

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 517  
5422497

BETWEEN

EMMA PAKI  
Applicant

A N D

THE WAREHOUSE LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Richard McNaughton, Advocate for Applicant  
Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 19 August 2013 at Hamilton

Date of Determination: 13 November 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] By determination issued as [2013] NZERA Auckland 482, the Authority dealt with an application to reopen filed by the applicant (Ms Paki). The application was made after the Authority had concluded its investigation but before it issued the substantive determination on that investigation.

[2] As the determination just referred to makes plain, the application to reopen was dismissed. The present determination deals with the substantive issue.

**Employment relationship problem**

[3] Ms Paki alleges that she was unjustifiably dismissed from her employment by the respondent (The Warehouse). Initially, she sought interim reinstatement but on the footing that the Authority was able to deal with the matter promptly, the

investigation of Ms Paki's claim proceeded only as a substantive hearing as a consequence of which permanent reinstatement is still sought.

[4] The Warehouse resists Ms Paki's claims in their entirety, maintaining that she was not unjustifiably dismissed, is not entitled to any remedies, and that reinstatement in particular would neither be practicable nor reasonable.

[5] Ms Paki had been employed by The Warehouse in Morrinsville for almost a decade when the events complained of happened.

[6] On 8 May 2013, Ms Paki was working at the checkout and served a customer who paid for a greeting card with a \$50 note. Ms Paki gave change for a \$10 note. The customer disputed that and Ms Paki began to argue with the customer. The supervisor intervened to try and calm Ms Paki down and, amongst other things, instructed Ms Paki to cease her engagement with the customer.

[7] Notwithstanding that, Ms Paki continued to argue with the customer while the till was being checked. The till check proved the customer's version of events, the correct change was given and the customer departed.

[8] Subsequently, the customer's wife made a formal complaint indicating, amongst other things, that her husband would never attend at The Warehouse again as a consequence of the treatment he had received.

[9] There was a disciplinary meeting on 11 June 2013 at which Ms Paki was represented by her advocate. Ms Paki acknowledged that the behaviour constituted misconduct or serious misconduct but sought to put in mitigating factors.

[10] At the conclusion of the meeting, The Warehouse formed a preliminary view that the behaviour constituted serious misconduct and that summary dismissal was the appropriate response. The meeting then adjourned for further consideration and input from both sides. It had been a lengthy meeting of some four hours.

[11] There were further exchanges between the parties and on 20 June 2013, The Warehouse confirmed its decision that Ms Paki should be summarily dismissed.

## **Issues**

[12] The questions for the Authority to address are as follows:

- (a) Was the conduct complained of serious misconduct; and
- (b) Was the decision to dismiss appropriate; and
- (c) Was The Warehouse's procedure appropriate?

**Was the behaviour serious misconduct?**

[13] It is common ground that at the disciplinary meeting on 11 June 2013, Ms Paki accepted that her behaviour fell well short of the standards required of staff at The Warehouse and indeed that her behaviour constituted serious misconduct. Her defence to the employer's allegations was based on the contention that dismissal was not the appropriate remedy and that she had a number of mitigating factors which, when considered, served to explain her conduct. One of the contentions made on Ms Paki's behalf is that notwithstanding her acknowledgment that the behaviour complained of was serious misconduct, the employer ought not to have simply accepted that and ought to have conducted further inquiries.

[14] But that submission is difficult to square with the facts. First of all, given Ms Paki's acknowledgment that her behaviour constituted serious misconduct, that constituted a meeting of the minds between the parties to the employment relationship about how to assess the behaviour and on the basis of her acceptance that the conduct amounted to serious misconduct, it was fair for the employer to simply move on and address the consequences of the behaviour.

[15] Even if that view of matters is not accepted, it is difficult to see how the conduct complained of, and readily acknowledged by Ms Paki as having happened as described, is not at the worst end of the continuum in a retail sales environment. After all, this was a situation where Ms Paki allowed an ordinary error about the giving of change to escalate into a full scale argument where she was rude to a customer and refused to accept the guidance of her supervisor to effectively withdraw and apologise.

[16] Indeed, rather than withdraw and apologise, Ms Paki chose to continue to engage with the customer to the extent of challenging his veracity and the whole incident was played out before the CCTV cameras together with other customers and other staff members. Even if Ms Paki had not accepted that the behaviour was serious

misconduct, it is difficult to see how any retailer could have reached any conclusion other than one of finding serious misconduct.

[17] In addition to Ms Paki's own admission, The Warehouse spoke with the wife of the customer, viewed the CCTV footage, got a statement from the supervisor who was physically present and tried to redirect Ms Paki into a more productive form of engagement with the customer, as well as talking with another customer unrelated to the customer at the centre of the incident, who saw the whole thing. The Authority is frankly at a loss to know what else The Warehouse ought to have done.

[18] The Warehouse concluded that Ms Paki had received The Warehouse's usual training on how to behave, had also received The Warehouse's house rules and signed for them and yet notwithstanding that training and knowledge of the nature of her obligations, Ms Paki had not only commenced an argumentative and disrespectful exchange with a customer, but more importantly had persevered with that approach when told not to by her supervisor. The incident was in the most public part of the store, the checkout, and the consequences of it were that that particular customer has indicated to The Warehouse that he will never set foot in the store again.

[19] The house rules draw a distinction between intimidating behaviour on the one hand, which is regarded as serious misconduct, and rudeness to customers which is simply misconduct. Not surprisingly in the Authority's opinion, The Warehouse decided this behaviour was intimidating rather than simply rude. It was intimidating because the customer refused to come back ever, and it was intimidating because even the supervisor who dealt with the matter felt intimidated by Ms Paki's behaviour.

[20] It is frankly difficult to see how the behaviour which Ms Paki herself acknowledged could be seen as anything other than intimidatory in nature. If she had realised the error of her ways when remonstrated with by the supervisor and immediately withdrawn and apologised, than that could properly have been considered as mere rudeness to a customer, but to persevere with the argument with the customer when she was told not to by the supervisor and to do that in full view of colleagues and other customers is simply inimical to the trust and confidence which must inform an employment relationship.

[21] The old business adage that "the customer is always right" would seem to be directly in point here. As it happens, the customer was right and Ms Paki was

completely wrong, but even if that were not the factual position, arguing with a customer in a public environment is simply not good retail practice, not something The Warehouse trains for, and not something which it ought to accept as appropriate from its staff.

[22] For the avoidance of doubt, the Authority rejects absolutely the claim made on Ms Paki's behalf that The Warehouse has somehow failed to make a proper assessment of the factual matrix because of Ms Paki's concession that her conduct constituted serious misconduct. The Authority is satisfied that even if Ms Paki had not made that concession, The Warehouse could properly have formed the view that the conduct complained of did constitute serious misconduct. Furthermore, the Authority rejects the suggestion made by the advocate for Ms Paki that The Warehouse was somehow "overcome and confused" by Ms Paki having accepted that the conduct constituted serious misconduct. In the Authority's opinion, The Warehouse could, should and did determine that the conduct complained of was serious misconduct and that conclusion would have been reached even if Ms Paki had not conceded the point.

[23] Accordingly, the Authority's considered view is that the behaviour complained of constituted serious misconduct.

### **Was termination of employment the appropriate response?**

[24] Ms Paki's principal focus, certainly at the time that the parties were engaging in the disciplinary process, was on this aspect. She acknowledged the conduct complained of was serious misconduct but thought that there were mitigating factors and that the employer should adopt some other approach short of dismissal.

[25] Of course the difficulty with that proposition is that, if The Warehouse had lost trust and confidence in Ms Paki, then any alternative short of dismissal would have been entirely unpalatable.

[26] What is more, it is plain as can be that The Warehouse did consider alternatives to dismissal. It certainly had ample opportunity to do so in a very long disciplinary meeting.

[27] Further, it was encouraged to consider a raft of matters put up on Ms Paki's behalf as mitigating factors. It was suggested for Ms Paki that she had "*had a bad*

*day*". While that might have been true as far as it went, none of the mitigating factors went any distance in explaining why she did what she did or gave any particular comfort that the incident was so far out of character as to be unlikely to be repeated.

[28] The mitigating factors included an episode of domestic violence when Ms Paki was a victim, dealing with issues relating to an abnormal cervical smear test, struggling with inadequate income, eyesight problems and an inability to afford new glasses and a long trail of unsuccessful applications for positions within The Warehouse group.

[29] The evidence for The Warehouse's decision-maker was that while all of those matters might have contributed in some way to the events complained of, the behaviour in question was so extreme as to call into question the continuation of Ms Paki's employment.

[30] Indeed, the decision-maker described Ms Paki's conduct as "appalling" and as "a serious breach of our company expectations of how customers should be treated".

[31] The Warehouse's decision-maker also emphasised that he was influenced by the fact that Ms Paki was unable to be dissuaded from continuing to argue with the customer even when she was told by her supervisor to desist, and by the fact that she had to be calmed down physically, afterwards.

[32] The Warehouse also was influenced by Ms Paki's history which exhibited previous episodes where her attitude was in issue and the Authority is satisfied that The Warehouse specifically turned its mind to the question whether a final warning would suffice and that that option was rejected because every role in the store "*required customer interaction of some sort*".

[33] The evidence before the Authority makes it absolutely plain that all of the pleas in mitigation made on Ms Paki's behalf were considered by The Warehouse because the documentary trail of the disciplinary meeting discloses that each and every one of those matters was responded to specifically by The Warehouse's decision-maker. It follows that it cannot be right, as Ms Paki's closing submissions maintain, that The Warehouse did not consider her representations in mitigation.

[34] The Authority is satisfied that The Warehouse correctly assessed and appropriately responded to the various issues of mitigation. Two examples will

suffice. The issue of domestic violence, for instance, had occurred some months prior to the events complained of and the evidence before the Authority is that Ms Paki had herself assured the employer that she was fine after that incident so it is a little difficult to see how it can now help to explain entirely unprofessional behaviour towards a customer, particularly some months later. Further, the abnormal cervical smear issue, while no doubt a background concern if there had been ongoing symptoms, was not actually notified to her until after the incident on 8 May 2013.

[35] Submissions for Ms Paki also seek to make something of the various previous issues that The Warehouse had had with Ms Paki's attitude and in particular a personal experience that the store manager had had with Ms Paki which resulted in him having to remonstrate with her. Ms Paki appears to contend that it is somehow inappropriate of The Warehouse to consider those earlier episodes as part of the totality of material it needs to reflect upon in a disciplinary environment.

[36] But it is plain on the evidence that The Warehouse's store manager told Ms Paki's advocate that the various previous episodes referred to on her personnel file would be taken into account in assessing The Warehouse's response to the current disciplinary issue, if The Warehouse got to the point of concluding that there was a current allegation to answer. It was also made clear that the historical matters would not be used to assess whether the most recent matter was true or not, only that those historical issues would be considered as part of the totality of the evidence when determining what outcome was appropriate.

[37] In making that clear, The Warehouse was doing no more than accurately stating the law. Refer Judge Couch's decision in *A v. Pacific Blue*. The Warehouse is entitled to take into account previous disciplinary issues, whether formal or informal, and it quite properly gave notice to Ms Paki's representative that that was its intention. There can be no criticism of that process as it is in accord with legal principle. As his Honour Judge Couch said in *Pacific Blue Employment and Crewing Ltd v. B* [2010] NZEMPC 112:

*Section 103A of the Employment Relations Act 2000 requires the Authority and the Court to assess an employer's conduct "in all the circumstances". The width of that requirement was emphasised by the full Court decision in Air New Zealand v. V. I note also the decisions of Judge Travis in Butcher v. OCS Ltd and Judge Shaw in Arthur D Riley & Co v. Wood. In both cases the Court had regard to the decision of*

*the United Kingdom Court of Appeal in Airbus UK Ltd v. Webb which was to the effect that all past conduct, even that which has been the subject of expired warnings, might properly be taken into account by an employer in making a decision to dismiss.*

[38] In all the circumstances, the Authority's considered view is that it was available to The Warehouse to conclude that termination was the only possible response available, having considered the "appalling" nature of the conduct, the history of attitude problems and the inadequacy of any of the mitigating factors in explaining how a properly trained and experienced employee could consider it appropriate to quarrel with an elderly customer over the giving of change to such an extent as to intimidate the customer and the attending supervisor and to continue that behaviour even when told to desist by the supervisor. It was available to The Warehouse to conclude that dismissal was the only possible outcome.

#### **Were there procedural deficiencies?**

[39] Ms Paki's submissions allege a number of procedural deficits. The Authority is satisfied that none has any force or effect.

[40] Dealing first with the allegations about the presenting of the employer's concerns, there is conflict between the parties as to whether Ms Paki received what is called a Step One notice. This is the notice The Warehouse issues to inaugurate a disciplinary process. While Ms Paki initially alleged that she had not been provided with this document, she subsequently conceded in cross-examination that she might not have seen it in the envelope. Conversely, The Warehouse's store manager gave clear unequivocal evidence that he handed the document to Ms Paki when he met with her to advise her there was a complaint.

[41] Even if the store manager is mistaken about handing that document to Ms Paki, and the Authority thinks that unlikely, the evidence is that both at the initial notification where the store manager met with Ms Paki and at the subsequent disciplinary meeting, the store manager went through the allegations point-by-point, by reading the document.

[42] Furthermore, if Ms Paki had not been clear about the nature of the allegations made against her, it is difficult to understand why she would not have protested that at the time. She was represented but there is no evidence that she protested any failure by The Warehouse to follow due process. The Authority rejects that suggestion.

[43] The alleged failure of The Warehouse to consider the mitigating factors has already been commented on at length. The Authority is satisfied that The Warehouse gave those views appropriate consideration.

[44] Ms Paki and her representative appear to have entirely misconceived the nature of the preliminary decision which The Warehouse gave at the end of the disciplinary meeting on 11 June 2013. This was not a final decision but a preliminary decision, as The Warehouse indicated. It is an absolutely standard process in disciplinary proceedings in the employment jurisdiction for a preliminary decision to issue and for the employee party to have the opportunity of making submissions on the proposed penalty. There is nothing improper in that and the comments made by another manager assisting the store manager in the disciplinary process wherein he endeavoured to explain the process have simply been misunderstood by Ms Paki.

[45] The allegation that Ms Paki's length of service was not taken into account is also of little moment. The Warehouse is entitled to conclude that a staff member with a decade's experience ought not to treat a customer and a supervisor in the way that Ms Paki did.

[46] Looked at in its totality, the process adopted by The Warehouse was a standard disciplinary process, informed by best practice. There was nothing in the process which, in the Authority's opinion, gave rise to any unfairness and The Warehouse's decision-making was measured and fair minded.

[47] The Warehouse had access to human resources advice, as you would expect from an employer of some 9,000 staff, and it utilised that human resources expertise.

[48] The Warehouse has a standard disciplinary process which this particular disciplinary inquiry followed and there is nothing in the evidence before the Authority which would suggest that there was any deviation from the standard approach.

### **Determination**

[49] For reasons which the Authority has already canvassed, Ms Paki's personal grievance claim fails in its entirety. The Authority is satisfied that a fair and reasonable employer in The Warehouse's position could have concluded that Ms Paki's conduct was so unacceptable as to constitute serious misconduct and that, in all the circumstances, the response of the employer ought to be to dismiss.

[50] That is not to say that another employer might not have reached a different conclusion; all the law requires is that one of the decisions that a fair and reasonable employer could reach on the facts is the one which is actually chosen.

**Costs**

[51] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority