IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 13/10
File Number: 5162731

	BETWEEN	Wagg & Harcombe Limited Applicant
	AND	Kathryn Pike Respondent
Member of Authority:	Denis Asher	
Representatives:	Adam Parker for the applicant Frank Minehan for the respondent	
Investigation Meeting	Wellington, 10 & 21 December 2010	
Submissions Received	By 28 January 2010	
Determination:	1 February 2010	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Ms Pike was the respondent's (the Company's) joint service station manager. The Company says, contrary to the terms of a BP fuelcard discount scheme, Ms Pike allowed purchases of items other than fuel and oil on a customer's card. The Company alleges Ms Pike's conduct was in bad faith and that she breached her employment agreement. As a result of the applicant's actions it says it has sustained a financial loss of $6,228.86. It now seeks to recover that sum from Ms Pike.

[2] The Company says Ms Pike knew, or should have known, the rules in relation to the use of the BP fuelcard. She should have known that if it was used to purchase items other than fuel and oil then those items would attract a discount in breach of the scheme for which the Company would be liable.

[3] As a result of improper purchases, the Company reimbursed BP a sum resulting from the improper purchases: it now seeks to recover that money from Ms Pike.

[4] The issues to be determined are: did Ms Pike breach her employment agreement? If so, are any remedies are payable to the Company?

[5] Ms Pike is legally aided.

The Investigation

[6] During a telephone conference on 4 September 2009 the parties agreed to an investigation on 10 December: as it happened, it was necessary to continue the investigation for less than half a day on 21 December. The parties usefully provided the Authority with an agreed bundle of documents and, following the investigation, written submissions. All references to documents set out below are to page numbers in the agreed bundle.

Background

[7] Most key facts are not in dispute.

[8] Ms Pike worked for the Company when it took over the service station, where she was already employed, from 2003 until 2008.

[9] The parties entered into a written employment agreement (pages 4-14). A job description (pages 15-30) and employee handbook (pages 31-50) were provided.

[10] During her employment, Ms Pike and two other employees allowed a customer, Mr L, to purchase non-fuel items on his BP fuelcard. Mr L used his card to

purchase, amongst other things, fuel vouchers which he cashed in, sometimes at the time of purchase. These purchases attracted an approximate 25% discount from BP. The purchases were outside the terms of the BP fuel card's terms and conditions. They totalled $56,688.55: as a result BP required the Company to repay a total of $14,250.43 (i.e. 25%).

[11] The Company calculates Ms Pike's responsibility for the loss as $6,228.86. It has asked the other employees (2) to reimburse it for their 'share' of the remainder: like Ms Pike, they have not agreed to do so.

[12] The terms and conditions of fuel cards were confidential between at least BP and the cardholder: neither the applicant nor respondent were privy to those terms.

[13] Ms Pike derived no benefit from Mr L's misuse of his fuel card.

[14] Neither the Company nor BP took steps to recover the monies from Mr L or the company that he drove for: that company apparently authorised the issue of fuel cards by BP to its owner-operator drivers and remitted payments to BP in respect of the fuel cards. There is no evidence of a criminal complaint against Mr L. or a Police investigation of his arguably fraudulent conduct.

[15] When Mr L's fuel card was declined he promised to return on a following day to fix the problem: another employee therefore 'parked' his transaction of $292. Mr L never returned: the employee volunteered to repay that sum.

Discussion

[16] The parties agree that the fuel card misused by Mr L clearly stated 'fuel and oil only'. They disagree on all other key issues about the fuel card and its use.

[17] It is the Company's position that fuel cards are to be used only for items listed on the card, normally fuel and oil. It does not accept that it or its predecessor in any way condoned the use of fuel cards to purchase items other than those prescribed by the card. The Company says staff knew that BP was monitoring the use of their fuel cards. It also says staff knew the rules surrounding the cards had to be followed.

[18] Amongst other things, the Company says Ms Pike's employment agreement stated she was bound by the employer's work rules, policies and procedures. Her job description clearly stated that accuracy was essential at the point of sale, that she was to reconcile stock purchases to ensure there was no loss, maximise profitability and ensure resources were used effectively and efficiently. The applicant failed to meet these standards of responsibility and thereby breached her employment terms.

[19] Ms Pike and the two employees' evidence was that they received no instruction from the Company as to the use of fuel cards. They were not informed as to the whether the cards provided any discount at all and, if it did, the amount of discount and whether it applied to both fuel and oil. They say they also received no comment and no instruction from BP representatives about the use of the fuel cards.

[20] Ms Pike and the two other employees gave evidence – strongly disputed by the Company – of inappropriate use of fuel cards seemingly being condoned by the applicant and its predecessor.

[21] Ms Pike said she believed she was supporting sales of store items by facilitating their purchase by use of the fuel card. She had no reason to believe Mr L was misusing his fuel card.

[22] Other than in respect of this disputed matter, there is no evidence of Ms Pike being other than a consistently conscientious employee.

Findings

[23] *"This is a matter of foreseeability. In this jurisdiction the principle was re-stated by the Court of Appeal in* Attorney-General *v* Gilbert *[2002] 2 NZLR 342 at 361-362 as follows:*

> The loss must be *"sufficiently linked to the* ***breach of the particular duty*** *to merit recovery in all the circumstances" (McElroy Milne* v *Commercial Electronics Ltd* [1993] 1 NZLR 39 at p 41 per Cooke P). Loss of the type suffered will usually be sufficiently linked to the breach if within the contemplation of the parties as a not unlikely consequence of breach. That is how the question of remoteness of damage in contract was addressed in the context of the employment contract in *Mahmud* v

Bank of Credit and Commerce International SA [1998] AC 20 at p 37 per Lord Nicholls of Birkenhead:

> *"… if it was reasonably foreseeable that a particular type of loss of this character [in that case, impairment of employment prospects] was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable."*

emphasis added, *Masonry Design Solutions Limited* v *Bettany*, unreported, AC 30/09, Colgan C J, 21 August 2009, par 52

[24] As the above makes clear, loss must as a consequence of a breach **and** be reasonably foreseeable as a serious possibility. The first matter to be determined therefore is, did Ms Pike breach a particular duty to the Company? The second is, if she did, did the parties contemplate loss as a likely consequence of breach and was the serious possibility of loss reasonably foreseeable?

[25] It follows from the above that, in the absence of a breach, loss cannot be recovered.

[26] Because errors and inefficiencies in workplaces are common place, and because of the good faith obligations set out at s. 4 of the Employment Relations Act 2000 (in particular sub-section (1A) (b)), it follows that the application of this test must be in circumstances where duties, and the recoverability of loss, are fairly and reasonably spelt out and accepted by parties to an employment relationship.

[27] It also follows that it is for the applicant to establish the duty it relies on.

[28] I am satisfied, after relating the tests set out in *Gilbert* (above) and for the other reasons set out below that it has failed to do so.

[29] I find on a balance of probabilities basis that Ms Pike and other staff were not informed, or were not sufficiently informed such that a particular duty was established, as to the proper use of fuel cards. The employment agreement, position description and employee handbook are silent on the use of fuel cards. They do not state they are to be used only for the categories set out on the card. The Company has

not issued separate written guidelines or requirements about the use of fuel cards. Its representatives cannot point to any meeting of staff where they were instructed in the use of fuel cards.

[30] There is no evidence of the Company disclosing to Ms Pike and other staff the terms and conditions of any agreement it entered into with BP about the use of fuel cards.

[31] There is no evidence of the detail of the benefit derived from having and using a fuel card being communicated to Ms Pike and the other staff.

[32] I do not accept that, despite their plain meaning, the Company can rely on the words 'fuel and oil only' as sufficient to amount to an instruction or duty, the breach of which would result in recovery of losses. An appeal of this sort to common sense, especially after the event but in the context of mutual obligations to be responsive and communicative, is not enough. It was for the applicant, in the first instance, to clearly address, and communicate its requirements in respect of, the issue of non-fuel and oil purchases: I am satisfied it did not do so. It follows therefore that it cannot be said that Ms Pike's actions (and those of her fellow employees) were in breach of any express and/or implied duty to the Company.

[33] In the alternative, and in the event Ms Pike breached her duty to the Company, I am satisfied the loss was not reasonably foreseeable. That is because the respondent acted in the absence of clear instruction and in ignorance. It cannot be said that the parties enjoyed a common understanding of the matter and/or the likely consequences of a breach. As a result the loss suffered by the applicant was not *"within the contemplation of the parties as a not unlikely consequence of breach"* (above).

[34] This was an unprecedented problem for both the Company and Ms Pike (and the two other employees). Unlike credit cards, this was not a situation where Mr L's improper use of his card (i.e. purchasing non-fuel and oil items) would result in a 'transaction declined' advice to the employee 'swiping' his card: tellingly, Ms Pike's co-worker's evidence is that she was not informed when BP cancelled Mr L's cards, or of problems with it. Naively, when Mr L attempted to use his fuel card for a fuel purchase and it was declined, she trusted him (a longstanding customer) to return – as

he promised – only to be left having to pay for that significant fuel purchase from her own wages.

[35] It is not clear when BP informed the Company of problems with Mr L's use of his fuel card: it is equally not clear when and how quickly the Company took steps to inform staff and whether the loss incurred by the co-worker could have been avoided. But, in fairness to the Company and the co-worker, the latter conceded it was against established policy to enter into such informal arrangements (to accept a customer's promise to return and pay later).

[36] The Company's representatives' evidence made clear their imperfect understanding of the amount of (the confidential) discount available to fuel card holders: the applicant's director makes clear he did not know what Ms Pike knew or did not know about the BP fuel card discount (par 4 of his second statement). What that means, of course, amongst other things, is that he cannot say Ms Pike knew or should have known that the card attracted a discount and misuse of it could result in a consequential loss to her employer.

[37] As is made clear above, I am satisfied the Company had no coherent instructions in place such that a duty could fairly and reasonably be said to exist between it and its employees in respect of the use and misuse of fuel cards. Because of the absence of instruction and of previous experience of misuse of a fuel card, and in light of the responsibilities Mr L himself carried in respect of his misuse of his fuel card, it cannot be said that what proved to be a significant loss to the Company … *was reasonably foreseeable* and/or that it … *was a serious possibility* (above).

[38] I am reinforced in this conclusion by the following: unlike the findings of the court in *Bettany* (above), this is not an instance of Ms Pike being a consistently bad performer. There is no suggestion of deficient performance by her except in respect of Mr L's fuel card use. It is a one-off, an aberration rather than a pervading characteristic. It is not a situation in which the respondent allowed herself to be distracted by private matters, in her employer's time; to the extent her performance dropped off and cost the applicant. Ms Pike did not and could not have known the confidential terms and conditions of the fuel card; she clearly believed Mr L himself paid for his purchases.

[39] BP recovered its money from the easiest source – the applicant, under the very real threat it would discontinue providing fuel, etc if the debt was not paid. Surprisingly, and as noted above, no one appears to have fronted Mr L in respect of his conduct.

[40] Understandably bitter as the experience has proven for the Company's director, and for the reasons set out above, I do not accept that the applicant can fairly and reasonably look to recover its loss from Ms Pike.

Determination

[41] The Company's application is dismissed.

[42] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority