

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 424  
5369101

BETWEEN                      RICHARD GUSTAVE SUHR  
   Applicant  
  
A N D                              PROLIFE FOODS LIMITED  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:              Anamika Singh, Counsel for Applicant  
   Vicki Campbell, Counsel for Respondent  
  
Investigation Meeting:      12 November 2012 at Hamilton  
  
Date of Determination:      28 November 2012

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]      The applicant (Mr Suhr) claims to have been unjustifiably dismissed from his employment as the Production Manager of the respondent (Prolife).

[2]      That claim is resisted by Prolife which says that the dismissal was a justifiable one but that if the Authority were to find for Mr Suhr, his contribution to the events giving rise to his dismissal was significant.

[3]      There was a written employment agreement between the parties commencing on and from 1 April 2011. Mr Suhr had previously been employed by the former owners of the business prior to Prolife becoming involved.

[4]      On 23 December 2011, there was a Christmas function for Prolife staff. It was the last working day of the calendar year.

[5]      At about 3.30pm on that day, Mr Suhr and one other employee entered one of the administration buildings and, according to a co-worker, appeared to behave

suspiciously. Mr Suhr and the other employee had a white bag with them which appeared to be half full.

[6] Mr Paul Donovan, a senior manager with Prolife, telephoned Mr Suhr on cellphone and sought an explanation about his behaviour.

[7] Dissatisfied with the explanation, Prolife called Mr Suhr to a meeting. Mr Suhr was advised that there would be a formal investigation into his behaviour the following week when the factory reopened. In the meantime, Mr Suhr was asked to give up the contents of the white bag and he produced 12 cans of beer.

[8] Mr Suhr maintained that he had the permission of Mr Donovan to take the beer; Mr Donovan denied that that was the position.

[9] There was a further meeting on 28 December 2012 at which Mr Suhr was again asked to give an explanation of his behaviour. Prolife says that the explanation Mr Suhr offered on 28 December was different from the explanation that he offered on 23 December and after an adjournment to consider matters, Prolife dismissed Mr Suhr summarily.

[10] A mediation between the parties failed to resolve the employment relationship problem and the matter proceeded to the Authority in the usual way.

### **Issues**

[11] It will be convenient if the Authority assesses the evidence in relation to the following matters:

- (a) What happened on 23 December 2011;
- (b) What happened at the first meeting on 23 December 2011; and
- (c) What happened on the final meeting of 28 December 2011?

### **What happened on 23 December 2011?**

[12] It is common ground that Mr Suhr, although only working as Production Manager for Prolife on and from 1 April 2011, had previously worked for another business called Donovan's Chocolates – the Chocolate Factory from 12 August 2009

down to 31 March 2011. On that basis then, his total time employed in the business was rather longer than the relatively short period he had been employed by Prolife.

[13] Whatever his length of service, it is common ground that Mr Suhr was in a position of trust and was amongst other things responsible for some staff and a part of the production of the business. There is some dispute as to exactly how far Mr Suhr's remit extended; Prolife disputes Mr Suhr's contentions about the extent of his involvement in management and in particular the extent of his decision-making ability without having to refer matters up the management chain.

[14] But nothing turns on whose view of Mr Suhr's duties is to be preferred. As the Authority noted, it is common ground that Mr Suhr was in a position of trust.

[15] On Friday, 23 December 2011, the final day of the working year for Prolife, there was a staff Christmas lunch held in the staffroom of the premises in Hamilton. Mr Suhr attended along with other staff.

[16] After that luncheon was over, a number of employees moved to the carpark area and shared some drinks. That group included Mr Suhr.

[17] Mr Suhr and his co-accused drove back to another Prolife site, ostensibly to collect the Christmas presents given to them by the firm, but more importantly for our purposes, to look for leftover beer. They eventually found some beer in a storage cupboard in the administration block and put that into a white plastic bag. It was their behaviour while they were doing this and shortly thereafter that attracted the attention of a co-worker, Ms Cindy Burke, who contacted senior managers to ask whether Mr Suhr and his colleague ought to be where they were.

[18] After emerging from the interior of the building, Ms Burke says that Mr Suhr and his colleague appeared to wait until Mr Donovan had left the building carpark in his car before proceeding out into the carpark themselves with their white bag now containing alcohol.

[19] One of the people who Ms Burke contacted by telephone was Mr Donovan. She did not know the names of Mr Suhr and his colleague but she knew that they were employees of the firm. She rang Mr Donovan who immediately was able to identify who the men were by Ms Burke's description. Mr Donovan's evidence is that he then

rang Mr Suhr and asked for an explanation. There is dispute between the parties about when that telephone call was made and when it was received.

[20] The Authority is satisfied on the balance of the evidence that it heard that the call made by Ms Burke to Mr Donovan took place after the two men had left the building and were in the carpark proceeding towards their car with the white bag and its contents. Given the Authority's preference for Ms Burke's evidence on that point, it follows that Mr Donovan cannot have rung Mr Suhr to ask for an explanation until after Mr Suhr was outside the premises, at the earliest.

[21] Mr Suhr says that Mr Donovan actually rang him while he was still in the building and before they had taken the alcohol which enabled Mr Suhr, so the story goes, to say to Mr Donovan that he had not taken anything from the building. He maintained in his evidence to the Authority that that was when the call took place, that he did tell Mr Donovan that he had not taken anything from the building and that that was the unvarnished truth at the time.

[22] But if Ms Burke's evidence is to be accepted (and the Authority does accept it), she did not ring Mr Donovan until after Mr Suhr had left the building with the alcohol and on that basis, given that the Authority also accepts Mr Donovan's evidence that Mr Suhr told him he had not taken anything from the building, Mr Suhr must have been mistaken when he told Mr Donovan that nothing had been removed by him from the building. This is because by the time Mr Donovan and Mr Suhr spoke, Mr Suhr would have been outside the building and would already have removed the alcohol.

[23] The only other possible explanation consistent with Mr Suhr's version of events is that somebody else, in addition to Ms Burke, rang Mr Donovan thus prompting his inquiry. If that had happened, then it is conceivable that Mr Donovan spoke to Mr Suhr earlier, as Mr Suhr contended. But that postulation was put to Mr Donovan by the Authority and comprehensively rejected. Mr Donovan told the Authority first that only one person had rung him about the behaviour of Mr Suhr and his co-worker, that that person was Ms Burke, and that Mr Donovan made only one call to Mr Suhr to ask what he was up to. On that basis then, the Authority concludes that Mr Suhr did not tell Mr Donovan the truth when the latter rang him to seek an explanation about his behaviour.

[24] Shortly after Mr Suhr and his colleague left the administration building, Mr Suhr received another telephone call, this time from Mr Sean Lambly, the Operations Manager. Mr Lambly had been contacted by Ms Lisa Nicholson, Prolife's General Manager, Human Resources. Ms Nicholson had been rung by Ms Burke in relation to the behaviour of Mr Suhr and his co-worker. Ms Burke told Ms Nicholson that she had also contacted Mr Donovan. Ms Nicholson thought it appropriate to refer the matter to Mr Lambly.

[25] Mr Lambly, once he became seized of the issue, rang Mr Donovan. Ms Nicholson overheard that conversation and confirmed its tenor. Mr Donovan told Mr Lambly about the conversation he had just had with Mr Suhr. Critically for our purposes, Mr Donovan confirmed to Mr Lambly that Mr Suhr had "*denied taking anything and that he had not found the beer he was looking for*".

[26] Mr Lambly then immediately rang Mr Suhr. It is common ground that Mr Lambly asked Mr Suhr if he had removed alcohol from the site and that Mr Suhr immediately admitted that he had. Mr Lambly then required Mr Suhr to return to head office for a meeting.

[27] The Authority notes, for the sake of completeness, that because on the face of it Mr Suhr had told Mr Donovan one thing and Mr Lambly something else, Prolife was already suspicious about Mr Suhr's behaviour.

### **What happened at the first meeting on 23 December 2011?**

[28] A meeting between Mr Suhr, his co-worker and Ms Nicholson and Mr Lambly took place at around 4pm on 23 December 2011. The Authority accepts that Prolife told Mr Suhr that the allegation was that he and his co-worker had taken company property without authorisation, that there would be an investigation and that there would be a disciplinary meeting the following week when the factory returned to work. Mr Suhr was asked to return the alcohol which he did.

[29] There is some conflict in the evidence as to the nature of the bag that the alcohol was returned in and whether that bag was claimed to be the bag that the alcohol had originally been put into. Ms Nicholson's evidence is that when Mr Suhr returned the alcohol, it was returned in a plastic shopping bag, and that Mr Suhr contended that that bag was the same bag that the alcohol had been taken in. But that

evidence, if true, is inconsistent with the recollection of Ms Burke who referred to a large white bag, indeed a white bin liner, which Ms Burke thought was about half full.

[30] More importantly for the Authority's purposes was the explanation given by Mr Suhr for the taking of the alcohol. According to both of Prolife's witnesses at the 23 December meeting, Mr Suhr claimed to have obtained permission from Mr Donovan to take the alcohol, when he had a brief conversation with Mr Donovan during the Christmas lunch function.

[31] Both Mr Lambly and Mr Suhr's evidence suggests that Mr Suhr also advanced another, more general proposition in support of the taking of the alcohol. This was that he had had a conversation with Mr Donovan some weeks earlier during which Mr Donovan had indicated that he (Mr Suhr) could take the leftover beer. While Ms Nicholson does not refer to that alternative explanation, the Authority is satisfied that Mr Suhr advanced both propositions, namely that he had a specific discussion with Mr Donovan during the Christmas lunch function and an earlier more general discussion some weeks previously.

[32] The difficulty for Mr Suhr with both of those propositions is that they were roundly denied by Mr Donovan. The evidence the Authority heard was that immediately after the brief meeting just described on 23 December 2011, Mr Lambly contacted Mr Donovan again to check the contention that Mr Donovan had given Mr Suhr permission to take the alcohol. Mr Donovan denied giving permission, either generally or specifically, and indeed denied even talking to Mr Suhr at the lunch function. Mr Lambly told the Authority that Mr Donovan was shocked that Mr Suhr had denied having the alcohol when he (Mr Donovan) spoke to Mr Suhr earlier that afternoon, and yet was happy to confirm to Mr Lambly shortly afterwards that he did have the alcohol.

### **What happened at the final meeting of 28 December 2011?**

[33] The first point the Authority desires to make in relation to the second meeting between the parties was that the personnel changed. Mr Lambly went on annual leave at the close of business on 23 December 2011 and accordingly was not available to attend the second meeting between the parties on 28 December 2011. Mr Suhr contends that that created unfairness because of the changed personnel. Mr Lambly's replacement was a Mr King, the General Manager, Finance. Mr King's evidence is

that he was briefed by Ms Nicholson about the events of 23 December and the meeting of that date.

[34] The Authority is not satisfied that there is any unfairness in the change of personnel, as Mr Suhr contends. The position might be otherwise if there had been a complete change in the employer personnel dealing with the matter but that was not the case here. Ms Nicholson was involved in both meetings and given the time of year, it is not unreasonable to anticipate that there might be some necessary changes in personnel because of that fact. In the Authority's opinion, the change in company personnel is analogous to the situation that would have applied if, for instance, Mr Suhr had already booked a period of annual leave starting at the end of business on 23 December 2011 when the employer would, of necessity, have had to reschedule matters around Mr Suhr's leave. The short point is that Prolife was properly represented at each meeting and the Authority can find no unfairness in the fact of a change of personnel.

[35] Despite Prolife clearly pointing up the importance of the second meeting, and its potential seriousness, and encouraging Mr Suhr to bring a representative, when the meeting proceeded on 28 December 2011, Mr Suhr had not made any arrangements in that regard and seemed prepared to proceed without support. Prolife, however, was insistent that Mr Suhr have support and proposed that Mr Lei Lui who, at the relevant time, was a Union delegate, should assist Mr Suhr. Mr Lui was the support person for Mr Suhr's co-worker and that meeting had taken place immediately prior to Mr Suhr's meeting with the employer.

[36] Despite Mr Lambly talking to Mr Donovan about the issue of whether or not permission to take the alcohol had been given, Ms Nicholson decided to have a further conversation with Mr Donovan who, by this stage, was in Australia on annual leave. Mr Donovan again confirmed that he had not at any stage, either on 23 December 2011 or at any time previously, given Mr Suhr permission to take the alcohol. Ms Nicholson conveyed that intelligence to Mr Suhr at the 28 December meeting.

[37] According to Ms Nicholson, Mr Suhr's explanation for when permission was granted changed at the 28 December meeting. She says that at the 23 December meeting, Mr Suhr very clearly stated that he had spoken to Mr Donovan at the Christmas lunch earlier that day but Mr Donovan had denied speaking with Mr Suhr at all at the function.

[38] At the 28 December meeting, on the other hand, Mr Suhr maintained that he had spoken to Mr Donovan not at the Christmas lunch but rather at the warehouse. Ms Nicholson is very clear that Mr Suhr maintained that his co-worker was present when he spoke to Mr Donovan in the warehouse and Mr Donovan gave permission to take the alcohol, but the difficulty with that claim is that Mr Suhr's co-worker, in his meeting with the employer, allegedly said nothing of the kind. Indeed, Mr Suhr's co-worker maintained that they never had any permission for the taking of the alcohol, or at least no permission was granted within his earshot.

[39] Mr Suhr also confirmed that while he had generic permission to remove alcohol, he did not have specific permission to take alcohol from the secure storeroom that he actually removed it from. Nor was Mr Suhr proposing to share the alcohol with anyone other than his immediate co-worker. Mr Donovan had indicated that he was happy to contemplate the leftover alcohol being shared among all the staff, but only on the basis that it was allocated by him personally and certainly never on the basis that Mr Suhr had *carte blanche* to remove it solely for himself and one other.

[40] Mr Suhr protests that the company relied on evidence from witnesses whose statements were not put to him for response. It is true that Mr Suhr received a limited amount of documentary evidence at the time, but the Authority is not satisfied that he was prejudiced by that failure. All the evidence the Authority heard confirms the clear view that Mr Suhr was provided with a clear verbal statement of what each witness said. Mr Suhr refers particularly to the evidence of his co-worker, the evidence of Mr Donovan and the evidence of Ms Burke. Dealing with each of those in turn, as to the co-worker, the evidence is plain that during a break in the 28 December meeting, Mr Suhr and Mr Lui attended on the co-worker, who was outside, and discussed matters with him. Mr Lui makes it very clear to the Authority in his evidence that Mr Suhr can have been in no doubt at all what the co-worker's position was, even if he were able to contend that Prolife had not given him a proper analysis of what the co-worker had said.

[41] In relation to the evidence of Mr Donovan, while the Authority accepts that there was no written information provided to Mr Suhr about what Mr Donovan said, what he said was relayed to Mr Suhr at the beginning of the 28 December meeting in the clearest terms. Mr Donovan denied giving permission, either generally or specifically, and in relation to one of Mr Suhr's particular claims (that he had

discussed matters with Mr Donovan at the lunch), Mr Donovan gave a very clear statement to the effect that he had not actually spoken to Mr Suhr at the lunch. The Authority is satisfied that no further information could have been provided to Mr Suhr if it had been reduced to writing, either in respect of the co-worker or in respect of Mr Donovan.

[42] In relation to Ms Burke, her only involvement was to ask why Mr Suhr and a co-worker were in a building that she supposed they were not supposed to be in. She gave evidence about Mr Suhr behaving suspiciously in the administration building with a white bag, apparently waiting for Mr Donovan to leave the carpark, and again the Authority is satisfied that all of that material was properly put to Mr Suhr in order that he could comment on it. In fact, that view of matters is confirmed to some extent by the fuss about whether the alcohol was collected in a white bin liner (as Ms Burke maintained) or in some other receptacle. Certainly, Mr Suhr gave very clear evidence about his understanding of the nature of the receptacle. It is difficult to understand how he can maintain that he did not have a proper opportunity to consider Ms Burke's evidence to the employer, when he went to so much trouble to deal with the issue she raised about the nature of the receptacle.

[43] Perhaps the most graphic evidence before the Authority is that of Mr Lui who attended the final meeting as Mr Suhr's support person, but whose evidence tends to confirm Prolife's conclusion that Mr Suhr was telling a variety of stories about when he got permission to take the alcohol. Mr Lui confirmed that Mr Suhr had offered a variety of different explanations for when he received permission to take the alcohol and indeed his evidence is that he privately (during a recess) challenged Mr Suhr about his inconsistencies but that Mr Suhr's response was to say that his co-worker had been present when Mr Donovan had given permission in the carpark. Mr Lui knew this was untrue because he had already dealt with Mr Suhr's co-worker and been part of his disciplinary meeting when the co-worker had told Prolife that no permission had ever been granted in his hearing. Then, when Mr Lui and Mr Suhr adjourned outside to meet with Mr Suhr's co-worker, Mr Lui says that Mr Suhr changed his position again and indicated that his co-worker was not present when permission was granted.

[44] Then, after the adjournment and when the parties reconvened, and Mr Suhr was asked again about when he got permission (because of the inconsistent stories

that he had been advancing), Mr Suhr, according to Mr Lui, said that he had got permission on 23 December when he met with Mr Donovan at the warehouse. But according to Mr Lui, that was not what he said moments earlier in the discussion with his co-worker, when Mr Suhr allegedly maintained that the co-worker was not present when he had got permission which was several weeks before.

[45] Of course, much of this witness's evidence is hearsay and must therefore be treated with some caution. But, the Authority formed the view that Mr Lui was honest and straightforward in the evidence that he gave to the Authority and questioning during the investigation meeting was not able to shake his view that Mr Suhr had offered a variety of different explanations as to when he had been given permission to take the alcohol. Mr Lui's conclusion, which the Authority accepts, is that there was never any permission granted for Mr Suhr to take the alcohol.

[46] Another issue the Authority wishes to deal with at this point is Mr Suhr's contention that Prolife should have waited until Mr Donovan was back in the country so that he could inform its process in person rather than from the end of the telephone. Prolife refused to defer matters until Mr Donovan returned and the Authority is not satisfied that Mr Suhr's claim in that regard invalidates Prolife's process or conclusion. Prolife had spoken on more than one occasion with Mr Donovan and satisfied itself that Mr Donovan had never given permission for Mr Suhr to take the alcohol that he did. What Mr Donovan said to Prolife was properly put to Mr Suhr and he was given an opportunity to address it. Mr Suhr's way of addressing it was to offer a variety of different explanations for when he was given the permission. But even on his version of events, it seems that he accepts that he did not have specific permission to remove the alcohol from the particular site that he took it from.

[47] Mr Suhr continues to maintain though that he had a "*reasonable expectation*" that he could remove the alcohol and consume it. He relies on *Sherwood v. Woolworths NZ Ltd* [2002] 2 ERNZ 508 where the Employment Court noted that every employment agreement had an implied term that the employee *.....will use the property of the employer for the employer's purposes or in accordance with the employer's instructions* and *...the employee will not use the employer's property for his own purposes without the employer's permission*( paragraph 23 ).

[48] But he has failed to satisfy the Authority that that expectation is in any way reasonable. First, even on his evidence, the alcohol that he took was from an area that

he was not entitled to take it from. Second, there is no evidence at all that Mr Donovan gave any permission for Mr Suhr to take alcohol. At best, all that can be alleged for Mr Suhr is that Mr Donovan contemplated an arrangement where surplus alcohol would be distributed amongst the operational staff. But Mr Donovan told the Authority that his anticipation was that he would physically do that, sharing it out equally, and certainly it was never in his contemplation that Mr Suhr could take it and consume it with one other. Even Mr Suhr acknowledged in his evidence that he ought to have contemplated sharing it with others but did not do so.

[49] On the evidence, there is nothing to suggest Mr Suhr was using the employer's property *for the employer's purposes or in accordance with the employer's instructions*. Indeed, on its face, the evidence suggests Mr Suhr was intending to use the employer's property *for his own purposes without the employer's permission*: *Sherwood* applied.

[50] In the Authority's considered view, there is nothing in the evidence which would support Mr Suhr's contention that he was entitled to remove the alcohol and Prolife is right to draw attention to the fact that Mr Suhr offered a variety of different explanations for when he got the permission that he claims to have got. Further, Prolife is correct in identifying that even on Mr Suhr's evidence, he did not have permission to remove alcohol from the site that he actually removed it from.

[51] Equally important in Prolife's rationale of its decision is its contention that, notwithstanding modern communications and the presence of Mr Donovan onsite at various times during the final day of the working year, Mr Suhr never checked with Mr Donovan, never confronted him about the issue, never took any steps to verify that he was entitled to do what he did.

[52] Not only was his explanation for his behaviour muddled, but he deliberately misled Mr Donovan when the latter rang him on the afternoon of 23 December 2011 and Mr Suhr told Mr Donovan that he had not taken anything from the building when the Authority is absolutely satisfied on the evidence it heard that that statement must have been wrong. What is more, that statement was completely inconsistent with the subsequent admission made to Mr Lambly in a telephone conversation shortly thereafter that he had in fact taken something from the building, namely cans of alcohol.

**Determination**

[53] The Authority is satisfied that a fair and reasonable employer could have concluded that Mr Suhr was guilty of serious misconduct in that he removed alcohol belonging to Prolife from the workplace with the intention of consuming it without any permission whatever. Having concluded that it was available to a fair and reasonable employer to reach a decision that this misappropriation of company property was serious misconduct, in view of the company policy identifying theft as serious misconduct and his position in the hierarchy as a manager, a decision to dismiss summarily for serious misconduct was an inevitable consequence: s.103A Employment Relations Act 2000 applied.

[54] Mr Suhr's operative employment agreement provided for summary dismissal for serious misconduct ( Clause 18.1 ) and the policies of Prolife, which, by common consent, he was bound by, made clear that conversion of the employer's property for personal use of the employee was treated as theft and that theft was serious misconduct. Mr Suhr's own evidence was that he was acutely aware of Prolife's policy of "zero tolerance" for employee theft and he was aware of previous dismissals by Prolife for theft.

[55] It follows from the foregoing that Mr Suhr's claim before the Authority fails.

**Costs**

[56] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority