

[2] When Mr Pollock joined her at the table Mrs Gore immediately alleged that his colleagues, Nerissa Cui and Carolyn Clark had seen him take money out of the till and put it in his pocket during his shift on 07 January 2012.

[3] Mr Pollock says he was so shocked and distressed at this unexpected allegation he was unable to think clearly or recall the incident Mrs Gore may have referred to. 07 January was one of the café's busiest days with customers lined up outside the café's door for most of Mr Pollock's shift and all staff were rushed off their feet.

[4] Mr Pollock said that when he met with Mrs Gore it was difficult to immediately recall anything specific about 07 January because he undertook the same activities that day as he did every other day. Mr Pollock was therefore unable to explain what his colleagues had allegedly seen, so Mrs Gore dismissed him with immediate effect.

[5] Mr Pollock says the meeting took about three minutes because there was nothing he could really say because he did not recall the incident. Mrs Gore agrees the meeting was short but she estimates it took around five to ten minutes.

[6] Mr Pollock says he was devastated about being dismissed for alleged theft so he spent the next few days going over and over in his mind what Mrs Gore might have been referring to because he knew he had definitely not stolen any money.

[7] Mr Pollock wrote to Mrs Gore on 17 January denying stealing from the café and expressing embarrassment at the way he had been dealt with and in particular Mrs Gore's failure to give him a proper opportunity to tell his side of the story. Mr Pollock asked Mrs Gore to reconsider his employment but she did not respond to his letter.

[8] On 18 January, Mr Pollock recalled that on 07 January he had served a family who had been billed \$85 which the father paid for with a \$100 note. Mr Pollock remembered that when he processed the payment he forgot to give the customer their \$15 change so he apologised to the customer when he returned to the table and said he would bring their change over. Mr Pollock said the customer told him to *keep the change*.

[9] Mr Pollock says he recalls returning to the till and removing \$15 cash which he put in his pocket as the tip he had been given. He says he did not recall this earlier because when he was questioned on 14 January he was blindsided and therefore too shocked to be able to recall anything specific about 07 January.

[10] Mr Pollock says he believed he was entitled to keep the tip because it was given to him personally and because that had been the usual practice with other hospitality jobs he had previously held.

[11] Mr Pollock claims his dismissal was procedurally and substantively unjustified.

Issues

[12] The following issues require determination:

- (a) Was Mr Pollock's dismissal justified?
- (b) If not, what remedies should be awarded?

Was Mr Pollock's dismissal justified?

[13] Justification falls to be determined in light of the s.103A justification test as it applies from 01 April 2011. Justification is to be objectively determined and the Authority is not permitted to substitute its own view for that of the employer.

[14] The Authority must assess whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.²

[15] In assessing justification the Authority must consider the four tests in s.103A(3) of the Act. The full Court of the Employment Court in *Angus & McKeen v. Ports of Auckland Ltd*³ held that failure by an employer to meet all of the four tests in s.103A(3) of the Act would render a dismissal unjustified.

[16] An employer also has statutory good faith obligations under s.4 of the Act. Section 4(1A) of the Act requires an employer to give an employee whose ongoing employment may be in jeopardy access to information relevant to the continuation of

² S.103A(2) ERA.

³ [2011] NZEmpC 106.

their employment⁴ and an opportunity to comment on that before a final decision is made.⁵

[17] A fair and reasonable employer is expected to comply with its statutory obligations, so failure to provide access to information and/or an opportunity to comment on is likely to undermine the justification of the employer's decision.

[18] I find that The Hardware Café is unable to comply with any of the tests in s.103A(3) of the Act. Contrary to s.103A(3)(a) of the Act it did not, having regard to its resources, sufficiently investigate its concerns. In particular:

- a. It did not check or retain the til receipts for 07 January which meant (because of the system in operation) it could not corroborate or disprove Mr Pollock's explanation about the personal tip he says he was given;
- b. It failed to investigate the total takings for the day against the til receipts to establish whether the café had a shortfall. If those inquiries had been made Mrs Gore would have discovered there was no shortfall and in fact the cafe was \$11 up for the day on 07 January;
- c. Mrs Gore failed to obtain written statements from the witnesses. This prejudiced Mr Pollock because Mrs Gore misunderstood what the witnesses had seen and done. That in turn resulted in Mrs Gore misrepresenting the alleged eye witnesses' account of the incident to Mr Pollock;
- d. Mrs Gore failed to consider that Mr Pollock made no attempt to conceal his actions when he took the \$15 he says was a personal tip. Mr Pollock removed the money openly whilst another staff member was standing at the til in front of customers in the busy café. It would be unusual for an employee who wished to steal from their employer to act in the manner Mr Pollock did;
- e. Mrs Gore misunderstood the information the two witnesses had about the incident. She incorrectly thought they had confronted Mr Pollock

⁴ S.4(1A)(c)(i) ERA.

⁵ S.4(1A)(c)(ii) ERA.

together on 07 January about his alleged theft, but that did not occur. Mrs Gore took an adverse view of Mr Pollock because he did not recall being confronted about alleged theft by two people which Mrs Gore could not believe he was unable to recall;

- f. Mrs Gore misunderstood what Caroline Clark had allegedly seen because she thought Ms Clark had seen Mr Pollock take money out of the til when she had not. Mrs Gore therefore incorrectly put to Mr Pollock that two of his colleagues had seen him remove money from the til. That was not correct because Nerissa Cui was the only person who said she saw Mr Pollock take \$15 from the til;
- g. The Hardware Café failed to promptly investigate its concern because Mrs Gore did not arrange for the Manager or Acting Manger to address the matter with Mr Pollock at the time of the incident. That prejudiced Mr Pollock because he was then expected to recall an incident which had occurred during an extremely busy day a week previously. I consider it likely he would have provided the tip explanation if the concerns had been raised with him at the time.

[19] The Hardware Café cannot comply with s103(A)(3)(b) of the Act because it did not fairly or properly raise its concerns with Mr Pollock. The manner in which it raised serious theft concerns with Mr Pollock was extremely unfair. He had no advance notice of the meeting held on 14 January and had no idea it was to be a disciplinary meeting.

[20] Mr Pollock was unaware that Mrs Gore wanted to discuss a theft allegation with him or that she viewed his alleged actions as serious misconduct. He had no idea his ongoing employment was in jeopardy or why. He had no prior information about his employer's concerns and, other than being accused of theft, he was not given relevant information during the meeting.

[21] The Hardware Café's actions deprived Mr Pollock of any opportunity to:

- a. Access or respond to the information which Mrs Gore based her decision about his ongoing employment on;
- b. Take advice;

- c. Arrange for a support person or representative to accompany him at the disciplinary meeting;
- d. Prepare his response to the theft allegation.

[22] Because The Hardware Café's concerns were not properly investigated or put to Mr Pollock he was not given a reasonable opportunity to respond to the theft allegation before he was dismissed, contrary to the requirements of s.103A(3)(c) of the Act. It follows from that finding that The Hardware Café is also unable to meet the test in s.103A(3)(d) of the Act because it could not have genuinely considered Mr Pollock's explanation to its concerns when it had deprived him of any genuine or real opportunity to provide his explanation.

[23] The Hardware Café also failed to meet its good faith obligations under s.4(1A) of the Act because it failed to provide Mr Pollock with information relevant to his ongoing employment so he was therefore deprived of a real or genuine opportunity to respond to such information before he was dismissed.

[24] The Hardware Café's failure to meet any of the statutory justification tests in s.103A(3) of the Act or to comply with its s.4(1A) good faith obligations in the Act or to otherwise adhere to well recognised minimum requirements of natural justice and procedural fairness means it could not fairly or reasonably have concluded Mr Pollock had stolen \$15. Summary dismissal was not an outcome which was available to a fair and reasonable employer in all of the circumstances.

[25] Section 103A(5) of the Act does not preclude a finding of unjustified dismissal because the process defects that occurred were serious, sustained, and resulted in substantial unfairness and prejudice to Mr Pollock.

[26] I find that The Hardware Café's actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time Mr Pollock was dismissed. It is therefore unable to justify Mr Pollock's dismissal.

What remedies should be awarded?

Mitigation of loss

[27] I am satisfied Mr Pollock took reasonable and appropriate steps to mitigate his loss. He is therefore entitled to be compensated for the nine weeks' remuneration he lost as a result of his unjustified dismissal.

Lost remuneration

[28] Mr Pollock earned \$400 in the nine weeks he was out of work before he found a new job.

[29] When employed by The Hardware Café Mr Pollock was paid \$15 per hour and worked between 35 and 40 hours per week. I have based his lost remuneration on 37.5 hours per week at \$15 per hour equals \$562.50 multiplied by nine weeks equals \$5,062.50 less \$400 earnings equals \$4,662.50.

[30] The Hardware Café is ordered to pay Mr Pollock \$4,662.50 lost remuneration under s.128(2) of the Act.

Distress compensation

[31] It was clear from Mr Pollock's evidence that he was extremely distressed by his unjustified dismissal. He told me he loved his job and was devastated to lose it, particularly in the circumstances he did. He was very upset that Mrs Gore failed to give him a chance to explain himself or to clear his name.

[32] Mr Pollock said his integrity was very important to him so he was badly affected to be dismissed for dishonesty. He also told me his dismissal was made even worse by not knowing what he was supposed to have done wrong. He said that he was stunned, at a loss for words, confused, and dismayed that he had lost his favourite job.

[33] As a result of his dismissal Mr Pollock could not afford to stay in the flat he was renting after his dismissal so he had to move in with his parents until he could find a new job. Mr Pollock gave evidence that the whole experience had a deeply adverse affect on him and has undermined his emotional and psychological wellbeing.

[34] The Hardware Café is ordered to pay Mr Pollock \$6,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he has suffered.

Contribution

[35] Under s.124 of the Act I am required to consider whether Mr Pollock contributed to the situation which gave rise to his dismissal grievance, and if so, reduce remedies accordingly.

[36] I consider Mr Pollock failure to obtain express permission from a manager to keep the \$15 tip he had been given was blameworthy conduct which gave rise to Mrs Gore's concerns which resulted in dismissal. He was a relatively new employee and he had not been given any training about what to do if offered a personal tip so it was unwise for him not to check the café's practice before he kept the tip for himself.

[37] Mr Pollock's distress compensation is to be reduced by 10% to reflect his contribution.

Outcome

[38] Mr Pollock's dismissal was procedurally and substantively unjustified. The Hardware Café is ordered to pay him:

- a. \$4,662.50 under s.128(2) of the Act to reimburse him for the remuneration he has lost as a result of his unjustified dismissal;
- b. \$5,400 (\$6,000 less 10% to reflect contribution) under s.123(1)(c)(i) of the Act to compensate him for humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified dismissal.

Costs

[39] The parties are encouraged to resolve costs by agreement. If that is not possible then Mr Pollock has 14 days within which to file a costs memorandum to which The Hardware Café has 14 days to respond.

Rachel Larmer
Member of the Employment Relations Authority

