

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Pero Tamarua (applicant)
AND	Toll NZ Consolidated Limited (respondent)
REPRESENTATIVES	David McLeod for the applicant Shannon Kelly for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 18 October 2005
SUBMISSIONS	26 & 28 October, 2005
DATE OF DETERMINATION	1 November 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Pero Tamarua says he was unjustifiably dismissed by the Company– statement of problem received on 20 June 2005. He originally claimed reinstatement, as well as reimbursement of wages or other money lost as a result of the grievance, \$10,000 compensation for humiliation, etc and costs. During the investigation Mr Tamarua withdrew his claim for reinstatement.

2. The Company says Mr Tamarua was justifiably dismissed for serious misconduct for taking customer property – statement in reply received on 8 July.
3. The parties did not settle their employment relationship problem in mediation. Agreement was subsequently reached on a one-day investigation in Napier on 18 October. Witness statements were usefully provided in advance of the investigation. Efforts by the parties during the investigation to settle their problem were unsuccessful. Agreement was reached on an exchange of submissions.

Background

4. Except where indicated the key facts are not in dispute.
5. Mr Tamarua was employed as a freight handler at the Company's branch in Hastings. He was part of a team responsible for delivering freight to customers on time and in a suitable condition. Mr Tamarua's length of service with the Company and its predecessors totalled 18 years, the final six being in Hastings.
6. Mr Tamarua had an unblemished employment record not having been involved in any previous disciplinary action or issued with any warnings.
7. During 2004 Hastings' branch management noticed product was disappearing from the site. Two memos were issued to staff, on 16 March and 20 May, and a meeting was convened with staff during which they were warned that it was unacceptable to take customer or Company property and they could be dismissed for doing so. Mr Tamarua saw those memos and attended the meeting.
8. Because property continued to disappear from the site a camera surveillance system was installed in September 2004. Some suspicious activity was recorded. Company management then arranged for investigations to be conducted by an external agency. The Company's investigators interviewed all freight handlers including the applicant.
9. Mr Tamarua was interviewed on 20 December 2004. He was represented during the meeting by a union delegate (who was also dismissed for serious misconduct on or about the same date as the applicant).

10. At his interview Mr Tamarua signed two statements: the first acknowledged, amongst other things, that he had nominated a representative to accompany him to the interview and that several penalties could be applied to someone found to have unlawfully taken property, including dismissal (refer to the attachment of 20 December to the statement of problem). The time of Mr Tamarua's signature on the first statement is recorded as the time the interview commenced. The investigator who interviewed the applicant says Mr Tamarua signed the statement at the start of the interview, after the matters set out in the statement had been explained to him, whereas the applicant and his representative say the first statement was signed at the end of the interview thereby disadvantaging the applicant.
11. The second statement records, amongst other things, Mr Tamarua's admission to taking 8 jars of jam about a month before.
12. Mr Tamarua was suspended with pay on the same day consistent with the provisions of his collective employment agreement while further investigations were carried out; he does not contest his suspension.
13. A letter was forwarded to the applicant on the following day, 21 December, advising him that a disciplinary meeting would be held on 22 December and, amongst other things, that dismissal could follow if the allegations against him were established.
14. Mr Tamarua was also represented, albeit by a different union officer, at the 22 December meeting. He confirmed again that he had taken 8 jars of jam. Following an adjournment the respondent dismissed Mr Tamarua.

Respondent's Position

15. Counsel for the Company, Ms Shannon Kelly, advanced the following argument on behalf of her client: it denies Mr Tamarua's claim that his representative at the first meeting was advised by the external investigator (who in turn advised the applicant) that Mr Tamarua should be honest as at worst a slap on the hand would result.
16. The Company says it has never authorised employees to take customers' goods, damaged or otherwise. Taking customer property is not common practice.

17. The Company did not intend to dump the jars of jam taken by the applicant.
18. Procedures are clearly laid down by the Company in its manual in respect of damaged consignments. The Company's main customer is particularly conscious of quality controls in relation to its product because of the potential liability in allowing damaged product to be distributed. The customer therefore requires the Company to return any damaged product. It is for the customer to determine what will happen to any returns. If it cannot distribute damaged goods it may, depending on its condition, sell the product to its own staff or dump it. If the latter happens then the Company is charged an amount based on the value of the damaged product. If the customer decides it can distribute the damaged returns then the Company will not be charged for it.
19. On extremely rare occasions the Company will dump damaged customer product into bins on its own site rather than return it to the customer, because it is too messy, or impracticable or dangerous, i.e. it is leaking or broken. The practice is, however, to recover any undamaged items and return them to the customer: no approval exists for employees to take customer product that has been dumped by the Company into its own bins.
20. During the interviews leading up to his dismissal Mr Tamarua did not say he believed he was entitled to take the jam as it was going to be dumped. I also note here that, similarly, in defence of his position, Mr Tamarua did not say in any of his interviews that he had been encouraged to tell the truth because at worst he would receive a slap on the wrist.

Applicant's Position

21. The advocate for the applicant, Mr David McLeod, advanced the following as well as other argument on his client's behalf: Mr Tamarua is adamant that the jars he took were from a consignment that was going to be dumped and that he took the product only because it was rubbish that was destined to be dumped by his employer. This was the only product he had ever removed.

22. The Company's policy about customer, etc product, as it is now presenting that policy, was never made clear to Mr Tamarua. The applicant has limited computer skills and did not access the respondent's intranet net. He therefore was not familiar with its site operations manual and saw it for the first time when some pages were attached to the Company's statement in reply. He denies ever seeing the Company's theft memos of 16 March and 20 May.
23. Mr Tamarua admitted to taking the jam because his then representative received an assurance from the Company's investigator that it would be best for him to be completely honest and that at worst only a warning was likely.
24. The meeting with the investigator was conducted in a procedurally unfair manner in that the applicant was not advised of his employment rights or that his employment might be in jeopardy regarding the information revealed.
25. Because of his unblemished record and the modest value of the product he took Mr Tamarua is entitled, in light of his length of service, prior record and cultural background and the absence of certainty as to the status of the product he removed, to the benefit of the new test of justification provided in the Act at s. 103A to a penalty less than dismissal.
26. The relationship is not beyond restoration: Mr Tamarua is genuinely remorseful. He now understands clearly what is required of him and is adamant that he would not behave in the same or similar way in the future.
27. It is likely that others dismissed at the same time did not align with Mr Tamarua's circumstances and a distinction could have been made to justify their dismissal and not the applicant's.

Discussion and Findings

28. A distressing feature of this case is that 8 jars of jam have cost Mr Tamarua the benefit of 18 years of otherwise unblemished service. Furthermore, during the investigation and as was already illustrated by the applicant's original frank admission, Mr Tamarua gave every appearance of sincerely believing the customer

product he took was destined for the rubbish bin and there was nothing wrong with – in those circumstances – his taking it.

29. Notwithstanding these observations, but because a single outbreak of dishonest behaviour may be so destructive of the relationship of trust and confidence between the employee and the employer (see *Barratt v Effem Foods Ltd*, unreported, Goddard CJ, 21 September 1993, WEC 24/93), I am satisfied the applicant was justifiably dismissed in terms of the justification test provided by s. 103A of the Act for the following reasons.
30. I find that the Company's position was and is plainly stated: staff will not remove any customer product, whether they believe it is destined for the rubbish bin or otherwise, without appropriate authority. No exceptions apply. Mr Tamarua had no authority to take 8 jars of jam. In particular, he cannot point me to any authority or evidence for his belief he could legitimately remove product destined to be dumped.
31. I am also satisfied that, as a result of Mr Tamarua's 18-years' experience, he was clearly informed as to the Company's policy and equally aware of its practice – of attempting to recover and return as much damaged stock as possible to the customer because of the latter's concerns about liability, and because the respondent stood to reduce its liability for damaging its client's product.
32. Mr Tamarua would also have known, from his experience on the job, that unauthorised removal of customer product can and did result in staff being dismissed.
33. I do not accept that Mr Tamarua was disadvantaged in any way by the procedure adopted by the Company in the lead up to its decision to dismiss that applicant. That is because, and notwithstanding the dispute as to when it was signed, Mr Tamarua elected, knowingly, to sign off a document acknowledging he had been warned he could be dismissed if the allegation of unauthorised removal of freight was held against him. Secondly, the Company's letter of 21 December clearly repeated that Mr Tamarua could be dismissed if the allegation of serious misconduct by him was established.

34. For those reasons I also find against the applicant's claim he was disadvantaged by (disputed) advice he, at worst, faced a slap on the hand. Any concern Mr Tamarua has in respect of the level of expertise and advice he enjoyed from his representatives is a matter for him to pursue with his former Union.
35. The Authority's evidence disclosed no basis for the claim that Mr Tamarua was unfairly disadvantaged by the respondent's process because insufficient regard was had to the fact English is his second language, and/or because of his cultural background.
36. I am satisfied the Company properly took into account Mr Tamarua's unblemished 18-year work history before arriving at its decision to dismiss him. I also accept that other staff members with longer service were dismissed at around the same time, for similar serious misconduct.
37. Objectively measured, as required by s.103A of the Act, I am satisfied that the employer's action and how it acted were open to it, in all the circumstances at the time the dismissal occurred, as a fair and reasonable employer,.
38. The Authority's investigation proved no evidence to support the applicant's claim that he had been dismissed so as to save the Company the cost of making him redundant. No formal redundancy process was underway at the time of Mr Tamarua's termination and it is impossible to say that, but for the dismissal, the applicant would have been made redundant and paid the applicable redundancy compensation.

Determination

39. For the reasons set out above I find against the claim by Mr Pero Tamarua that he was unjustifiably dismissed by the respondent, Toll NZ Consolidated Limited.
40. The parties are, after taking account of relevant considerations including Mr Tamarua's ability to pay and the consequence of his deliberate decision to proceed into the investigation with the full knowledge that costs would almost certainly

following the event, to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher

Member of Employment Relations Authority