

BETWEEN MAGDALENE MUDGE
 Applicant

AND BOTANY PLASTICS LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Graeme Norton for Applicant
 Glenys Steele for Respondent

Determination: 16 April 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Magdalene Mudge ("Ms Mudge") asks the Authority to investigate her summary dismissal on 13 June 2006 from Botany Plastics Limited ("Botany Plastics"). Ms Mudge claims the summary dismissal is unjustifiable and that she is owed wages and holiday pay.

[2] Botany Plastics says that it summarily terminated Ms Mudge's employment consequent upon her written confession that she had stolen \$613.00. It says the dismissal is substantively justified and any procedural defects *"should not be subject to pedantic scrutiny given the contribution of the Applicant in voluntarily confessing"*.

[3] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[4] Ms Mudge commenced employment with Botany Plastics as a sales assistant on 9 May 2006. The terms of her employment were recorded in a written individual employment agreement.

[5] At about 8.55 am on 13 June 2006 as she was starting work, Ms Mudge was called into director Mrs Mary Anne Murray's ("Mrs Murray") office. Present as well, was Ms Cherie Burns ("Ms Burns") the office manager. Ms Mudge was not given any advance notice of the meeting or

any information about what was to be discussed. Mrs Murray had called the meeting to put to Ms Mudge an allegation that she ("Ms Mudge") had stolen money.

[6] Mrs Murray had made a number of enquiries prior to meeting with Ms Mudge on 13 June 2006. She had contacted the Police on the weekend of 10 - 11 June 2006 seeking advice and assistance in relation to theft by an employee. She had spoken with other employees and been told that Ms Mudge had only come to work on 8 June 2006 because she needed money for her rent.

[7] Mrs Murray and Ms Burns say that Ms Mudge confessed to theft saying "*I did it - I took the money.*" Mrs Murray gives this evidence:-

36. I thanked her for being honest at least at this point and not covering up. I informed her that due to her young age and confession I would not lay charges and that I would expect the money to be repaid out of any wages/holiday pay due to her and the balance over three months. The applicant agreed to this repayment. I knew she would not have the money to repay it immediately. Reflectively I said this is terrible. This is a sad day. You do not need a criminal record. I also actually said, you need to have a talk to God.

[8] The Authority prefers Ms Mudge's evidence and finds that Mrs Murray said to Ms Mudge "*We are dismissing you*". Ms Mudge asked "*Why?*" and Mrs Murray told her she had stolen \$600 and the money had been traced back to her. The Authority finds that Mrs Murray had with her a bundle of computer records but Ms Mudge was not permitted an opportunity to inspect them or challenge the contents.

[9] Mr Murray then told Ms Mudge she would need to pay the money back. She said that Ms Mudge had stolen the money. Ms Mudge said that she had not. At that point Ms Murray threatened to call the Police. Ms Mudge was intimidated by this threat. Mrs Murray then asked Ms Mudge to write a statement. Ms Mudge accepted pen and paper from Mrs Murray. Ms Mudge wrote and added her signature:-

*I Maggs Mudge have stolen from payless plastics. The amount of \$613. I agree to repay this money in full from wages owing & holiday pay owing & any balance I will pay in the next 3 months. I accept that I am being dismissed from my position today
M Mudge (signed) 13/06/06*

[10] The Authority accepts Ms Mudge's evidence that Mrs Murray dictated this note and that when Mrs Murray specifically dictated that Ms Mudge had stolen, Ms Mudge objected. The Authority prefers Ms Mudge's evidence that Mrs Murray threatened several times to call the Police if Ms Mudge did not write that she had stolen money.

[11] This is the evidence Ms Mudge gives to the Authority which the Authority prefers over Mrs Murray's evidence:-

22. *Mary Anne Murray did threaten to call the police. I was very scared about this threat and I did not have anyone with me and I felt intimidated. Mary Anne Murray said I need you to write something out. I did not have any idea what it was that I had to write down. I believe that Mary Anne Murray saw how scared I was when she said that she was going to call the police.*

23. *While I have not had any convictions and I have not had any encounter with the police, I am still very scared of them as I think a lot of young people are. When Mary Anne Murray talked about getting the police in to talk to me I became very frightened and I felt I should say something to stop the police coming in. I asked what she wanted me to write down.*

24. *When Mary Anne Murray said you can write something for me, I said OK and took a pen and paper from her. She started speaking and was dictating what was to be written in the note. She started by saying "I Maggs Mudge have stolen \$613 ..." I froze at this point and said no I haven't. Mary Anne Murray said do you want me to get the police in here to help you write it down.*

25. *Mary Anne Murray said that I needed to write this down so to(sic) that she had a record of where the money has come from. I remember that I sat there for a while thinking about should I walk out. Mary Anne Murray was talking during this time and I recall that she said several times she was going to call the police if I did not write down that I had stolen the money.*

26. *With the threats about calling the police I eventually wrote down the words that Mary Anne Murray dictated. This did not come from me. The only part I agree with was that I he(sic) had been told I was being dismissed today.*

[12] Having seen and heard the witnesses, the Authority prefers Ms Mudge's evidence to that of Mrs Murray and Ms Burns. Ms Burns' evidence is unreliable because its chronology is inconsistent with the hand written note. As well, Mrs Murray's evidence is that Ms Mudge was dismissed after the written confession but that is not consistent with the written note either. But it is consistent with Ms Mudge's evidence however that she was dismissed at the commencement of the session.

[13] Mrs Murray denies threatening Ms Mudge with the Police. In her evidence she disputes the inference that she is a threatening and coercive person. But a letter Mrs Murray wrote to Ms Mudge's representative of 12 July 2006 does contain a threat of the kind Ms Mudge alleges:-

In view of these latest circumstances, it leaves me with no alternative than to give you on behalf of your client Ms Mudge 5 working days to retract the personal grievance against myself/and my company and for the entire balance due to be paid within that time and all uniforms that she has not returned, returned otherwise I will be putting this matter in the hands of the police forthwith.

[14] Ms Mudge was sent an invoice for \$206.71 being the difference between what she was alleged to have stolen (\$613) and her severance pay (\$406.29). The invoice had this endorsement:-

This debt must be paid within a three month period from the date of this invoice otherwise charges will be laid.

The merits

[15] The Authority determines Ms Mudge's position is the more meritorious.

[16] The Authority finds that the dismissal was unjustifiable. Ms Mudge was informed she was dismissed without being permitted to be heard in her own defence. She was not given any advance notice of the allegations against her. Nor was she invited to have a support person or representative present with her in the meeting at which she was dismissed. She was not afforded any of the minimum requirements of procedural fairness.

[17] Mrs Murray did not have convincing and compelling evidence of serious misconduct by Ms Crawford to justify Ms Mudge's summary dismissal because she had not conducted any enquiry at all that involved Ms Mudge. Having completely failed to conduct a fair process, Mrs Murray's decision to dismiss was unfair and cannot be justified.

[18] I must now separate out Mrs Murray's decision to dismiss and evaluate it against the specified objective standard of what a fair and reasonable employer would have done in these circumstances. The circumstances include Ms Mudge's age. She was a young adult aged 17. The Authority accepts that she felt intimidated by the way her employer treated her in the meeting where she was dismissed. The Authority accepts that in the circumstances there is a real risk that Ms Mudge was intimidated into confessing that she had stolen money from her employer. For that reason, it is unsafe to rely on the signed confession, Botany Plastic's investigation and the conclusion of serious misconduct. Botany Plastic's actions through Mrs Murray were not actions that a fair and reasonable employer would have taken.

[19] Standing back and assessing matters objectively from the perspective of a fair and reasonable employer in these prevailing circumstances, I conclude that Botany Plastic Limited's decision to dismiss Ms Mudge was not what a fair and reasonable employer would have done.

The Determination

[20] For the reasons set out above, I conclude Ms Mudge was unjustifiably dismissed. She has a personal grievance arising out of her dismissal and she is entitled to remedies in settlement of it.

[21] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Employment Relations Act 2000 to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find there was no proved blameworthy conduct on Ms Mudge's part that would constitute contributory fault. There is therefore, no basis for reducing the nature and extent of remedies to her.

[22] Ms Mudge seeks reimbursement of lost wages in the gross sum of \$5,381.32. I am satisfied that she took steps to mitigate her losses by application for other employment. **Botany Plastics Limited is ordered to pay to Magdalene Mudge the gross sum of \$5,381.32 as reimbursement of lost wages.**

[23] Ms Mudge claims \$8,000.00 compensation. Having regard to her evidence, the nature of the allegations and the particular aggravating circumstances of her dismissal, that amount is entirely appropriate. **Botany Plastics Limited is ordered to pay to Magdalene Mudge the sum of \$8,000.00 as compensation.**

[24] Ms Mudge is owed wages deducted from her final pay which should not have been. **Botany Plastics Limited is ordered to pay to Magdalene Mudge the sum of \$406.29 as arrears of wages.**

Costs

[25] In the event that Ms Mudge seeks costs, the parties are encouraged to resolve that question between them, but failing such agreement, Mr Norton is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Steele is to lodge a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority