

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Bridget Schueber (Applicant)
AND General Distributors Limited (Respondent)
REPRESENTATIVES David Fleming for Applicant
Sam Audeau for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 15 and 17 May 2006
DATE OF DETERMINATION 21 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem – unjustified dismissal claim

[1] The applicant Ms Bridget Schueber challenges the justification for her dismissal that the respondent General Distributors Ltd (GDL) claimed it had in taking that action against her.

[2] Ms Schueber promptly raised a grievance about her dismissal. Through the National Distribution Union she applied to the Authority for interim reinstatement. Mediation was undertaken by the parties, at the direction of the Authority, but the problem remained unresolved. In the end the interim application did not require determination. The merits of the grievance have been fully investigated by the Authority to leave it able to now substantively determine the claim.

[3] Ms Schueber was dismissed on 24 January 2006 from the job she had in a Foodtown supermarket, one of a chain operated by GDL. She had been employed there for about 10 years, working with staff and customers in and around the checkout area. She was dismissed for her conduct in connection with the disappearance of a particular stock item, a Konica Minolta digital camera, and also for her conduct in connection with the employer's disciplinary enquiry into that disappearance. GDL alleged that Ms Schueber had removed the camera from a secure room where it was kept and handed it to another employee, Ms Dale Budd, who GDL suspected had taken it away from the store without paying for it.

[4] In explanation Ms Schueber said that she had removed the camera from the secure room to show a customer. She said that after doing so she had shown the camera to Ms Budd but had then taken it straight back and left it in the secure room.

[5] GDL commenced a disciplinary enquiry to establish whether there had been any wrongdoing by Ms Schueber or Ms Budd. (Ms Budd later resigned, when she was told the conclusion of the enquiry.) During that enquiry another employee, Ms Mele Mills, said that on 13 January 2006 she had been at work with Ms Schueber in the checkout area when they had both gone into a secure room known as the 'cigarette room'. Inside was kept higher value stock such as cartons of cigarettes. Also kept there were a number of Konica Minolta digital cameras, which were available for sale at \$229. Ms Mills, who had gone into the room to get cigarettes for a customer she was serving, said she had seen Ms Schueber take a camera from

the room.

[6] Ms Mills told GDL that when she and Ms Schueber had returned to the checkout area where they were working, she had seen Ms Schueber hand the digital camera to Ms Budd who had then placed it in a trolley with other items of what appeared to be her personal shopping. Later she had seen Ms Budd pass through the checkout and purchase the shopping in her trolley. Ms Mills said she had made a point of looking but had not seen the digital camera among the items purchased by Ms Budd. Later that day she reported to a manager what she had seen.

[7] Management made enquiries and ascertained that a digital camera had not been purchased in the store by anyone on 13 January 2006 or a few days either side of that date, and that a Konica Minolta digital camera was missing from stock.

[8] When questioned by management during the enquiry, Ms Schueber said she had taken a digital camera from the cigarette room on Friday 13 January 2006. She said that she had done so to show it to a customer but had then put it straight back without giving it to anyone else. When questioned again later, Ms Schueber stated that she had handed the camera to another person besides the customer. That person she said was Ms Budd, who had wanted to check the camera's specifications which were printed on the blue and white box it was packaged in. Ms Schueber said that she had immediately returned the camera to the cigarette room after Ms Budd had finished examining it. The camera had been taken from and returned to that room within the space of several minutes - about seven or eight - Ms Schueber said in evidence she gave to the Authority.

[9] GDL rejected Ms Schueber's explanation for the way she had handled the digital camera, in particular her claim that she had returned it to the cigarette room after letting Ms Budd look at it. Based on the information the employer had obtained from its enquiry and as presented by it to the Authority, I find that it was reasonable for GDL to reject that explanation.

[10] In the course of its investigation the Authority has had before it most if not all of the information GDL gathered during its enquiry. Further, the Authority has itself examined Ms Schueber, Ms Budd and Ms Mills in particular, as well as several other witnesses, and it has also gone on-site to view the area in the supermarket where the contentious events of 13 January 2006 took place. Following its consideration of this evidence, like GDL the Authority too rejects Ms Schueber's explanation.

[11] Justification for a dismissal is to be determined according to the circumstances as they existed and were known of by the employer at the time it made the decision to take that action. Therefore the Authority's own findings about Ms Schueber's alleged misconduct are relevant not to the question of justification but to the question of contributory fault, which only arises if the dismissal is found to be unjustified.

[12] I consider that GDL was reasonably able to reject Ms Schueber's explanation (and I also reject it) for the following reasons. The work area where the missing digital camera was seen by Ms Mills being handled by Ms Schueber was under surveillance. This was being kept by fixed security cameras. They are linked to a central clock which provides the exact time for each frame of the scene captured on video. Footage taken by one camera showed Ms Schueber uplifting the digital camera from the cigarette room, as she said she had done. No footage showed her returning the camera to that place, as she also claims to have done. Highly compelling is the eye-witness account of Ms Mills that she saw the camera being handed by Ms Schueber to Ms Budd, who had placed it in her trolley with other shopping and wheeled it away.

[13] This is a case where what is significant is what a surveillance camera does not show. Since the matter was first taken up with Ms Schueber, she has consistently maintained that she returned the digital camera to the cigarette room. Yet, the surveillance cameras do not show her doing that. Ms Schueber could make no suggestion as to why any movement of hers

back to the room to return the digital camera would not have been captured by the security cameras fixed inside and outside that room.

[14] Had the cameras suffered from equipment malfunction, or had they been knocked so that their view was in a different direction, or had the sight of the lens been obscured by some means, all of these things would have become obvious when the video tape was viewed. The tapes have been viewed for several hours past the time that Ms Schueber is shown leaving the room, digital camera in hand. There is no dispute that after that time the tapes continue to show the room, but it is entered only by other persons and not by Ms Schueber.

[15] There has been no suggestion made that GDL doctored the tapes, or indeed any other suggestion no matter how far fetched as to how Ms Schueber could have entered the secure cigarette room without her movement being filmed. In the circumstances, only an 'invisible man' could have achieved that feat.

[16] There is an additional reason the Authority has for finding that Ms Schuber did not return the camera to the cigarette room. In her evidence she outlined her action from the time she went to the room to get the camera, to the time she took it back. She said that it was about five minutes after she had shown it to a customer that she had met Ms Budd who wanted to look at the camera to see what features it had. The timed footage of the surveillance camera shows that 42 seconds elapsed from the moment of Ms Schueber leaving the the secure room (at 16.07.40), digital camera in hand, to the moment Ms Budd is shown walking with her trolley away from the checkout area towards the aisles (at 16.08.22).

[17] The centrally timed surveillance cameras record that after she left the room (at 16.07.40) only 25 seconds elapsed before she is shown (at 16.08.05, by a different camera) standing in front of the checkout next to Ms Budd who can be seen placing an item into her trolley. Ms Mills, who was standing only two or three metres away, convincingly stated to both GDL and to the Authority that that item was the camera in its blue and white box.

[18] I reject the evidence of Ms Schueber that she was detained in her journey to the side of Ms Budd by the need to show the camera to a customer and that she did so for several minutes. In my visit to the site with the parties I checked the approximate distance from the cigarette room to where Ms Schuber and Ms Budd can be seen on the video tape standing together. It is a distance of about 20 metres, which is easily travelled in 25 seconds. I also found that in the way the security cameras are fixed and aimed there was no possibility of a person entering the cigarette room without being captured on video tape.

[19] Ms Schueber agreed in her evidence that in only 25 seconds she could not have moved in the way she had described to the Authority. She acknowledged that she was not a "superperson." Yet, she maintained her account of her actions and insisted that the digital camera had been returned to where she had got it from.

[20] The evidence from the surveillance cameras alone might have been sufficient for a reasonable employer and for the Authority to conclude that Ms Schueber had not given an acceptable explanation for her handling of the digital camera. But that evidence was supported by the usual stock and sales records that are kept by a retail store. They show that in stocktaking carried out on 11 January 2006, the number of Konica Minolta cameras counted in the store was 10. The sales records show that none of those cameras were purchased by a customer between 11 January and 16 January 2006, but on that later date only 9 cameras were able to be counted in stock. Video footage shows one of the digital cameras being handled on 13 January by Ms Schueber out of the secure store but does not show it being handled by her back to that place. There is footage showing what looks like a camera being placed in a trolley, which is later taken with its contents through the checkout.

[21] Ms Mills, who was an eye-witness, was certain that it was a camera she saw being placed in the trolley, the same camera she saw Ms Schueber a short time earlier take from the secure room and pass to Ms Budd. Ms Mills gave GDL a clear statement of what she had seen. I find that a reasonable employer would have believed Ms Mills, as GDL did. As a witness before

the Authority, I found Ms Mills to have a strong and precise recollection of what she saw happen between Ms Schueber and Ms Budd. I consider that Ms Mills was not mistaken that she saw Ms Schueber hand the digital camera to Ms Budd who then placed it in her shopping trolley, before wheeling it away down the aisles. I consider that she was not mistaken when she saw Ms Budd go through the checkout without purchasing a camera or without even having it visible in her trolley.

Dismissal unjustified

[22] Despite these conclusions strongly adverse to Ms Schueber, the Authority is bound by case law to find that her dismissal in the particular circumstances was unjustified. This is because in rejecting her explanation for the alleged misconduct, GDL concluded she had lied during the disciplinary enquiry but the employer failed to allege dishonesty in that regard against her. Consequently GDL failed to give her an opportunity to answer the allegation of lying before it decided to dismiss for that additional reason.

[23] In the way GDL viewed the misconduct of Ms Schueber, the significance of her lying is seen from the following. Meeting notes of the disciplinary enquiry carried out by GDL record that on 24 January 2006 immediately before she was dismissed, management said to Ms Schueber;

In summary, we have concluded that you did not put that camera back, contrary to your version of events.

We believe that that camera was handed to Dale Budd, who put it in her trolley.

As a result of this enquiry, we conclude that you have lied during this investigation.

We state that due to the video evidence and two staff member's evidence, which contradicts yours.

(my underlining)

[24] The author of the notes Mr Gary Swan, GDL's Regional Security manager, confirmed in his evidence to the Authority that during the meeting of 24 January he told Ms Schueber;

.....that as a result of this enquiry, and what I have just stated, [she has] lied during this investigation.

(my underlining)

[25] The misconduct found by the employer was explained by Mr Swan to Ms Schueber in the following way;

Your version of events has seriously undermined the integrity and has brought into question the trust, honesty and integrity of an employer/employee relationship. We have concluded that serious misconduct has occurred.

There was then an adjournment of the meeting, after which Mr Swan repeated to Ms Schueber the conclusion GDL had reached that her actions constituted serious misconduct. The meeting of 24 January 2006 concluded when she was told she was summarily dismissed.

[26] Next day GDL wrote Ms Schueber a letter confirming her dismissal. In referring to the meetings held to enquire into the disappearance of the digital camera, the store manager wrote;

These meetings were held to investigate an incident that occurred in the store on the 13th of January, where it was alleged that you took a digital camera from the stock and gave it to another staff member. This camera was not returned and is

now unaccounted for. During these meetings, contrary to the evidence provided which included witness statements and store video footage, you stated that you returned this camera. This brought into question the Company's continued trust and confidence in you as an employee. Such an act is considered a breach of Company Rules and constitutes serious misconduct. The resulting consequences, if the alleged serious misconduct was proved correct, were explained to you at these meetings and are detailed in your employment agreement.

[27] In its Statement in Reply lodged with the Authority, the respondent GDL gave the following as being among the relevant facts surrounding Ms Schueber's dismissal;

2.6

The respondent reasonably concluded that the camera had not been returned and that the applicant had lied about the fact she put it straight back.

2.7 *the respondent could reasonably conclude that the applicant was in possession of the camera without authority.*

2.8 *This [position of employment] was a senior position in store and required a high degree of trust and honesty to discharge faithfully.*

2.9 *the respondent did/does not trust the applicant therefore cannot continue an ongoing relationship with her.*

(my underlining)

[28] I conclude from the above references to lying made by GDL, that lying was an additional ground for dismissal relied upon by the employer.

Alofa and Reckitt and Colman decisions

[29] Mr Fleming counsel for Ms Schueber made strong submissions about the principles of law applied in *Alofa v Aotea Cente Board of Management* unreported, AC 50/01, 30 July 2001. This was an appeal to the Employment Court from a decision of the Employment Tribunal. The Tribunal had found that the main reason relied upon by the employer for the dismissal of an employee was that he had lied in the course of an investigation into misconduct. It was alleged that the employee had engaged in sexual activity in the work place and during work hours, misconduct which the employee denied during the investigation.

[30] The Tribunal found that the lies were not incidental to the main issue of sexual activity at work but were "directly and inextricably linked" with his dismissal. The Tribunal found that the employer had reasonably concluded that the employee had not told the truth and that, "this was serious misconduct entitling the employer to terminate his employer." This was particularly so, the Tribunal found, given the requirement for the employer to hold a higher level of trust and confidence in the employee, because of the nature of his job as a security officer and also as a supervisor of others performing that work.

[31] On appeal the Court overturned the Tribunal decision, finding that the allegation of lying had not been put directly to the employee during the disciplinary investigation and also had not been made in writing as required by a Human Resources Policy and Procedures Manual kept by the employer. The Court held that the allegation of lying, although made indirectly, should have been made in writing as required by the manual, and it held that although the employee had been aware of the seriousness of the situation;

. the precise disciplinary allegations had not been formulated against him.

[32] According to case law Ms Schueber should have been given a chance to provide any excuse she might have had for an explanation that had been heard but rejected as untrue by

the employer. In *Reckitt and Colman (NZ) Limited v Neale* unreported, AEC 25B/95, 14 July 1995, the Employment Court applied that principle to a clear set of facts similar to those of the instant case. At page 21 of its decision the Court stated the following;

.....it was never expressly put to [the employee] by [the employer] that they considered he was lying to them in the course of the investigation and was thereby guilty of a serious act of misconduct for which he was liable for dismissal. If this allegation was the basis for the dismissal, [the employee] was not given the opportunity to offer an explanation to the allegation that he was lying in the course of the interviews.

.....

The failure to put the allegation of lying confirms the conclusion that even had this been the reason for the dismissal, the conclusion was not one that was capable of being reached after a fairly conducted investigation.

[33] I conclude that in this case lying was one of the grounds the employer GDL relied upon to justify its decision to dismiss, but that Ms Schueber was not afforded an opportunity to explain that particular allegation before the employer found it to be established.

[34] I find that GDL although not bound as in *Alofa* (above) by an HR manual to do so, did not in writing allege against Ms Schueber that she had told lies in her explanation. Neither did it orally make that allegation either directly or indirectly. In this particular regard her case is a stronger one than that of the employee in *Alofa*.

[35] A right to have all allegations made precisely to her was given to Ms Schueber in the collective agreement covering her employment. In Appendix II which sets out the procedure for investigating allegations of misconduct, it is stated;

The employee alleged to have committed misconduct will be given an opportunity to have the allegations described and the opportunity to give an explanation.

[36] At the start of the disciplinary enquiry the employer even gave Ms Schueber, for her to sign, a statement of her rights. It said she was entitled to know, "what it is the Company believes you may have done, or failed to do, as the case may be." She was also expressly entitled to be provided with, "an opportunity to explain your side of things." Therefore she had a right to have her alleged failure to tell the truth made known to her, and she had a right to have an opportunity to explain that allegation.

[37] Accordingly, as in *Alofa* and *Reckitt and Colman*, I find that the dismissal was unjustified. Applying legal principle I find that a fair and reasonable employer would not have dismissed her without first putting her on notice that her explanation for the alleged misconduct was not only rejected but was actually disbelieved. She then would have had a chance to respond to that separate and distinct allegation before the employer made a decision whether to dismiss her on the grounds that she had been untruthful, as well as on the grounds of being in unauthorised possession of the employer's property.

Other alleged defects in employers enquiry

[38] There are two further matters to be addressed in this regard. Ms Schueber complained there was some unfairness about Mr Swans first interview of her, held on 17 January 2006. She also complained about GDL's refusal to allow her to have a copy of the interview notes and written statements that related to Ms Budd and which Ms Budd had authorised GDL to release to Ms Schueber.

[39] I find that on 17 January 2006 when Mr Swan spoke to Ms Schueber for the first time about handling the digital camera on 13 January, he had not then commenced a disciplinary enquiry on behalf of the employer. As his note says, he was making enquiries about a

missing camera. This was the typical fact finding exercise that usually must precede any disciplinary enquiry. The purpose of it was to see from the intelligence gathered whether indeed any disciplinary enquiry was needed at all. In many cases the facts ascertained at this preliminary stage will show that suspicions of misconduct are unwarranted and that it would be an overreaction and unreasonable to pursue the matter further.

[40] Given the eye witness account from Ms Mills of the movements of Ms Schueber and Ms Budd, and given their accounts which conflicted with that of Ms Mills, it is not surprising that GDL decided to elevate its investigation after 17 January into a disciplinary enquiry. I find there was no entrapment or other unfairness arising from Mr Swans approach to Ms Schueber on 17 January.

[41] I find that there was no unfairness in the decision of GDL not to give Ms Schueber copies of notes and statements it had in relation to Ms Budd and her explanations. The substance of that information had been made known to Ms Schueber. The form of it in writing, with the exact words used and their setting out, was not something GDL had to release to Ms Scheber at the request of Ms Budd. Ms Budd could have obtained a copy herself and would have been entitled to pass it on to Ms Schueber. Alternatively, there was nothing to prevent Ms Budd telling Ms Schueber what she had been asked and what she had said at any interview with GDL. This is a minor issue that Ms Schueber has attempted to inflate into one of importance.

[42] As I have found for a different reason that the dismissal of Ms Schueber was unjustified, consideration must be given to the remedies she may recover to resolve that employment relationship problem.

Remedies

[43] The remedies sought by Ms Shueber for her unjustified dismissal are reinstatement to her position at Foodtown, reimbursement of lost wages and compensation for hurt feelings, humiliation and distress.

[44] In considering and awarding remedies the Authority is required by s.124 of the Employment Reltions Act 2000 to consider the extent to which the actions of Ms Schueber contributed towards the situation that gave rise to her unjustified dismissal. If it finds there was contributory fault, the Authority is required to consider whether the conduct of that kind by Ms Schueber was such as to require some reduction in the remedies that would otherwise have been awarded to her.

[45] I find that Ms Schueber gave an explanation to GDL that was false. This was that she had returned the digital camera to the cigarette room. On the evidence it had, the employer not surprisingly disbelieved her and dismissed her for serious misconduct. There is strong evidence from which I too find that explanation to be false. Had she returned the camera as she said she had done, it is highly probable that her actions would have been filmed by the surveillance cameras inside and outside the secure room. They were not and the only reasonable explanation for that situation is that she did not return the camera to the room after she had taken it away from there. Had she returned the camera it is reasonable to conclude that there would have been 10 of them found in stock on 16 January, since none had been sold between 11 January and that date.

[46] A further reason I have for rejecting her explanation as false is that the surveillance cameras record that no more than 25 seconds elapsed between the time Ms Schueber left the secure room with the camera and joined Ms Budd in front of the checkout. Whatever Ms Schueber and Ms Budd did with the camera at that point could not have occurred as long as 5 or 6 minutes after Ms Schueber left the secure room.

[47] Ms Schueber's explanation that she had returned the camera to the secure room was, I conclude, a false statement and was made knowingly. Wilfully making a false declaration is expressly prohibited under the the collective agreement work rules, which are contained in Appendix III. The employment agreement also provides that any serious breach of the work

rules may result in dismissal without notice.

[48] Knowingly making an untrue statement in the course of a disciplinary investigation was serious misconduct and is therefore strongly blameworthy conduct, especially by an employee in whom a higher level of trust and confidence has been placed because of her length of service and the nature of her job, in this case involving stock and cash handling.

[49] I find that the blameworthy conduct of Ms Schueber was closely causally linked to the situation that gave rise to her grievance. If Ms Schueber had not made and repeated untrue statements GDL would not have disbelieved her and would not have been put in the situation of having to make a fresh allegation against her and allow her the opportunity to explain.

[50] I am also satisfied that Ms Schueber was in unauthorised possession of the camera for some or all of the time after she took it from the secure store and until it left her possession, which most probably happened when she handed it on to Ms Budd. Her actions amounted to serious misconduct for which she must account in the assessment of contribution.

[51] Mr Fleming asked the Authority to find that any contribution was so slight as to be only 20%. I am of the opposite view and find that it was so major and so causative of the grievance, that in justice and equity no remedies should be awarded.

Determination

[52] For the above reasons, the determination of the Authority is that Ms Schueber was unjustifiably dismissed but that she contributed to that situation. She did so to such an extent that no remedies are to be awarded to resolve her grievance.

Costs

[53] Costs are reserved. In the overall result this cannot realistically be viewed as a case where Ms Schueber has been successful, even if she has been found to have been unjustifiably dismissed. I note that because Mr Audeau is an in-house representative of GDL there would appear to be no basis for a claim by the company for the costs of legal representation, although there may be an entitlement to disbursements. If costs are to be pursued by either party the best course may be for the representatives to discuss with me in a telephone conference the basis of any such application by either of them and to give further directions from there. The representatives are to advise the Authority if they want costs to be fixed by it, and a phone confernce can then be arranged.

A Dumbleton

Member of Employment Relations Authority