

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 300/08  
5086695

BETWEEN                      GERHARDA REITZEMA  
   Applicant  
  
AND                                ELP PAYROLL HOLDINGS  
   LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Applicant in person  
   Jenni-Maree Trotman, Counsel for Respondent  
  
Investigation Meeting:     4 April 2008 at Auckland  
  
Determination:              21 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      On 9 February 2007 the Respondent dismissed the Applicant from her job as a manager. The dismissal was said to be for serious misconduct.

[2]      The Respondent identified three alleged instances of serious misconduct as justifying the dismissal:

- (i)      the Applicant was dishonest in the information she gave the Respondent's directors about whether its premises were "*contaminated*" by residue from a product it sold; and
- (ii)     the Applicant was dishonest in what she told the Respondent's directors about customer concerns about the ongoing availability of its products; and
- (iii)    the Applicant has used her computer for personal purposes in breach of a company policy.

[3] The Applicant admits she was not truthful about what she had told the directors about some supposed customer concerns and that she breached the company's policy on computer use. However she strongly denies the directors' account of what she reported about possible contamination of the premises and says that their decision to dismiss her was unjustified in all the circumstances. She seeks lost wages for an 18-week period.

### **Issues**

[4] Resolution of this problem requires the Authority to determine the following issues:

- a. Whether the Respondent fairly investigated and established that the Applicant had misled its directors about whether harmful contamination had been identified on its premises?
- b. Whether the Applicant's inaccurate information about customer complaints and her breach of company policy on computer use were fairly investigated and evaluated in the Respondent's finding of serious misconduct?
- c. If a personal grievance is found, whether lost wages (the only remedy sought by the Applicant) should be awarded?

[5] Throughout the Authority must consider whether the Respondent's actions were what a fair and reasonable employer would have done in all the circumstances at the time of investigating the alleged serious misconduct of the Applicant and deciding to dismiss her. This is determined on an objective standard, that is from the point of view of a neutral observer.

### **The investigation**

[6] The parties had attended mediation prior to the Authority's investigation but had not resolved the issues between them.

[7] For the purposes of investigation the Authority was provided with written witness statements from the Applicant, her husband Ray Reitzema, and the Respondent's directors Andrew Broczek and John Frew. Also lodged was a sworn statement from Stuart Keer-Keer, director of K2 Environmental Limited ("K2"), a company that carried out testing for possible contamination of the Respondent's premises in Karangahape Road.

[8] The Applicant, Mr Reitzema, Mr Broczek and Mr Frew attended the investigation meeting where, under affirmation, each confirmed their written evidence and answered questions from the Authority and some additional questions from the parties. The Applicant and the Respondent's representatives provided closing submissions.

### **The facts**

[9] The Respondent is a wholesaler of lubricants, massage oils, and "*party pills*". An associated business operates retail shops. At the times relevant to this matter – from October 2006 to January 2007 – these "*party pills*" included benzylpiperazine ("BZP"), and were able to be sold legally. At the time legislative changes were underway to make party pills containing BZP illegal and those changes have since come into effect.

[10] The Respondent also sold a liquid product advertised as a "*leather cleaner*". The actual use of the product was as a so-called recreational drug referred to as a "*popper*". Its vapours are inhaled to produce a short "*high*" or increase sexual arousal.

[11] The "*leather cleaner*" sold by the Respondent – according to the evidence of Mr Frew – comprised isobutyl nitrate and may be legally sold without a prescription, unlike amyl nitrate, a similar substance also used as a "*popper*".

[12] It is sold in small glass bottles.

[13] The Applicant's role involved managing the packaging and despatch of products, including the leather cleaner, to various retail stores.

[14] She worked at the Respondent's premises in Karangahape Road ("the premises").

[15] Supplies of the products, including the leather cleaner, were stored at the premises.

[16] In October 2006 the Applicant had two weeks off work after experiencing headaches, congestion and nausea. She attributed those symptoms partly to being exposed to liquid and vapours while moving some trays of leather cleaner on which a number of the bottles were broken. She also considered increased heat and lack of ventilation in her work area contributed to those symptoms.

[17] In the early months of 2006 the Respondent had installed a heat pump and air conditioning to improve the ventilation and temperature in the office in which the Applicant worked. The adjacent storeroom also had an extractor fan.

[18] On 11 October 2006 the Applicant requested a meeting with Mr Broczek and Mr Frew. The two directors were due to depart on an overseas trip and arranged to meet the Applicant at her house on the evening of 13 October. Mr Reitzema was present and overheard some of the conversation but was not directly involved in it.

[19] In September 2006 Mr Frew had authorised the Applicant, at her request, to arrange some professional testing of air quality of the premises. The Applicant arranged for K2 to provide a quote for the work and on 6 October two representatives of that firm visited the premises to inspect the site before providing a quote for the testing work.

[20] On 13 October 2006 the Applicant told the directors about that site visit. She said the K2 representatives had taken swabs off the walls. She also said that her doctor had taken a swab from her skin.

[21] At this point there is a sharp conflict in the evidence.

[22] Mr Broczek and Mr Frew insist that the Applicant told them that the K2

representatives told her they had found residue of isobutyl nitrate on the office walls and that the swab taken by her doctor was “positive” for the same subject.

[23] The Applicant is adamant that, while she did report talking to the K2 representatives about how they could test the premises, she did not say they had confirmed that the office was contaminated. She admits talking about a swab taken by her doctor but did not say this had produced a “positive” result.

[24] The differing accounts do concur on subsequent steps in the conversation, and were confirmed in Mr Reitzema’s evidence on what he overheard. Mr Broczek and Mr Frew asked the Applicant what she thought should be done. The Applicant said that she and other staff should stay out of the premises until testing was completed. The two directors agreed with the suggestion. Before they left on their overseas trip two days later they arranged for the premises to move to a Takapuna site. This included moving computers, arranging diversion of telephone lines, moving stock and files, and meeting with staff to advise of the relocation and arranging to compensate them for additional travel costs.

[25] They also approved a K2 quote for testing of the premises.

[26] A verbal report on K2 testing was provided to the directors in late 2006. It reported no contamination. Staff and stock were relocated from Takapuna back to the premises shortly before Christmas 2006.

[27] In January 2007 the directors received a written report from K2. It contained no reference to initial swabs that the directors understood had been taken and said to show contamination. The report advised that air samples and wipes of surfaces taken at the premises on 20 October 2006 did not detect isobutyl nitrate or another substance for which tests were conducted.

[28] On inquiring of K2, the directors were told that no swabs had been taken during the initial visit of K2 representatives to the premises on 6 October.

[29] Around the same time the Applicant asked the directors to instruct retail staff not to talk to customers about the prospect of a legal ban on sales of party pills. She

told them that two retail customers had rung about returning supplies of party pills for credit as they had been told by staff that the pills would be banned.

[30] The directors started to look into the Applicant's concern about what staff were saying to customers. Selling party pills was a large part of their business which they wanted to continue until the law changed. They asked the Applicant to identify the customers so they could, in turn, find out which staff member had talked to those customers about the possible ban on party pills.

[31] The Applicant, via email, identified two customers in the Bay of Plenty but said that she had dealt with the issue and there was "*no need to upset things again*".

[32] In her later evidence to the Authority, the Applicant admitted making up the story of those customer reports in order to reinforce her concern that the directors needed to give retail staff some specific instructions on what to say about the future of party pill sales. In her written statement she says: "*They are right I was dishonest about this, but in my mind it was for the best of the company*".

[33] The directors were not aware of this at the time but from their own enquiries came to believe that what the Applicant had said about reports of customer concerns was not true.

[34] On 31 January 2007 they sent the Applicant a letter calling her to a meeting to discuss "*serious concerns*". The letter identified these concerns as being "*dishonesty*" about "*work place contamination*", "*dishonesty*" about reports on customer comments, and "*unauthorised use*" of company computers and internet. Background information was included on each concern.

[35] The letter advised the Applicant that the Respondent was considering suspending her and wanted to discuss the matter with her before deciding whether to do so. She was told the meeting was also to get her response on the identified concerns. She was encouraged to bring a representative or support person and told that her employment could be in jeopardy.

[36] In the meeting, on 7 February, the Applicant provided some written comments

on each concern identified by the Respondent. These included saying that:

- a. K2 representatives had talked to her in October about “*having to swab things as well as testing the air*”.
- b. She had spoken to two identified customers with concerns caused by staff comments about party pill sales and now “*considered the matter closed*”.
- c. As a manager she should be able to “*have a few small breaks now and then*”.

[37] The Respondent had identified three occasions when the Applicant had used her work computer to play games or browse the internet. It had a written policy banning personal or private use of its computers and internet access. The policy stated a “*zero tolerance*” approach with any breach deemed serious misconduct.

[38] Following the meeting the directors conducted some further investigation. Mr Frew contacted the two customers said to have returned party pill stocks because – according to the Applicant – of supposed comments from staff of the Respondent about the upcoming banning of the pills. Both customers denied their actions resulted from staff comments.

[39] On 9 February 2007 the directors met again with the Applicant and told her that they did not accept her explanations. Later that day she was given a letter of dismissal.

[40] Some weeks later the Applicant sought reinstatement to her position but did not pursue that claim when she lodged her personal grievance application in the Authority.

## **Discussion**

[41] It was not until the Applicant lodged a written statement for the Authority investigation that she admitted making up the supposed commercially damaging

comments that she reported to the directors as having been made to customers by some staff.

[42] However it is clear that the Respondent directors had taken steps to check the accuracy of the Applicant's report to them and from those enquiries established that the customers identified by the Applicant had not acted on the basis that the Applicant said they did. The directors were entitled to come to the conclusion that they had been misled by her – or as they put it, she had been dishonest with them.

[43] The Applicant says that she had taken that step for what she saw as the best thing for the company.

[44] There is a dispute in the evidence of the witnesses on whether the Applicant had been as emphatic in her report to the directors about contamination of the premises as they subsequently allege.

[45] In light of the Applicant's conduct regarding supposed customer concerns, I consider it more likely than not that her report to the directors about the K2 visit was similarly overstated or misleading.

[46] For that reason I prefer the directors' account of what they were told on 13 October rather than what the Applicant now says she said at the time.

[47] Again, the Applicant no doubt considered she had good intentions or reasons for painting a picture that was less equivocal than the reality. However the result was that the directors were not told the truth about what had – or rather had not – been identified about the state of their premises. They incurred relocation expenses that they might otherwise have avoided.

[48] The directors were entitled to expect more of the Applicant as their manager in the business. The misinformation she gave them was not inadvertent. It was deliberately given with an intention to secure an outcome sought by the Applicant.

[49] The directors were entitled to expect that their manager would be both frank and accurate about what she told them of events or information in the business. To do

otherwise struck deeply into the relationship of trust and confidence which an employer could reasonably expect of a manager. Having fairly identified that they were lied to about two matters in the operation of their business, they were entitled to conclude that the Applicant's conduct was serious misconduct.

[50] I have less confidence in their conclusion about the Applicant's use of the computer. It was really a 'make weight' matter identified as they investigated other aspects of her conduct.

[51] Technically, as the Applicant accepted, it was correct that she breached a written policy about which she knew by playing some games or browsing on the internet on three occasions over two separate work days. The total time involved was 30 minutes and it was not established that this time was not before work or in reasonable break periods.

[52] However the concern regarding computer use was clearly not central to the Respondent's ultimate decision to dismiss the Applicant, which was really motivated by the other two more serious concerns. It was also a concern that, having identified, the Respondent did fairly put to the Applicant for comment before making any decision.

### **Determination**

[53] For the reasons given above I find that in deciding to dismiss the Applicant, the Respondent carried out reasonable inquiries which left it, on the balance of probabilities, with grounds for believing — and it did believe — that there was serious misconduct in how the Applicant carried out her managerial duties and this deeply impaired the Respondent's essential confidence and trust in her.

[54] In the circumstances at the time that is a conclusion that a fair and reasonable employer would come to and the Respondent was justified in doing so.

[55] The Applicant does not have a personal grievance. Her application is dismissed.

**Costs**

[56] Costs are reserved. If there are issues of costs that the parties cannot resolve between themselves, the Respondent may lodge an application for the Authority to determine costs. Such an application should be lodged and served within 28 days of the date of this determination. The Applicant will then have 14 days to reply. In the absence of any special factors not presently known to the Authority, costs in a matter of this type would normally be disposed of on the basis of the principles and tariff approach discussed in *PBO v Da Cruz* [2005] ERNZ 808 (EC).

Robin Arthur  
Member of the Employment Relations Authority