

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 125/09
5139701

BETWEEN RACHEL SMITH
Applicant

AND DATAMAIL LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Graham Clarke, for the Applicant
Guido Ballara, for the Respondent

Investigation Meeting: 16 June 2009 at Wellington

Determination: 2 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rachel Smith claimed that her dismissal on 7 August 2008 was unjustified because the company failed to carry out a thorough and adequate investigation, the incident relied upon did not, in all the circumstances, amount to serious misconduct, and there was a disparity of treatment between the applicant and other employees. Ms Smith claimed lost wages, compensation and costs. Prior to the investigation meeting she withdrew an application for reinstatement.

[2] Datamail Limited denied the claims.

The facts

[3] Ms Smith was employed by Datamail. Ms Smith's terms of employment with Datamail were under a collective employment agreement (2006-2008 between Datamail Limited and the Postal Workers' Union). Ms Smith was employed as a job manager at the Datamail's Converga Technology Centre (CTC) at Petone.

[4] Ms Smith's role was to ensure that Datamail's data processes were followed in respect of client campaigns (jobs) as allocated to the manager. The day to day operations are managed under service level agreements (SLAs). In practice, the business processing of clients' back office functions, and for transforming paper documents into data and images involves a verification process where documents are received, opened, sorted, receipted, scanned, and where necessary keyed in by an operator to be completed and moved to a new status.

[5] If a client has asked for verification, batches are assigned by a job manager to operators, with greater experience than the first operators, to key in a second time. Once that has been done the system moves the data to a verified status, and the data and images are exported by the job manager to the client. Datamail says that before exporting occurs there is a requirement that the job manager must ensure the data has been keyed in initially and then separately re-keyed and verified.

[6] Ms Smith's duties and responsibilities were provided in her 'job manager role profile' and the quality of her work were governed by the SLA. One of Ms Smith's campaigns involved a client that had contracted Datamail for, and had paid for, an additional verification service to be provided with the data processing. It is common ground that a client is able to request verification of the data to closely ensure the integrity of the data was occurring. This involved Ms Smith needing to ensure that each batch of data or batches entered by her subordinates was processed accurately and then keying this into the computer system. Also, Ms Smith was required to verify that the data batches had been checked by indicating in the computer system that this had taken place.

[7] Initially, the client contacted a client service manager at Datamail to express some concerns around errors found in data. Ms Mandy Tait, the CTC production manager, requested Ms Smith to check what might have happened. Ms Smith reported back to Ms Tait, and it is common ground that she stated that she had no knowledge as to how the errors may have occurred. Ms Tait and a new job manager, Selina Richards, then scrutinised more data and it became apparent to them that the client's data had not been verified, despite having been marked as such before being exported back to the client. Ms Tait and Ms Richards then had a discussion with Ms Smith and asked why the data had not been verified. Ms Smith said that she had no idea.

[8] There is a dispute between the parties on which data Ms Smith was shown. There is no dispute that the spreadsheet produced with information relating to verifications was partially filled in by Ms Smith. Even at this point, Ms Smith did not make any mention of having manually changed the status of data to indicate that it had been verified. Some further checks were then made by Datamail to ascertain whether there were any system errors which may have caused the problem, and IT employees were asked to perform this task. The IT employees were able to rule out any such errors, but confirmed that the batches had been manually changed to the “verified status” when they had not in fact been verified. As a result of this, Ms Tait decided that there needed to be an investigation which she commenced. Instead of Ms Richards being asked to undertake the investigation, Ms Tait decided that she would intervene directly and use the situation to give training to Ms Richards.

[9] Ms Tait adamantly denied ever instructing any one to ignore the requirement to verify data batches in order to meet an SLA because to do so would breach the terms of a contract with the client and the SLA.

[10] On 28 July 2008, Datamail sent a letter to Ms Smith initiating the formal investigation. That letter requested Ms Smith to attend an investigation meeting on Wednesday 30 July 2008 and alerted her that the Datamail’s concern was to discuss and seek an explanation “*regarding an allegation of serious misconduct specifically, negligence resulting from a number of deliberate acts which have adversely affected the quality of work within the Converga Technology Centre.*” That letter went on to say as follows:

“This, in summary, is as follows:

On 16th and 17th June 2008 you manually changed 16 Kiwibank batches individually from “status three” before work had been verified and then exported the batches knowing that the appropriate procedures had not been followed.

This information was gathered while investigating errors highlighted by [the client]. We have a contract with [the client] which stipulates that we will key and verify all work and they are charged for this service as such. The potential outcome of Converga not verifying work as stated can have far reaching and serious implications of future and on-going work.

We have investigated potential system issues with the solutions team and have tested scenarios to discount any system error. Our investigations have shown that there have been no system anomalies thus confirming batches having manually been altered.

As a result of this action, its impact on the quality of work delivered to the client, the potential impact on Converga's reputation and future business, as well as the deliberate non-compliance of process and procedure. This situation is considered serious and appropriate action needs to be taken.

Please find attached the following documents relating to this allegation:

- *"Status 3" non-verification report*
- *"Status 3" verification report*
- *EC Kiwibank loaded procedures.*

We need to gather as much information as possible in order to make a fair and impartial decision regarding these allegations. There may be other people you would like us to interview, please let us know if this is the case.

This investigation is part of a formal disciplinary process and as noted above, the possible outcomes if serious misconduct is deemed to have occurred range from no further action to summary dismissal from your position with Datamail Limited."

[11] Ms Smith's representative, Mr Graham Clarke, intervened on her behalf upon receiving the letter of 28 July. He asked for answers to some questions and Datamail replied.

[12] The parties met on 6 August 2008 where Datamail received confirmation that Ms Smith was aware that the client had paid for the additional verification service. It was also confirmed that Ms Smith was aware of Datamail's policy on verification and the correct process to be followed. Ms Smith confirmed that she had intentionally manually changed the verification status of data batches when she was aware that the data had not been verified. The explanation provided during that meeting by Ms Smith (through Mr Clarke) was that there had been an instruction given to clear the floor and get the work done ASAP, supporting an explanation that there was pressure placed on Ms Smith to get the work done. Ms Tait denied giving any such instruction to ignore the requirement to verify data batches properly. Ms Smith's representative also explained her concern about *quality versus quantity* during that meeting. She was unsure if she had ever raised this directly, and tried to do her job without getting her managers to intervene all the time. Ms Tait did not recall this issue ever being raised. Also, it was alleged that the skipping of the verification stage was a widespread practice which occurred in order to meet service level agreements (SLAs).

[13] After the meeting, Ms Tait decided to look again at the resourcing for the client loaded jobs. She concluded that there had been sufficient resources for the job, staff had been increased on the day shift and reduced on the twilight shift resourcing because there had not been much work left on that shift to process. The issue of additional resources required for the job was also discussed at a job managers' meeting she held on 29 May. Also, the allegation and explanation that there had been an alleged widespread practice was investigated with initial discussions with job managers and a review of data. Sufficient information was received from the job managers that would suggest that there was not a widespread practice, although the focus at this point then went on to individual circumstances. Two other people were identified, one not verifying data, and another saying she had been instructed by the aforementioned person not to verify data.

[14] The next meeting held was on 7 August 2008 and Ms Tait provided her explanation that there were sufficient resources for the client loaded and that Ms Smith had not raised any concerns about meeting the SLA and that the escalation policy had not been used. The escalation policy was produced by Ms Tait. Ms Tait also informed Ms Smith of the tentative decision to dismiss her without notice had been made because it had been concluded that her actions were deliberate and had adversely affected the quality of work within the CTC.

[15] Datamail's decision that Ms Smith's actions constituted serious misconduct was challenged when Mr Clarke informed Ms Tait that he did not consider that Ms Smith's actions amounted to serious misconduct. Ostensibly his conclusion was based on Datamail's failure to properly investigate the matter and because the applicant was not involved with the errors, for which there were no details provided.

[16] Ms Tait's concern related to a contractual obligation held by Datamail to provide the verification service to the client which had paid for the verification service. She could not lie to the client about what had happened and that it had to be informed. The client had already raised errors in its data with Datamail and the client had been told about the data not being verified. Ms Tait also considered that Ms Smith had admitted that she had acted deliberately and that it could not be seen as unintentional or as a mistake.

[17] There was an adjournment during the meeting held on 7 August and after which Ms Smith was informed that she was dismissed without notice and that the

seriousness of her actions meant that Ms Tait could no longer have any trust or confidence in her. The issue of the degree of seriousness in which the matter was viewed by Ms Tait and the possibility of concluding that there would be a loss of trust and confidence was raised during both meetings on 6 and 7 August 2008.

[18] As this process was playing out, Ms Tait also embarked on interviews with the two other job managers and met with them on 11 August 2008 separately. Both these job managers accepted that they too had not properly verified data batches but their circumstances were such that no further action was taken. A third job manager was dismissed for the same action.

Issues

[19] The applicant's case is based on an allegation that Datamail had not properly completed an investigation to enable it to come to the conclusion to dismiss Ms Smith, a conclusion it reached on 7 August. Further, the applicant's representative submitted that the grounds relied upon for serious misconduct would not lead to a fair and reasonable employer, in all the circumstances, deciding to dismiss. This was because of:

- (a) The nature of the investigation;
- (b) That it was not clear that the applicant had made the verification errors on the data that was relied upon in respect of data batches dated 16 and 17 July; and
- (c) The applicant reasonably believed she had discretionary powers with regard to the production process and had not compromised the quality of the product by her actions and had genuinely attempted to assist the respondent's business.

[20] The respondent contended that the dismissal of the applicant on 7 August 2008 was justified because a fair and reasonable employer would have taken that action when confronted with an employee who:

- *Admitted that she knew she was required to ensure 16 batches of client data were properly verified before exporting them to that client;*
- *Admitted that she had intentionally failed to verify the 16 batches before exporting them to the client;*

- *Admitted that she knew the client had paid extra for data verification to occur;*
- *Admitted that she intentionally changed the status of the 16 data batches to indicate a verified status when she knew they had not been verified;*
- *Admitted that she failed to escalate any (or her subsequently alleged) concerns before exporting the unverified data batches to the client, despite knowing that the escalation policy required this and was in fact intended to remedy the situation she later claimed had led her to act as she did.*

[21] The respondent further contended that the investigation and the disciplinary process were fair.

[22] This is a matter to be determined in accordance with s.103A of the Employment Relations Act 2000 requiring me to determine the matter on an objective basis by assessing Datamail's actions with regard to all of the circumstances at the time the dismissal occurred. It is not the role of the Authority to substitute its opinion for that of the employer but rather to focus on the employer's actions at the time and to have account of all the circumstances.

Submissions

[23] It is not necessary for me to reproduce the respondent's position on the matter, but for clarity the applicant's representative made a number of points that I will address in my reasoning for the decision. The points made by Mr Clarke were as follows:

- The respondent failed to carry out a reasonable investigation involving practices of all employees. It failed to adequately investigate any widespread practices involving all employees. A fair and reasonable employer would have established that there was a systemic problem in the production process.
- The respondent's investigation was compromised by determining that the matter involved serious misconduct before making any general enquiries and commencing a disciplinary process. In other words the respondent predetermined that the applicant's behaviour amounted to serious misconduct.

- The respondent did not properly take into account the applicant's mitigation – she believed that she had discretionary powers, the quality of work was not compromise and she genuinely attempted to assist the respondent's business.
- The 16 batches complained about did not contain any errors, and errors referred to by the respondent have never been produced.
- Two other batches that did contain errors that were available did not involve the applicant.
- The respondent's contention that the requirement that a job leader check all the stages of the production before exporting batches is not in the rules, and has not been provided to the applicant.
- The respondent did not check properly the applicant's claim that all employees omitted the verification stage and the employee responsible for the errors in the first place has never been discovered.
- The investigation was not completed at the time the findings and decision were made against the applicant.
- Allegations finally relied upon by the respondent were not put to the applicant at the time. This involved the allegations being restated as a false claim to verify the batches.
- The applicant had not exported batches with any errors.

Determination

[24] During the Authority's investigation Ms Smith admitted and accepted that she had not verified batches of client data before sending them to the client, she did not escalate the matter and that her actions had been intentional. These are the core matters arising from the applicant's explanation, and even though the issues may have been restated by the respondent, and appear to be different; I find that the core issues remained the same.

[25] These admissions were sufficient for the employer to come an honestly held belief that its policies and procedures had not been properly followed by Ms Smith.

Ms Smith knew that the client required verification and that it had paid for it. It was part of the role and I find that the employer was entitled therefore not to give weight to Ms Smith's comment that she believed she had discretion, the quality of work was not impaired and she was trying to assist in the employer's business.

[26] I find that the employer was able to make its decision based on information available at the time. The issues were raised with Ms Smith by Datamail. The allegations were put to Ms Smith. A response was heard by Datamail. There was further investigation in regard to Ms Smith's allegations of a widespread practice, but what was discovered involved individual instances that the Datamail decided to enquire about separately, which it was entitled to do given the practices involved in verification, the SLA's, and that the applicant had never raised concerns or obtained any clarification about what she was doing, quality issues and that she somehow believed that she was required to clear the floor and dispose of work quickly, which Ms Tait denied. Ms Tait says she never gave permission and never gave such an instruction. Datamail was able to rely on information that it had before it at the time and it has been able to satisfy me that Ms Smith's claims were not sufficient to take the matter any further for a decision and that any widespread practices would absolve her. Thus, information now being advanced by Ms Smith cannot mitigate her acts and omissions at the time.

[27] It was open to Datamail to conclude that Ms Smith's failure to verify the batches for clients amounted to a failure by her to follow the correct procedure and placed at risk the relationship between Datamail and the client. The client raised an issue that led to the finding that the batches had not been verified. Ms Smith was being inconsistent explaining that she had no idea before Datamail's investigation and then explaining that she was apparently following a practice of changing the status of batches to indicate a verified status when the batches had not been verified, which included work of her own that she had done the original keying for. Datamail was entitled to be concerned when the client had paid for verification.

[28] Ms Smith was informed of the tentative decision and the reasons including that Datamail could no longer maintain the necessary trust and confidence in her. I find that this conclusion was linked to her explanation that changed and that it is also linked to the employer's decision about the gravity of the situation concerning Ms Smith in her role as a job manager. Ms Smith had the opportunity to reply to the

tentative decision. Ms Smith's position that the client did not know was reasonably countered by Datamail stating that it had an obligation to tell the client once the client had raised an issue about some errors that had been discovered. Secondly the allegation that Ms Smith was following a widespread practice undertaken by all job managers so that they could meet targets was further considered, and found to be a matter for investigation. The employer was entitled to take that up separately because no instances had been provided by Ms Smith.

[29] Other explanations from Ms Smith at the time were that the team was under resourced and that there was pressure on her to complete the work causing a need to compromise quality and quantity. A fair and reasonable employer would have given this little weight considering Ms Smith had never raised the issues before.

[30] I do not agree that Mr Clarke is right when he said that it was reasonable for the applicant to assume there was some discretion about verification. This is because the policy and procedure and the practice and the job profile were clear about what job managers were required to do. Also Datamail checked for any systems errors through the IT personnel and has been able to rebut the claim that the system would omit to verify clients' data even where that client had contracted for verification. Two witnesses alluded to these problems, but I am satisfied that the employer did not need to consider the issues because the problem it had was not about IT failures or systems failures or any errors, but had more to do with Ms Smith's acts and omissions complying with Datamail's policies and meeting the expected practices on verification and escalation.

[31] I am satisfied that Datamail has been able to justify Ms Smith's dismissal in all the circumstances where a fair and reasonable employer would have concluded that her acts and omissions were serious. I am satisfied that a fair procedure was followed.

[32] Ms Smith's claims are dismissed. There is no personal grievance.

[33] Costs are reserved.

P R Stapp
Member of the Authority