

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Jamie Te Nana
AND	Telecom New Zealand Limited
REPRESENTATIVES	Joanne Watson for the Applicant Samantha Turner for the Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	7 September 2006
SUBMISSIONS RECEIVED	15 September 2006 from Applicant 22 September 2006 from Respondent
DATE OF DETERMINATION	29 September 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 10 March 2006 Mr Jamie Te Nana was dismissed for serious misconduct following an investigation by his Manager, Ms Tania Beynon into alleged breaches of Telecom New Zealand Limited's ("Telecom") policies. Mr Te Nana claims the dismissal was unjustified and seeks remedies including reinstatement.

[2] In response Telecom denies Mr Te Nana's dismissal was unjustified.

- The justification of Mr Te Nana's dismissal is to be determined in accordance with section 103A of the Employment Relations Act. This requires an objective assessment of what a fair and reasonable employer would have done in all the circumstances.

The Circumstances

[3] Telecom is New Zealand's largest telecommunications provider. Telecom holds personal information about a significant proportion of New Zealand telecommunication users, such as credit ratings etc, and therefore Telecom has in place measures to protect that information. Telecom views the integrity of its employees, as paramount.

[4] Employees are required to act in accordance with Telecom's policies which expressly prohibit employees from accessing and/or working on the records of friends, relatives or acquaintances.

[5] Mr Te Nana was employed initially by Telecom as a Customer Solutions Representative (CSR) in May 2003. In November 2004 he was promoted to the position of team leader in Ms Jennifer Squire's team. Ms Squires is a Customer Care Manager based in Hamilton.

[6] In February 2005, Mr Te Nana applied for and was appointed to a position as team leader in Ms Tania Boynton's team. Ms Beynon was based in Christchurch. Mr Te Nana continued to be based in Hamilton.

Policies
Telecom Code of Ethics

[7] This document sets out the standards applicable to the conduct of Telecom employees in their work and includes instructions on issues such as Conflicts of Interest, Gifts, Corporate Opportunities, Confidentiality, Behaviours etc. Paragraph 8 of the Code sets out delegated responsibilities and requires employees to:

Only act within the Delegated Authority framework and any authority that may be specifically given to them as a Delegated Authority holder...

[8] It is clear from the Code that Telecom requires its employees to conduct themselves to a high ethical and professional standard.

Delegated financial authority (DFA)

[9] Mr Te Nana's specific DFA, which he was entitled to use at his discretion, allowed him to provide goodwill credits to customers who had received less than satisfactory service or to remedy an overcharge without the need to seek higher authorisation. The way the DFA is exercised and the standards expected are set out in a "Use of Delegated Financial Authority" form. Employees are required to sign this form confirming they have understood the guidelines. Mr Te Nana signed his "Use of DFA" form on 24 May 2003.

[10] The DFA policy specifically prohibits employees from issuing service orders, arranging disputes, or issuing credits or write off charges, on their own account or on the account of a relative, friend, acquaintance or work colleague. These actions must always be referred to a manager.

Telecommunications Fraud and Misuse of Company Resources Policy

[11] On 26 May 2003, not long after Mr Te Nana was appointed to his initial role at Telecom, a memo was sent to all customer sales and service staff in relation to Telecom's telecommunications fraud and misuse of company resources policy. The memo states, amongst other things, that employees must never action work on their own account. The memo is clear that any breach of the fraud policy would likely result in summary dismissal.

Misuse of Company resources and use of
delegated authority

[12] On 18 December 2003, all Northern Region customer care employees, which included Mr Te Nana, were sent a memo from Ms Debbie Herlihy, Group Customer Care Manager, in relation to Telecom's misuse of company resources and use of delegated authority policies. The memo specifically stated that:

- You are not to issue service orders for yourself, colleagues, friends, relatives or acquaintances.
- You are not to arrange disputes, issue credits or write-off charges for yourself, colleagues, friends, relatives or acquaintances.
- You must not ask a friend or colleague to issue a service order for yourself, colleagues, friends, relatives or acquaintances.
- You must not ask a friend or colleague to arrange disputes, issue credits or write-off charges for yourself, colleagues, friends, relatives or acquaintances.

[13] Employees were reminded that breaches of the policy could result in summary dismissal. Employees were also asked to read the memo and sign their acknowledgment that they had read and understood the policy and would abide by it as Telecom employees. Mr Te Nana signed as understanding the guidelines on 22 December 2003.

[14] It was common ground at the investigation meeting that if credits are issued or charges waived for customers who are not colleagues, friends, relatives or acquaintances, full details are to be notated on the customer's permanent account record in the form of a memo so that it is clear why that action occurred. This requirement protects the employee as well as Telecom. Telecom has, through its various policies, consistently emphasised the need for its employee's to be responsible and accountable for their own actions. The policies also highlight the need to eliminate any question regarding the validity of actions taken.

[15] Mr Te Nana says that when he became a team leader a lot of the learning he did was by him and that he was not trained. He says that the time between signing the policies in 2003 and Telecom's reliance on them in 2006 was too great a time lapse and he couldn't be expected to remember what was in them. He says the policies have never been brought to his attention since 2003.

[16] Ms Squires evidence (which I accept) was that when Mr Te Nana became a team leader in November 2004, she inducted him into his role and that his induction training included: a mentor team leader for support on an as-required basis; twice weekly coaching for three weeks; ongoing weekly coaching sessions; and an open door policy where ad hoc coaching was given as matters arose.

[17] Ms Squires says specific training was also given to Mr Te Nana on the audit requirements of Mr Te Nana's new team leader role such as monthly CSR reports. The reports are checked by team leaders to ensure CSR's are operating within Telecom's processes,

policies and guidelines. The training was linked to the policies to provide context and to reinforce the need for the audits.

[18] In addition to his induction training, a centre management meeting was held on 1 April 2005. At this meeting all team leaders, including Mr Te Nana received coaching which included references to audits and the applicable policies.

[19] I consider it more likely than not that Mr Te Nana was aware of and familiar with the policy requirements relating to activity on his own account, and issuing upgrades and credits for family, friends and acquaintances. Mr Te Nana accepted at the investigation meeting that he was aware of the code of ethics when, in 2005 he and other team leaders from the Hamilton site voiced concerns to Telecom regarding the potential for the code to be breached.

[20] The concerns related to a marketing campaign during which Telecom offered free upgrades for customers converting from the 025 network to the 027 mobile network. The process to complete the upgrades, especially for the pre-paid connections, required employees to create an existing connection on a Telecom account then complete an upgrade service and apply a sales credit or account credit to ensure the correct pricing for the customer. Mr Te Nana told me that he had voiced his concerns that completing mobile orders in the manner required by Telecom would encourage an unethical sales behaviour among the sales staff. Mr Te Nana also used this example as a way of supporting his contention that Telecom applied its policies inconsistently.

[21] I do not accept that there were any inconsistencies in the processes required to be followed by employees in the example provided by Mr Te Nana. It may well be that some sales staff could succumb to unethical behaviour, however, that was a matter for team leaders such as Mr Te Nana, to manage as a supervisor.

Audits of staff

[22] Consistent with its focus on high ethical standards Telecom undertakes regular random audits on the activities of its employees. The audits are carried out on a monthly basis and the employees to be audited are picked at random.

[23] As a Team Leader, Mr Te Nana was required to audit the work of his direct reports and identify any unusual activity. Mr Te Nana says he was also required to carry out self-audits on his own work which he found difficult. Ms Beynon did not recall requiring Mr Te Nana to self-report. In any event, Mr Te Nana did not provide any reports on his own activity.

[24] Mr Te Nana was of the understanding that his work was being audited by his manager in the same way as he was auditing the work of his direct reports. Mr Te Nana says that if he had been audited regularly then the issues which lead to his dismissal could have been dealt with much earlier in his employment rather than 1-2 years later.

[25] As already set out above, the audited employees were picked at random. Only one team leader was audited each month. The randomness of the selection of the employees who were audited, combined with the fact that there were only 26 team leaders in Hamilton, led to a situation whereby Mr Te Nana was never subject to an audit.

[26] In relation to the allegations made against Mr Te Nana, however, I am satisfied that even if Mr Te Nana had been picked at random for the monthly audit the issues giving rise to his dismissal would, in all likelihood, not have been picked up. The audit reports are looked at monthly, in isolation, and so unusual crediting activity would not have been identified. Also, no reports are carried out on personal ESN activity. Ms Beynon, told the Authority, and I accept, that there must be a modicum of trust at the team leader level. Ms Beynon says she managed her team with the view that they would do the right thing.

Electronic serial number (ESN)

[27] Mr Te Nana's actions leading to this personal grievance revolves around the use of his own personal ESN number. By way of explanation each particular piece of hardware (mobile phone) has a dedicated electronic serial number (ESN). The ESN can not be changed. However, the history of a user of the hardware can be recorded and changes tracked. For example, person A purchases a Nokia mobile phone (the hardware). Customer A gets a mobile number allocated which can either be on a call plan or as a pre-paid. The allocated mobile number is then recorded against the ESN for that hardware. If customer A then upgrades their mobile to another model (for example a Sanyo or a newer Nokia), and takes their mobile number with them, Telecom transfers the mobile number to the new ESN for the new hardware. The ESN number of the old phone remains with that hardware. Customer A is then able to have a new number allocated to the old ESN.

Telecom's actions

[28] Telecom says that Mr Te Nana had used his own personal ESN number which allowed customers to have discounted upgrades to mobile telephones and/or to receive unauthorised credits.

Upgrades

[29] Telecom customers become eligible for free upgrades for a new mobile phone if they meet specific criteria. Telecom defines through its policies what can be offered to a customer. For example, if a customer was to purchase a new mobile phone they may receive a discount on the new phone as a result of upgrading. However, to be eligible at all for any upgrade, the customer must first of all own a mobile phone.

Credits

[30] At various times Telecom run Direct Marketing (DM) promotions. Usually, specific Telecom customers are targeted in these promotions. Letters are sent out to those customers outlining the promotion and the eligibility criteria. The promotion may include credits being offered to customers, against their Telecom account, in exchange for taking up a particular offer. The targeted customer accounts are annotated indicating they are entitled to a credit if they take up the offer, so that sales reps and others will know which customers are eligible and which aren't. It goes without saying, those customers whose accounts do not carry the annotation, are not eligible for the DM credits.

The disciplinary process

[31] In February 2006, Ms Squires was approached by a customer care representative who advised her that the representative had been dealing with customer called Suttie and there appeared to be some unusual activity on their ESN which actually seemed to be owned by Mr Te Nana. The representative explained that when she had entered the details of the customer into the computer system she noted that there were an unusual number of changes to the ESN. She noticed that one of the telephone numbers attributed to the ESN was Mr Te Nana's personal mobile phone number.

[32] Ms Squires passed the information onto Ms Beynon who conducted an investigation into the use of the ESN. The ESN was owned by Mr Te Nana. The investigation showed that Mr Te Nana had, among other things, used his own ESN number for what appeared to be unauthorised activity. Before embarking on a disciplinary process Ms Beynon conducted a search on the use of Mr Te Nana's extension number and the numbers assigned to those customers appearing on Mr Te Nana's ESN report.

[33] That investigation raised concerns about whether Mr Te Nana had actioned requests and provided unauthorised credits and upgrades on the accounts of people who could be classed as family, friends or acquaintances and whether he had breached Telecom's sales rules and ethics by providing credits to customers in order to procure a sale.

[34] The frequency and multitude of the interactions between Mr Te Nana and the customers was concerning. Ms Beynon told me it is unusual for a team leader to deal with one particular customer because they work in a call centre environment and you would not necessarily have contact with the same customer all of the time. At the investigation meeting Ms Beynon did concede that there could be a lot of contact if a matter had not been resolved, but if it was a new issue then it would be unusual for the same person to handle it. Ms Beynon also conceded at the investigation meeting that it may not be unusual for customers to request a specific telecom employee where a professional relationship between that employee and the customer has developed.

[35] The following actions by Mr Te Nana raised questions which Ms Beynon determined needed to be answered:

- On 29 March 2004 a number previously connected to Mr Te Nana's ESN was disconnected. The following day, on 30 March Mr Te Nana connected a new number in the name of Le Gros to his ESN.
- On 18 May 2004 Mr Te Nana issued a \$100 DM credit against customer Suttie. The customers had signed up on a 12 month contract. The \$100 DM credit was only available on 24 month contracts.
- On 30 November 2004, six months after the first credit against Suttie, Mr Te Nana issued a further \$200 DM credit against the same customer. Once again the customer is notated as signing a 12 month contract. There was no evidence that this customer had been direct marketed and the credit was within 12 months of the previous credit.
- On 29 August 2005 (nine months later), the Suttie's upgraded to a new handset and were issued with a \$100 DM credit. The credit was requested by Mr Te Nana.
- On 5 October 2005 Mr Te Nana disconnected Le Gros's number from his ESN and on the same day connected a new number in the name of Amiria.
- Four days later, on 9 October 2005 this number was disconnected and Mr Te Nana had his old mobile number reconnected to the ESN. Mr Te Nana upgraded his mobile phone 7 days later on 17 October 2005.
- On 6 December 2005 Mr Te Nana connected another number, again in the name of Le Gros and on that same day Ms Le Gros upgraded to a new Sanyo handset. Le Gros received a discount of \$50.00 on the upgrade.
- On 12 December 2005 Mr Te Nana's old number was once again connected to the ESN. Five days later, on 19 December Mr Te Nana arranged for his number to be transferred to a dummy ESN (an ESN number which is not attributed to a piece of hardware).
- On 19 December 2005 Mr Te Nana issued an upgrade to a new handset for \$221.33 excluding GST. The customer (Manaaki) signed up on a 24 month plan. Mr Te Nana issued a \$100 tier credit as well as a \$100 DM credit. Given the amount of credits received against his account the customer paid a total of \$21.00 plus GST for the new handset. The customer was entitled to the \$100 tier credit but not the \$100 DM credit.

- On 20 December 2005 a new number was connected to Mr Te Nana's ESN in the name of Allen. On 24 December 2005 Allen received an upgrade to a new Sanyo at a discount of \$50.00.
- That same day (24 December) Mr Te Nana issued a new connection in the name of Dempsey. Mr Te Nana issued a discounted upgrade on 29 December 2005 together with a \$100 DM credit to this customer. This customer was not eligible for the DM credit as there was no alert code connected to this customer's account.
- On 22 January 2006 Mr Te Nana connected a new number to his ESN in the name of Suttie. The next day Mr Te Nana upgraded the Suttie's to a new handset providing them with a \$50.00 discount and issued them with a \$200 credit. In a memo on the account, Mr Te Nana noted that the customers had queried an order they had made previously for a Xmas promotional price for their new handset. Ms Beynon says there was no promotion by Telecom for this handset at the price offered to the Suttie's during Xmas 2005. Neither was there any promotion for credits to be applied to the handset on the plan signed up for by the Suttie's.

[36] Ms Beynon told me that one of the core functions of Mr Te Nana's role was business compliance. That required Mr Te Nana to ensure that he had a sound understanding of, and a demonstrated commitment to, and compliance with, all legislation and policies that were relevant to all activities he undertook as a team leader. Mr Te Nana's employment agreement also provided that Telecom staff policies form part of his terms and conditions of employment.

[37] Mr Te Nana was notified of three serious issues relating to potential non-compliance with Telecom business practices and ethics. The allegations were outlined in a letter dated 7 March 2006. At the time, Mr Te Nana was also provided with all the documentation containing the reports investigated by Ms Beynon.

[38] Mr Te Nana acknowledges that when he was given the letter he was advised that he would be required to respond to the allegations and that he could have a support person with him at the meeting. Mr Te Nana accepted that the letter put him on notice that dismissal was a possible outcome, but he didn't really believe he would be dismissed.

[39] The allegations were set out in the letter of 7 March were:

- the potential use of hardware previously connected under his name to allow customers to procure new mobile phones at reduced upgrade prices; and
- the potential misuse of company resources in relation to actioning requests and providing credits on accounts of friends, family or acquaintances; and

- potentially breaching sales rules and ethics where he provided credits in order to secure a sale.

[40] Mr Te Nana says he tried to work his way through the documents provided to him by Ms Beynon but he says he struggled with recalling what had happened in some of the examples, as some of them had occurred in 2004 and prior to him being appointed as a team leader.

Disciplinary meeting

[41] On 8 March, Ms Squires, Ms Beynon and Mr Te Nana attended the disciplinary meeting. On his arrival, Mr Te Nana did not have a representative or support person and Ms Beynon recommended that he should do so. Despite that, Mr Te Nana wanted to proceed with the meeting and specifically asked that it be recorded in the meeting notes that he did not consider he needed a support person or representative with him. Mr Te Nana had recently undertaken a disciplinary process himself, in relation to one of his employees. Therefore, I am satisfied he knew, or ought to have known, the importance of representation at the meeting and made an informed decision not to have such assistance.

[42] Ms Beynon confirmed to Mr Te Nana that she was taking the allegations very seriously, that she had a number of concerns in relation to his conduct, and that if proven, disciplinary action up to and including dismissal could result. Mr Te Nana confirmed that he wanted to proceed with the meeting. Mr Te Nana was advised that the purpose of this meeting was to put the allegations to him, to give him an opportunity to respond, and provide an explanation for his conduct. Ms Beynon then explained that following this meeting she would take time to consider his explanations and would undertake further investigations if that was necessary. She advised Mr Te Nana that they would meet again with him to provide him with a further opportunity to respond to the allegations.

[43] Mr Te Nana responded to each of the allegations. He had pre-prepared notes which he used throughout the meeting. Generally Mr Te Nana accepted that he had taken actions without properly recording the reasons for those actions in the form of a memo against the customer's account. Mr Te Nana was adamant throughout the meeting, that he did not take any action which led to him receiving a personal gain.

[44] On a number of occasions Mr Te Nana was unable to provide any explanation except to say that he could not remember. Mr Te Nana explained to Ms Squires and Ms Beynon that he shouldn't be responsible for the actions he had taken because he wasn't fully aware of what the policies actually said, as he hadn't looked at them since he had signed them. Essentially his explanation was that he had carried out actions for friends without thinking and out of habit, but had not done so for personal gain.

[45] There were six customers involved in the transactions:

- Le Gros – received a \$50.00 discount on an upgrade (6 Dec 05). The customer is a friend of Mr Te Nana's.
- Suttie – received a \$100 DM credit (18 May 04); \$200 DM credit (30 Nov 04); Free upgrade and \$100 DM credit (29 Aug 05); \$50 discount upgrade, plus \$200 credit (22 Jan 06). The customers are friends of Mr Te Nana's.
- Amiria – Mr Te Nana issued this customer with a prepaid number against his own ESN. The customer is Mr Te Nana's daughter.
- Allen – received \$50.00 discounted upgrade. The customer is related to Le Gros.
- Manaaki – received an upgrade to a new handset plus \$100 tier credit and \$100 DM credit (19 Dec 06). The customer was a friend of a friend of Mr Te Nana's.
- Dempsey – received discounted upgrade of \$50.00 plus \$100 DM credit (29 Dec 05). The customer is related to the Suttie's who requested Mr Te Nana to contact the customer.

[46] On 9 March a second meeting was held at which time the notes from the previous day's meeting had been transcribed and were provided to Mr Te Nana. He was given the opportunity to read through the notes and provide any further explanations. Mr Te Nana advised he had nothing further to add. Following that meeting Ms Beynon decided Mr Te Nana would be dismissed for serious misconduct.

[47] Ms Beynon and Ms Squires met again with Mr Te Nana on 10 March at which time he was provided with the notes from the 9 March meeting. He signed the notes after confirming that they seemed to be an accurate picture of the meeting.

The decision to dismiss

[48] It is a well accepted principle that there is a need to have trust and confidence in an employment relationship. Mr Te Nana was dismissed because of the unexplained multiple breaches of Telecom's policies which led to customers (most of whom were friends) receiving a financial gain. Ms Beynon says it wasn't a situation where there were just one or two infractions. There were issues also about processes not being followed and the lack of memos against customer accounts to explain the credits which had been given. It is the team leader's responsibility to lead the processes and enforce compliance with policies. It was Ms Beynon's view that Mr Te Nana had a good understanding of the policies and had breached them without a satisfactory explanation.

[49] Ms Beynon and Ms Squires were both of the view that what Mr Te Nana had done was a breach of the policies regarding credits because they are clearly defined and credit cannot be provided outside of those defined areas. If team leaders or other employees wanted to go outside the defined policy they needed to get approval. Mr Te Nana had provided upgrades and credits outside of the policy and without the necessary approvals.

[50] Mr Te Nana relied on his DFA to support his view that he was entitled to use his discretion to issue credits. I am satisfied that the DFA was not to be used for issuing DM credits for customers. The DFA is for the purpose of appeasing disgruntled Telecom customers by providing credits for poor customer service or overcharging, not DM credits. Mr Te Nana was also required to add notations and memos to accounts when issuing credits to avoid allegations of this kind. In this case, Mr Te Nana had not made any notations against customers and therefore no explanations as to why he felt these customers were entitled to receive the credits.

[51] During the disciplinary meeting on 8 March Mr Te Nana accepted that his notations on the transactions were not sufficient.

Would a fair and reasonable employer have dismissed Mr Te Nana

[52] The Authority must have regard to the nature and degree of the alleged misbehaviour and its significance in relation to the position held by the employee and the business of the employer. What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZILR 176).

[53] The business of the employer is to provide telecom services to its customers. In doing that it is required to collect and retain a large amount of personal information on its customers which it is obliged to protect. It has in place various policies to protect both its customers and its employees and expects its employees to act to a high ethical and professional standard.

[54] There is evidence that Mr Te Nana allowed customers to gain financially from issuing credits to which they were apparently not entitled and, through the use of his own ESN number, allowed customers to receive discounted upgrades. Without the use of Mr Te Nana's ESN number, those customers would not have qualified for the discounted upgrade as a prerequisite was that they already owned a mobile phone. By using Mr Te Nana's ESN number the customer was able to give the appearance that it was their hardware they were upgrading from.

[55] Mr Te Nana says that as the issues raised with him were one to two years old and some were before his appointment as a team leader, he was not given a proper opportunity to address matters as they had occurred. He says that this amounts to unfairness because he

could not be expected to remember what had happened months ago, let alone some years ago.

[56] I accept that raising issues some years after the event can lead to unfairness. However, Telecom has in place a requirement to make notations against customer accounts explaining actions taken, to prevent this situation arising. I do not accept that the issues were raised outside a reasonable time frame. With the exception of two of the twelve actions under scrutiny the actions taken by Mr Te Nana were after he was appointed team leader. Again with the exception of one action taken in late 2004 the rest of the actions taken by Mr Te Nana were late 2005 leading into 2006.

[57] Standing back from the detail of the case, I consider Ms Beynon acted fairly and reasonably in reaching the conclusion that Mr Te Nana's actions were sufficiently serious to warrant his dismissal.

[58] Mr Te Nana was responsible for supervising staff and ensuring their compliance with Telecom's policies and processes. Mr Te Nana's actions in issuing credits outside the policies with no suitable explanations, and allowing his ESN to be used to allow customers to receive discounted upgrades for new mobile phones, damaged the trust and confidence he previously enjoyed.

[59] I find Telecom has discharged the burden of showing the dismissal was justifiable because the actions taken by Ms Beynon were what a fair and reasonable employer would have taken in all the circumstances at the time of the dismissal.

[60] I am unable to assist Mr Te Nana any further.

Costs

[61] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority