

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jeanette Elizabeth Thomson (Applicant)
AND The Farmers' Trading Company Limited (Respondent)
REPRESENTATIVES Andrew Golightly, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 23 November 2005
SUBMISSIONS RECEIVED 7 December 2005 from Applicant
8 December 2005 from Respondent
DATE OF DETERMINATION 21 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] After an initial period of employment Ms Jeannette Thompson was re-employed by Farmers' Trading Company Limited ("Farmers") in or about May 2002. Ms Thompson was subject to a written employment agreement signed on 30 August 2002.

[2] Following an investigation into the whereabouts of some cosmetic testers ordered by Ms Thompson but not available in the store, Ms Thompson was dismissed for serious misconduct. Ms Thompson says that dismissal is unjustified and seeks lost wages, compensation for hurt and humiliation, and costs.

[3] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of a fair and reasonable employer ...in all the circumstances ...at the time.... (Section 103A Employment Relations Act 2000).

Credibility Finding

[4] At the investigation meeting Ms Thompson changed her evidence on a number of points and was evasive when answering questions. Overall I found her evidence to lack credibility. Where evidence is contradictory, I have preferred the evidence of the respondent.

The Circumstances

[5] Ms Thompson's employment was subject to two written warnings. One was issued to Ms Thompson in October 2004 for breaching the work rules relating to personal behaviour. The second warning was issued to Ms Thompson in March 2005 for breaching the work rules relating to unauthorised possession/removal of company property and staff purchases. These were matters which Mr Campbell took into account.

[6] In October 2004 Ms Thompson ordered five testers from B.D.M. Grange ("BDM"). Included in the five testers was a tester called "Byzance" and another called "Madam Richet". It was common ground at the investigation meeting that Farmer's do not stock these fragrances. Ms Thompson told me she ordered the testers to create sales as she had had a number of enquiries about these perfumes. The products retail for between \$80 and \$100.00. Ms Thompson states in her written evidence that:

I ordered the testers for behind the counter as I understood that although we did not stock the particular fragrances in the Whangarei store I was able to make a sale on a customer's Farmers Card and get the fragrance from an Auckland store.

[7] Ms Thompson's evidence as to why she didn't simply order the product from the Auckland store when she received enquiries was not clear. Ms Thompson told me that she didn't know, when she ordered the testers, that Farmer's did not stock the fragrances. In answering questions at the investigation meeting Ms Thompson conceded that information on all items stocked by Farmer's stores is available on the computer system. She told me that she didn't always get on the computer to check if Farmer's stocked certain fragrances. I would have thought that if a sales person had received a number of enquiries about a specific product, one would check the computer system to find out if it was a product stocked by the store, before taking steps to order testers for the product to increase sales.

[8] In December 2004 the Cosmetics department had a clean out of the obsolete products. Ms Thompson took a bag containing the two BDM testers she had ordered in October, to her

supervisor, Ms Petrina Anderson and asked her to check seal the bag (in accordance with Farmer's policy). Ms Thompson then took the testers home.

[9] Ms Anderson told me that she treated Ms Thompson like a counter manager and trusted her. Ms Anderson says that when Ms Thompson bought the testers to her in a bag for check sealing, she did not check the contents, nor did she question Ms Thompson about the specific contents of the bag. She trusted Ms Thompson to only be taking testers which were obsolete or past their shelf life.

[10] In March a Loss Prevention investigation was undertaken at the Whangarei store. The investigation revealed that there were testers which had been ordered and received into stock, but could not be found in the store. Mr Colin Campbell, Store Manager, received the information about the testers and became concerned as he was aware Farmers stores did not stock Byzance" or "Madam Richet".

[11] On 24 March 2005 Mr Campbell met briefly with Ms Thompson and discussed with her an order form showing that 4 testers had been ordered and received into the Whangarei store. Mr Campbell told Ms Thompson that the testers were no longer in the store.

[12] I am satisfied that at this point in time Ms Thompson advised Mr Campbell that she was aware that Farmers' did not carry the stock relating to the testers that had been ordered. This statement contradicts Ms Thompson's written evidence provided to the Authority. She told Mr Campbell that the Yves St Laurent ("YSL") sales rep had told her she could order testers of stock not carried by Farmers, for trial and testing. Mr Campbell pointed out to Ms Thompson that the product was not an YSL brand but was from the BDM brand. Ms Thompson advised Mr Campbell that she had taken the Byzance and Madam Richet testers home.

[13] On 29 March 2005 Mr Campbell wrote to Ms Thompson requesting her to attend a disciplinary meeting on 30 March 2005. Ms Thompson was advised that the purpose of the meeting was to discuss concerns regarding alleged unauthorised movement of company property in breach of the work rules. Ms Thompson was further advised that the company was taking the matter seriously and that she was entitled to representation.

[14] At the meeting on 30 March 2005 Ms Thompson was advised that the matter was serious and that disciplinary action could result in her dismissal. Ms Thompson told Mr Campbell that the BDM order was placed to increase sales. She told him she had taken the two testers home because

they could no longer be ordered through the inter-stores transfer system as the stock transfer system had changed. Ms Thompson told Mr Campbell that Ms Anderson, had check sealed the goods and that she had given two testers to other staff and that this is something that had happened in the past.

[15] At a further meeting on 31 March, Mr Campbell requested further information from Ms Thompson relating to the testers which she had admitted taking home. Ms Thompson told Mr Campbell that she understood the testers belonged to Farmers' but that she put the testers in a Farmers' bag and sealed it with cello tape and that Ms Anderson signed the check seal. She reiterated to Mr Campbell that she took the testers home because she could no longer do stock transfers between the stores.

[16] Mr Campbell adjourned the meeting in order to consider Ms Thompson's explanations and to make further enquiries. The meeting was reconvened on 1 April 2005. At that meeting it was pointed out to Ms Thompson that no store has ever stocked the fragrances for which the testers had been ordered and no sales had been made from the testers.

[17] Mr Campbell had also investigated Ms Thompson's explanation that the stock transfer's policy had changed and advised Ms Thompson that she had actually ordered the testers after the policy change. Also, enquiries from Ms Anderson revealed that she did not know what was in the bag when she signed the check seal note.

[18] The meeting was adjourned at about 2.00pm for approximately 30 minutes to allow Mr Campbell an opportunity to consider Ms Thompson's further responses to the matters raised.

The decision to dismiss

[19] An employee is entitled to be provided with an understandable account of the allegations of misconduct with sufficient particulars and enough time to provide the employee with a real as opposed to a nominal opportunity to refute the allegations or mitigate the conduct (*NZ (with exceptions) Food Processing etc IUOW v Unilever NZ* [1990] 1 NZILR 35).

[20] When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus of the Authority is not whether there was misconduct, but whether the employer had reasonable grounds for believing that there was misconduct.

[21] I am satisfied that Ms Thompson was fully aware of the alleged misconduct against which she was required to provide her explanations. I am also satisfied that Ms Thompson was given a full opportunity to be heard and to put forward her side of the story and that her explanations were given full consideration by Farmer's.

[22] Following the meetings on 30 March, 31 March and 1 April 2005, Mr Campbell concluded that Ms Thompson had breached the company policy by taking goods home without proper authorisation (Ms Anderson did not know what was in the bag she signed for – Ms Anderson relied on Ms Thompson's honesty to take only obsolete testers, that is, the line had been deleted or discontinued or alternatively the shelf life of the testers may have expired). Mr Campbell was concerned that Ms Thompson had ordered testers for products that were not stocked by Farmer's. He was also concerned that no sales had been made of the products either before or after the testers had been ordered and received into the Whangarei store. Mr Campbell concluded that the explanations provided by Ms Thompson at the meetings were inconsistent with other information available.

[23] Mr Campbell concluded that Ms Thompson's actions were a serious breach of the work rule relating to the use of company property and that this led to such a serious breach of trust her ongoing employment was no longer tenable.

[24] I am satisfied Ms Thompson was fully conversant with the seriousness with which her employer viewed the unauthorised use or removal of its property. About one month prior to her dismissal Ms Thompson had been subject to a disciplinary process which resulted in her receiving a written warning after she was found to have uplifted and used product belonging to Farmer's which Ms Thompson had failed to pay for.

[25] In this matter Ms Thompson says she had the approval of her supervisor to remove the testers, however, I find that the approval was not properly obtained. It seems to me Ms Thompson deliberately did not disclose to Ms Anderson what was in the check sealed bag and relied on Ms Anderson's trust that she was only taking home obsolete or out of date testers.

[26] I find that in all the circumstances Ms Thompson's dismissal is justifiable. I find that the actions of the respondent and the way in which the respondent acted were what a fair and reasonable employer would have done. Ms Thompson does not have a personal grievance and I can be of no further assistance to her.

Costs

[27] The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority