUSE LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Adrian Plunket, advocate for the Applicant
Penny Swarbrick, counsel the Respondent

Investigation Meeting: 16 April 2019 at Christchurch

Date of Determination: 23 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Ms Moore) says that she was unjustifiably dismissed by the respondent (the Warehouse) on 28 May 2018.

[2] The Warehouse resists that claim.

[3] Ms Moore had been employed by The Warehouse on 26 April 2012 as a shop floor assistant.

[4] There was an incident on 30 April 2018 which was the proximate cause of The Warehouse's decision to dismiss Ms Moore. On that date, Ms Moore marked down from the normal retail price of \$20 each, six bags of Whiskas cat biscuits by 50% such that each bag was then priced at \$10, subsequently purchased four of those bags and

then at the end of her shift on that day, Ms Moore left the workplace for a period of three week's annual leave.

[5] While Ms Moore was away on leave, the nature of the Whiskas transaction was called into question and the employer conducted a preliminary investigation to see if it had reason to be concerned.

[6] When Ms Moore returned to the workplace on 21 May 2018, The Warehouse had decided that a disciplinary process was required and to that end, Ms Moore received a letter requesting her attendance at a disciplinary meeting on 24 May 2018.

[7] That meeting proceeded in the normal way, was adjourned to provide The Warehouse with the opportunity to conduct further inquiries and reconvened on 28 May 2018. On that date Ms Moore's dismissal without notice for serious misconduct was confirmed.

[8] A personal grievance was raised by letter dated 1 July 2018.

Issues

[9] The question for the Authority is whether a good and fair employer in The Warehouse's position could have dismissed Ms Moore after conducting a full and fair investigation.

[10] It will be useful if the Authority considers the following questions:

- (a) What happened during the Whiskas transaction?
- (b) How did The Warehouse deal with this? and
- (c) Does Ms Moore have a personal grievance?

What happened during the Whiskas transaction?

[11] It is common ground that Ms Moore's role as a shop floor assistant entitled her to mark down the price of stock and indeed, she was supposed to be using her initiative to identify stock items which were appropriate for mark down.

[12] The stock items are marked down for a variety of reasons but in respect to food products (including food for cats) The Warehouse's policy is to mark down the price of short dated product, that is to say product which is coming up to its use by date.

[13] Ms Moore identified the Whiskas cat food as being in that category and although strictly speaking the stock line ought not to have been reduced in price until the day after Ms Moore acted, The Warehouse accepted that her identifying the product for price reduction was in itself appropriate.

[14] What was not appropriate, according to The Warehouse, was Ms Moore's complete failure to confirm with a more senior staff member the fact of the reduction and the price that the product was reduced to.

[15] Not only was there no attempt by Ms Moore to get the price reduction approved by a more senior staff member but the price which she attributed to the reduced item would, it seems, not have been approved by a more senior employee at any event because it was less than the cost price of the item which meant that on any construction of events, The Warehouse would be selling those items at below cost.

[16] Ms Moore maintained that she did not believe that Jeanette Beacham, the senior staff member she would normally have asked, was on duty on the day in question. In fact, Ms Moore was quite mistaken in that regard as Ms Beacham was on duty and regularly worked that day of the week and indeed met with Ms Moore when Ms Moore checked out of the store the items that she had purchased.

[17] In any event, Ms Moore maintained that at the time she attended to the mark downs, she was not aware that Ms Beacham was on duty on that particular day.

[18] Moreover, Ms Moore maintained that she did not know how to access the information about the cost price of the Whiskas cat biscuits. The evidence before the Authority is that all members of The Warehouse floor staff have access to iPods which contain the pricing information for all products in the store and that Ms Moore would have been trained in the use of that equipment.

[19] Mr Fergusson, the store manager at the relevant time, indicated that the system was very straightforward to use and would have been accessible by any person. As a matter of fact, Ms Moore did have an iPod with her at the relevant time.

[20] Ms Moore's position was that she had, during her shift, identified the Whiskas cat food as being short dated, and had marked the product with yellow clearance stickers and then put the product back on the shelf so that customers could purchase the stock at the reduced price.

[21] The Warehouse has two sets of relevant stickers for the purposes of dealing with reductions in stock price.

[22] There is a small yellow sticker which contains the words "Reduced to Clear" which is placed on items that are in that category. Ms Moore says that she placed four such stickers on the four front bags of Whiskas cat food on the shelf. There were six bags by common consent; Ms Moore's evidence is that she stickered only the front four.

[23] Ms Moore should also, strictly speaking, have affixed another sticker to the reduced stock which contains a barcode recording the mark down price of the item. The purpose of this second sticker obviously is to save time at the checkout; the effect of the barcode is to simply carry the reduced price instead of the original barcoded price.

[24] Ms Moore says that she was interrupted in the performance of the process of reducing the price on these stock items, perhaps to be called to serve at checkout, and accordingly, it was not until the very end of her shift that she says that she had an opportunity to go back to the pet food area and check to make sure that she had appropriately completed the work that was necessary to reduce the price on these items.

[25] I should say that Ms Moore's evidence on this part of the transaction is strongly disputed by The Warehouse. The Warehouse does not accept that Ms Moore ever went to the pet food area in the middle of her shift, as she claims, and started the process then of reducing the price on the Whiskas cat food. The Warehouse's position is that Ms Moore's evidence on that point is not believed and there is no independent verification to confirm that she did visit the cat food area prior to the end of the shift.

[26] It is clear that a few minutes before the end of her shift, the CCTV footage of the checkout area shows Ms Moore going to the pet department with stickers in her hand, then re-emerging with a trolley and four bags of cat food on the trolley.

[27] The evidence from Ms Moore was that when those four bags of cat food came back to the checkout area in the trolley pushed by herself, two of the bags had the yellow reduced to clear stickers on them and two had not. Again, that evidence is disputed by The Warehouse who maintained that their vision of the CCTV footage does not disclose the presence of the yellow reduced to clear stickers and I must agree with them. I accept that the stickers in question are small; I was shown an example during the hearing but even so, I am unable to detect the presence of yellow reduced to clear stickers on any of the four bags of cat food so I prefer The Warehouse's evidence on that point to Ms Moore's recollection of events.

[28] It is common ground that when Ms Moore came back into the checkout area with the trolley with the four bags of cat food on them, she is seen removing the reduced to clear bar sticker from the bags of cat food and placing them on paper. This is to facilitate the checkout operation such that the checkout staff member does not have to source the barcode on each bag.

[29] What happens next is most important because immediately prior to going through the checkout with the four bags, Ms Moore comes across Ms Beacham who has been working in the store all day. Indeed, I was told during The Warehouse's evidence that not only was Ms Beacham at the store all day but that it was one of her regular days of work and that Ms Moore knew, or ought to have known, that fact.

[30] In any event, it is apparent from the video that is available to me that Ms Beacham and Ms Moore did have a brief conversation, perhaps no more than a minute and a half or so.

[31] At my investigation meeting I was at pains to ask Ms Moore why she did not engage with Jeanette Beacham when she met the latter staff member at checkout. Presumably, this would have been an ideal opportunity for Ms Moore to get Ms Beacham's permission, albeit belatedly, for the transaction that she was then in the process of concluding.

[32] Ms Moore maintained that Ms Beacham did not either confirm or deny the transaction with her despite the fact Ms Moore says she asked Ms Beacham to do so. If that is right, Ms Beacham's behaviour seems extraordinary as it would have been clear to her on the evidence of her own eyes, that Ms Moore was buying reduced, short dated product. But, and it is a big but, she would only have known that if the reduced to clear stickers were indeed on the product and as I have already made clear, neither The Warehouse nor my own examination of the video evidence could find the presence of those yellow reduced to clear stickers.

[33] In their absence, Ms Beacham would have no way of knowing that the transaction was unusual.

[34] Ms Moore of course maintained to me that the yellow reduced to clear stickers were on the product when she talked to Ms Beacham and so Ms Beacham would have been aware of the nature of the transaction and allegedly made no comment about it. But that evidence relies on the yellow reduced to clear stickers being on the product or at least on two of the bags. And as I have already noted, neither the employer nor indeed I can see any evidence of those stickers being there.

[35] The next thing that happens is that Ms Moore goes through the checkout and in doing so, tells her work colleague who is the checkout operator about the cheap cat food

and the checkout operator then departs from her post, goes off to the pet food area and claims the last two bags for herself, again at the reduced price.

[36] The transaction eventually completed, Ms Moore leaves the store at the end of her shift with the four bags of cat food in her possession and commences her three weeks of annual leave.

How did The Warehouse deal with this?

[37] The manager of the Belfast store at the relevant time was Neil Fergusson. His evidence was that one of his senior team leaders conveyed to him in early May that Jeanette Beacham had indicated a concern with the mark down in price of the Whiskas cat food which she had not authorised.

[38] It is inconceivable that Ms Beacham would have waited to raise this issue as a problem in early May if she had known about it on 30 April, when she met by chance with Ms Moore at checkout. That she raises the matter after the event suggests it is more likely than not that the bags of cat food which she saw Ms Moore in possession of were not stickered with The Warehouse's reduced to clear labels, but indeed had no such stickers on them. If they had, surely Ms Beacham would have raised the matter immediately with Ms Moore.

[39] Ms Moore put into evidence at my investigation meeting a document which she says that she wrote a week before my investigation meeting. It purports to be her commentary on the video footage and contains a representation of Ms Moore's supposed conversation with Ms Beacham in which Ms Moore is supposed to have disclosed to Ms Beacham the fact of the mark downs in price of the Whiskas cat food and allegedly not got any substantive response from Ms Beacham.

[40] I have already made the observation that it seems to me inconceivable that Ms Beacham would have waited until 2 May 2018 to raise this matter with one of her superiors if she had known about it since 30 April 2018, and in fact would have had the

opportunity on that very date of confronting the subordinate responsible for the subject transaction.

[41] So, for the avoidance of doubt, I do not accept Ms Moore's recollection of her discussion with Ms Beacham at the checkout counter on 30 April 2018. I should say also for the sake of completeness that, because this purported recollection of the conversation was tabled at my investigation meeting it had not been seen previously by The Warehouse, and so The Warehouse would not have had an opportunity to put that version of events to Ms Beacham.

[42] I did consider requesting The Warehouse to do precisely that, but I am satisfied that the surrounding particulars identify Ms Moore's recollection of that conversation as an ex post facto rationalisation.

[43] The Warehouse's Mr Fergusson commenced a preliminary investigation. He spoke with Ms Beacham, the duty manager on 30 April 2018 and later with the checkout operator who had processed Ms Moore's purchase of the subject cat food. It was that checkout operator who had alerted Ms Beacham to the fact of the marked down transaction.

[44] Mr Fergusson viewed the video footage that was available and identified the features of the transaction that could be seen from the video recording. Amongst other things, he noted that there were no yellow clearance stickers on the bags of cat food in the trolley. That is significant for two reasons. First, the absence of those stickers would make it impossible for anyone to identify the transaction as being of reduced price stock but secondly and most importantly, the absence of those stickers at checkout gives the lie to Ms Moore's claim that she had put reduced to clear stickers on the product earlier in her shift to give customers the opportunity of purchasing the product.

[45] I did ask Mr Fergusson whether he had any information about the likely turnover of that sort of product to see if there was another way of getting independent verification of the likelihood of the product being purchased by ordinary clients before

it could be claimed by Ms Moore. Mr Fergusson indicated that there were too many variables to enable him to give any accurate answer to that question.

[46] Put shortly, The Warehouse's preliminary investigation suggested that there was a case to answer for Ms Moore and accordingly she was asked to attend a disciplinary meeting on 24 May 2018. As happens frequently in such cases, The Warehouse adjourned the initial disciplinary meeting to conduct further inquiries based on the responses that Ms Moore had given, but the further inquiries only suggested more doubt in Ms Moore's explanations.

[47] A further and final meeting took place on 28 May 2018 which resulted in Ms Moore's dismissal.

Does Ms Moore have a personal grievance?

[48] I have not been persuaded that Ms Moore has any personal grievance. I am satisfied that it was available to a fair and just employer after conducting a proper investigation to conclude that Ms Moore could be dismissed for serious misconduct. That serious misconduct was an abuse of discounts, conduct which undermines trust and confidence between the parties, and a failure to act with honesty and integrity.

[49] I do not agree with Ms Moore's advocate's characterisation of the matter as being a failure to get permission to mark down the price of stock items. I am satisfied with my formulation of the matter that if Ms Moore had simply failed to get authority to reduce the price of the cat food but not attempted to purchase it at the reduced price, she would simply have been counselled by the employer to follow due process. What makes the behaviour culpable is the intention to take advantage of the reduced price which itself has been affected by an improper process.

[50] To put that conclusion around the other way, if Ms Moore had sought to reduce the price of the cat food, got proper authorisation to do that and got the price point right, and then purchased, there could be no criticism of her whatever.

[51] But what happened here was that Ms Moore proceeded to improperly reduce the price of a stock item, failed to get the appropriate authorisation for the price reduction which itself was illicit, being below cost price, and then herself took advantage of that reduced price by purchasing four bags of the product.

[52] I am satisfied that any employer in The Warehouse's position could have concluded that characterisation of the transaction fundamentally impaired the continuation of trust and confidence between the parties, as well as self-evidently being a breach of the house rules and normal company processes.

[53] It is a truism that the law on justification for a dismissal requires only that the subject employer come to one of the possible outcomes that a fair and reasonable employer could decide upon. It does not have to be the only outcome in order to meet the test.

[54] It follows that provided that the outcome achieved by The Warehouse is one of the outcomes that a fair and reasonable employer could arrive at, then the test is met, and I am satisfied that is the position here.

[55] There is nothing in the investigative process that The Warehouse undertook which seems to me inappropriate. The Warehouse is a large employer with a significant human resources department and as a consequence it has experience in dealing with employment relationship problems. I have not been persuaded that there is anything wrong with the process that Mr Fergusson undertook on behalf of his employer.

[56] I think that he properly, fairly and sufficiently investigated the allegations against the employee, made clear to that employee precisely what it was that The Warehouse was concerned about, gave the employee a reasonable opportunity to be heard and genuinely considered the employee's responses. So, I am satisfied that s 103A(3) of the Employment Relations Act 2000 is met.

[57] Nor do I think that there were any defects in The Warehouse's process which were sufficiently major to result in the employee being treated unfairly. It will always

be the case that processes can be improved and that, looked at in the cold light of day, questions can be asked about whether inquiries might have been directed to different quarters or proceeded with in a different way.

[58] But the short point is that there is no council of perfection in respect to employment investigations; it is enough if the employer does a reasonable workmanlike job which contains no major blemishes and causes no unfairness to the employee.

Conclusion

[59] Ms Moore has no personal grievance and is therefore not entitled to any remedies.

Costs

[60] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority