

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 143
5308886

BETWEEN JILL WAINES
Applicant

A N D KARAMEA INFORMATION &
RESOURCE CENTRE INC
Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
Linda Ryder, Counsel for Respondent

Investigation Meeting 1 September 2011 at Westport

Date of Determination: 26 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Waines) alleges that she was unjustifiably dismissed from her employment by the respondent (the Information Centre) and the Information Centre resists that claim saying that the dismissal was justified and conducted in a procedurally fair manner.

[2] Ms Waines was employed initially as a casual worker in the Information Centre shop in Karamea. The duties were varied and involved the provision of a number of goods and services, including the sale of fuels, the sale of tourist goods and the making of bookings and the like. Ms Waines maintained that because of the range of transactions undertaken, the work was more complex than a traditional shop assistant role.

[3] The work was also seasonal in nature because the winter months were very quiet and summer was busier, particularly with tourist traffic commencing the Heaphy Track. Having commenced her casual employment in 2003 and performed in that capacity for around four years doing initially only one or two days a week, Ms Waines got more permanent hours when the Information Centre purchased the adjoining garage and began the supply of fuels. The Authority was provided with a job description relating to this period of Ms Waines' employment which sets out the duties expected of her.

[4] Six months ago, Ms Waines was offered an additional role as finance officer and a job description for that was also made available to the Authority. However, Ms Waines said that she had never seen that job description before although the Information Centre was very clear that it was the job description that applied to the role.

[5] Most recently, Ms Waines was working an average of 32 hours per week with longer hours in the summer months than the winter months and with about 10 hours a week devoted to the finances.

[6] Ms Waines' role as finance officer was concerned principally with the inputting of data and the management of debtors and creditors. The higher level work beyond her base involvement was done by the Information Centre's accountant and supervised by the Information Centre's treasurer who gave evidence before the Authority and who was a member of the Information Centre's management committee.

[7] Rosalie Sanson, the Information Centre's treasurer, told the Authority that, after a long period of surpluses, the Information Centre had a deficit in the 2009 year. This was its first deficit and it caused alarm amongst the members of the management committee. They obtained an audit of the figures which revealed that the problem was real and not imaginary. Members of the committee spent a great deal of personal time trying to unravel the reasons for the loss and the evidence the Authority heard was that the management committee was near to "*cracking the case*" when a lightning strike "*fried*" the Information Centre's computer system, thus making it absolutely impossible to get to the bottom of what occasioned the loss.

[8] Having failed to resolve the deficit to its satisfaction using electronic means, the committee proceeded with more mundane approaches after the lightning strike and undertook weekly stocktakes. While that identified some shortfalls, it did not actually resolve the issue. The committee thought the problem was shoplifting and accordingly it borrowed money to install covert cameras in and around the business premises to try to see what was going on.

[9] It was as a consequence of that covert camera activity that Ms Waines received a letter from the management committee dated 14 January 2010 in which she was asked to respond to certain allegations which had been picked up in the course of an examination of the film run by the camera system. The allegations were detailed in the letter and the letter also made clear that Ms Waines might be subjected to dismissal if there was a finding of serious misconduct.

[10] Ms Waines told me that while she accepted that the letter was clear in its terms and she ought to have taken it more seriously than she did, at the time she was not disposed to regard it as serious because "*she had not done anything wrong*".

[11] In essence, when the disciplinary meeting was convened later in January 2010, there were two groups of issues to which the Information Centre wanted a response. The first of those was incidents which took place on 19 December 2009 and the second took place on 21 December 2009.

[12] Ms Waines' explanation for her apparent failure to scan purchases and to removing money from a jar on the counter was that it had been a busy day and that she had, because she was involved in a fire service callout early in the morning, come to work without her purse. As to the jar issue, the jar in question was, according to the employer, a jar which customers put money into when they picked up a copy of the local Chronicle, a local newsletter run in effect on donations of the sort gathered from this jar and others like it around the district. Ms Waines, on the other hand, says the jar was an "*overs and unders*" jar and was also used for putting money found on the floor when doing the vacuuming and for tips for staff. The Information Centre had no knowledge of this alternative explanation for the purpose of the jar and expressed considerable surprise that that should be Ms Waines' view of it.

[13] In any event, as to the jar issue, Ms Waines readily acknowledged that she had taken money from the jar, bought some food and used the jar money to pay for the

food. She agreed at the time that she did not put an IOU in the jar and it was not until contemporaneously with the employer's consideration about whether the issue was serious misconduct or not that she revealed, in passing, that she had returned some, but not all, of the money she had taken from the jar, some weeks after she had taken it. Because Ms Waines regarded the jar as being, in effect, a multi-purpose facility, she was difficult to persuade that she had done anything wrong by removing money from the jar and she brought evidence to the Authority from a former coworker who agreed they themselves had taken money from the same jar in similar circumstances.

[14] As to the failure to scan product, Ms Waines' evidence was that she simply did not remember why she did not do what she was supposed to do; she acknowledged that it was the employer's policy that all product for sale had to be scanned at the point of sale and she knew this was the right thing to do, but she acknowledged that she did not do it. Her explanation was simply that she was busy at the time and that there were a number of people in the shop; but the employer's investigation and a view of the camera footage did not confirm that claim.

[15] The situation with the events of 21 December was similar, although Ms Waines advanced the contention at the investigation meeting (which she had not done during the employer's investigation) that she did actually try to scan the product on 21 December but that for whatever reason the system malfunctioned. As that explanation was not offered to the employer, I must discount it completely in terms of my evaluation of the employer's behaviour at the time of the dismissal.

[16] Ms Waines' general approach to the concerns raised by the employer was that the workplace was a bit "*slapdash*", that no one was really accountable and that "*it was very hit and miss at times*". Despite her role as finance officer, Ms Waines was very clear in her evidence to the Authority that it was:

... never [my] role to be interested in the financial health of the organisation. As finance officer I just banked what money I was given.

[17] This approach from Ms Waines clearly resonated negatively with the employer and both Ms Samson, the treasurer, and Ms James, the chairperson, were clearly quite startled by the evidence of someone they obviously had trusted that things were all a bit slapdash and that nobody seemed much concerned. Clearly, that was not the position of the employer. It was concerned, particularly because the

Information Centre had run at a deficit for the first time in the year 2009 and the committee had spent many unpaid hours trying to establish why.

[18] When it came to a consideration of Ms Waines' behaviour, what seemed to weigh with the employer most was Ms Waines' longstanding as an employee, the fact that she worked in a sole charge capacity more often than any other staff member and that as the finance officer, the Information Centre would have expected a higher level of trust from her than it would from an ordinary employee. Put another way, Ms Waines, by virtue of her experience in accounting matters (amply demonstrated by her curriculum vitae), meant that she knew or ought to have known the importance of proper systems and the obligation to maintain the integrity of the operation by following the systems determined by the employer. Ms Samson, in particular, told me that the issue that weighed with her the most was that Ms Waines "*was always complaining about the failure of systems in the shop and yet she was so loose with her own explanation about what she had done*".

[19] It was clear to the Authority that the employer went into the disciplinary process expecting viable and credible explanations for what it had seen but concluded it without receiving those viable and credible explanations. Its expectation was that it would be able to be satisfied by its employee and that the employment relationship could continue on unimpeded, but sadly that was not the consequence that it ended the disciplinary process with. The conclusion was reached that Ms Waines had committed serious misconduct in removing money from the Chronicle's jar and using that money to purchase food, that Ms Waines had failed to account on two occasions by not scanning product that was sold, and that she had failed to account for money she had transferred from the Chronicle jar to the till. Taken together, the employer concluded that those matters went to trust and confidence and that it could no longer have confidence in Ms Waines' given her apparently cavalier attitude to its systems, her failure to account and her breach of what the manager of the Information Centre, Ms McNab, referred to as the golden rule of retailing, namely "*don't serve yourself*".

[20] As a consequence of the foregoing considerations, Ms Waines was dismissed from her employment and the matter proceeded to the Authority in the usual way after an unsuccessful mediation endeavoured to resolve employment relationship problem.

Issues

[21] Ms Waines' contention is that the dismissal was both procedurally unfair and substantively unjustified. It will be convenient if the Authority considers each of these contentions in subsequent sections of the determination.

Was the dismissal substantively justified?

[22] Ms Waines says that she did not do anything which constituted serious misconduct therefore ought not to have been dismissed. She contends that she ought to have been given some sort of warning rather than face dismissal.

[23] The law requires the Authority to review the justification for the dismissal using the test prescribed by s.103A of the Employment Relations Act 2000 (the Act). The decision to dismiss was made before the law change to S103A, which took effect on 1 April 2011. The test must be the test which applied at the date of dismissal. Legislative enactments are not normally retrospective unless specifically provided for: Section 7 Interpretation Act 1999.

[24] In *Air New Zealand Ltd v. V* (AC15/09, 30 April 2009), a Full Bench of the Employment Court concluded that s.103A required the Authority to objectively review all of the actions of the employer up to and including the decision to dismiss and concluded that the challenge was to determine "*objectively what ... a fair and reasonable employer (would) have done in all the circumstances*". There is, then, an objective standard imposed of a fair and reasonable employer. The Court emphasises again that it is not for the Authority to impose its views on what the employer ought to have done, but rather to try to assess what a fair and reasonable employer would do when confronted with the circumstances facing this employer in these circumstances.

[25] The essence of Ms Waines' position on justification is that the Information Centre overreacted and could not reasonably have concluded her actions were "*serious misconduct*" and thus that dismissal was an available response. It is a matter of judgment as to whether the factual matrix in a particular case reaches the threshold, or not, for it to be regarded as serious misconduct. The test for justification set out in s.103A requires assessment from the Authority based on an objective review of what a fair and reasonable employer might do when confronted with the particular factual circumstances of the instant case.

[26] To assist the Authority in that task, there is a long line of decided cases relating particularly to questions about honesty or integrity of employees. In addition, there are leading cases which refer to the general circumstances in which conduct will be assessed as being toxic to the necessary trust and confidence that must exist between the parties. An example of the latter kind of case is a decision referred to by the Information Centre in its submissions, the well known decision of the Court of Appeal in *BP Oil Ltd v. Northern Distribution Workers' IUOW* [1989] 3 NZILR at 276. In that decision, the Court said:

As for instance, conduct, as would deeply impair the basic confidence that it is essential should exist between the parties, in each case it is a matter of degree, whether the Act complained of is of the requisite gravity.

[27] Again, in the later case of *Northern Distribution Union v. BP Oil NZ Ltd* [1992] 3 ERNZ at 483, Mr Justice Hardie Boys said about the kind of conduct that would justify summary dismissal:

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[28] A number of decisions of the Authority have concluded that failure to follow stipulated cash management processes of the employer will result in a finding of serious misconduct. See, for example, *Meyrick v. Transportation Auckland Corpn Ltd* (ERA Auckland, AA381/10, 24 August 2010).

[29] The salient facts in the present case are that Ms Waines was employed both as an ordinary, behind-the-counter staff member, and, most recently, as finance officer. That latter role must, by its very nature, impose a higher standard on the incumbent's behaviour than the more general information officer role.

[30] Next, Ms Waines is clearly highly experienced in finance and accounting matters. Her curriculum vitae was produced to the Authority and it evidences a longstanding involvement in this area of work. Again, it is not unreasonable to anticipate that a person with such a history would be especially sensitive to, and responsive to, cash handling requirements of the employer and common retail disciplines of the sort characterised by one witness as the retailing adage of "*not serving yourself*".

[31] Then there was the fact that Ms Waines worked primarily by herself and clearly, based on the evidence given to the Authority by the Information Centre's witnesses, that aspect alone resonated negatively with they came to consider both what she admitted she had done and what, on the facts before them, they concluded she had also done in addition to what she had admitted to.

[32] There were four matters in contention which the employer had to review and consider, two of which happened on 19 December 2009 and two of which happened on 21 December 2009. Two transactions involved the so-called *Chronicle* newspaper jar and two involved the sale of postcards. The employer relied on the video evidence of these transactions. I will deal with the process the Information Centre used in the next section of this determination, but for present purposes it is enough to say that the transactions in question were clearly evidenced in the video footage sufficient for both employer and employee to see what was going on.

[33] As to the postcards, the Information Centre concluded that the video evidence showed Ms Waines selling postcards to customers, putting the money in the till for those sales but on each occasion failing to scan the postcard. The effect of this process is to make it difficult or impossible for the Information Centre to account accurately for stock levels in relation to the two items that had been sold. By scanning the sold items, the assistant ensures that the Information Centre's computer records those items as having gone out of stock. Equally importantly, it apportions a dollar amount to each sale which ought to be represented by the money collected in the till at the end of the day's trading. However, because the items in question were not scanned, that trail is broken. It is important to note that, contrary to what Ms Waines alleges in her closing submissions, the Information Centre is not alleging that she stole the money, simply that she failed to follow proper documented processes required by the employer.

[34] On the two postcard transactions, Ms Waines was unable to give any explanation as to why she would have done what she did. Certainly, it was clear from the evidence she gave to the Authority that she knew perfectly well what the employer's requirements were, namely that all items were to be scanned at the point of sale. So why she failed to do that remained a mystery, although the Information Centre maintained that Ms Waines could not be said to have misunderstood the policy or not been aware of it (and I accept those contentions at face value), and therefore

that she must have deliberately failed to scan the items. I think that last statement, though, goes too far. Another perfectly obvious explanation for Ms Waines' behaviour is that she was simply "sloppy" or "slapdash", both allegations ironically that she levels at the employer. One can surmise that if Ms Waines' thought the employer was "slapdash" about financial matters, then there might well be some encouragement for she herself to be less than precise also.

[35] On these two issues then, it is clear to the Authority that Ms Waines knew what the employer's policy was and therefore knew what was expected of her and it is also clear that the policy was hardly revolutionary or unusual in a retail trading sense. It is also evident on the testimony given to the Authority that Ms Waines did not scan the postcards despite being clear that that was what was required of her. The only explanation she offered was that she was busy but the video footage does not confirm that. Even if she were busy, that is still little excuse for not following an absolutely simple and straightforward, almost reflex action, in a retail setting.

[36] The other two matters in contention, as I noted above, relate to the *Chronicle* jar. The first in time was the evidence which disclosed that Ms Waines had taken money from the *Chronicle* jar and used that money to buy a snack with. She did not deny this transaction, although late in the final disciplinary meeting, she did tell the Information Centre that she had put some of the money back (but I am satisfied not all). It will be evident that there are two problems with this transaction. The first is that Ms Waines took money from the jar which was not her money. As I have already recited, there was much evidence heard by the Authority as to the nature of the money in this jar with Ms Waines maintaining that it was not just the *Chronicle's* jar but was also money collected from the floor when the carpets were vacuumed at the end of the day and an overs and unders collection used to help to balance the till. While there was some support from one of the witnesses at the Authority who gave evidence for Ms Waines, the Information Centre's witnesses hotly denied that the *Chronicle's* jar was anything other than a jar to collect money on a voluntary basis for people who took a copy of the local newspaper, *The Chronicle*, which newspaper was funded by donations from points such as *The Chronicle* jar in the Information Centre.

[37] So Ms Waines did not deny at the time that she had taken money from the jar, but she alleged that there was precedent for doing that (that is, that other staff had done it and the evidence before the Authority supports that contention), and that the

money in the jar was from a variety of sources and for a variety of purposes. The evidence before the Authority does not support that latter contention. As I have just noted, the Information Centre's witnesses were all very clear that the money in the jar was exclusively for *The Chronicle* and for no other purpose. For the sake of clarity, I note that I prefer the Information Centre's evidence on this point. I am satisfied the jar was for donations for *The Chronicle* newspaper and for no other purpose.

[38] So the short position on this allegation is that Ms Waines accepted that she took money from the jar and then used that money for the purposes of making a purchase of food for herself. This second aspect of this allegation of course breaches the fundamental rule I have referred to earlier in this determination, namely the retailer's adage that you do not serve yourself. Ms Waines acknowledged taking the money from the jar and acknowledged making the purchase without involving another staff member. Her response to the second part of the allegation was that she was in sole charge at the time. The Information Centre retorted that she could have made a purchase across the road at the grocery store or more completely that she could have shut the Information Centre briefly and gone home to get her purse which she had apparently left at home. This was Ms Waines reason for taking money from the jar; because she had left her purse at home.

[39] I am satisfied that a fair and reasonable employer was entitled to conclude that Ms Waines had both taken the money from *The Chronicle* jar (she admits as much), and had used that money to make a purchase for herself (again, she admits as much herself).

[40] The next allegation involving *The Chronicle* jar involved Ms Waines taking money from *The Chronicle* jar and putting it into the till, but without properly accounting for that money. Ms Waines gave no explanation for this behaviour during the employer's investigation. However, subsequently, she has offered the explanation that she was effectively exchanging large coin denominations for small on the basis that she needed more small change in the till. The Information Centre records in its closing submissions in reply that it does not accept that explanation but it quite properly makes the point that the real issue is that the explanation proffered was not made at the time the allegation was first on foot during the disciplinary investigation. Accordingly, the employer's consideration of this issue must be assessed on the basis

of an absence of explanation from Ms Waines rather than the explanation she subsequently came up with.

[41] As to this final aspect, the Information Centre did not accept the necessity for money to be transferred from *The Chronicle* jar to the till without being properly accounted for. There was a defined procedure for accounting for *The Chronicle* money and that process simply was not followed by Ms Waines when she put money from *The Chronicle* jar into the till.

[42] Dealing exclusively with the substantive aspect of the matter it is as plain as can be that a conclusion that Ms Waines has not followed the employer's cash handling procedures can be made out in each of the four cases under investigation. Ms Waines failed to properly record sales of goods, failed to properly account for cash from *The Chronicle* jar, took money from *The Chronicle* jar for her own use and then used that money to enter into a retail purchase for herself. Ms Waines acknowledged taking the money for her own purchase from *The Chronicle* jar and could hardly deny subsequently making the purchase as it was plain to see on the video recording. Equally, the evidence available to the employer supports, to a very high standard, the employer's conclusion that Ms Waines has completely ignored the employer's cash handling policies in relation to two sale and purchase transactions and in relation to accounting for the cash from *The Chronicle* jar.

[43] Furthermore, far from this being an isolated example of, for instance, a young and inexperienced employee making a single blunder, this was a senior and experienced employee who had worked for the Information Centre for many years, was in a position of trust both because of the sole charge nature of her employment and because of her finance officer role, but was also a person widely experienced in financial and accounting matters by virtue of the succession of positions of that type that her curriculum vitae disclosed.

[44] Precisely because she was so experienced and had such a strong background in finance and accounting, the employer said, the Authority considers quite justifiably, that it needed to regard her integrity as unimpeachable and yet, in the present circumstances, it was faced with a succession of failures to follow simple perfectly standard rules of practice. A conclusion that that sequence of events goes to trust and confidence leading to a finding of serious misconduct seems well open to a fair and reasonable employer after the conducting of a proper inquiry.

What was the procedure adopted by the employer?

[45] Ms Waines alleges that she was unable to adequately respond to her employer's allegations because of failures by the employer in putting the matters to her. That point is not accepted by the Information Centre. Indeed, it contends that the process adopted was fair, measured and reflective, that the applicant was given an opportunity to be represented throughout the investigation, that she was told clearly what the allegations were and given a proper opportunity to respond to them and that those responses were genuinely considered by the Information Centre before making its decision.

[46] Certainly, the identification of some of the usual elements of a proper process can be established based on the evidence before the Authority. There was an initial letter asking Ms Waines to attend a meeting and setting out what the employer was concerned about in clear terms. The letter made clear that, if found proved, the allegations might amount to serious misconduct and that that might result in the termination of Ms Waines' employment. She was told she could bring a representative to the meeting, although she chose not to. There were a number of meetings between the parties. There were two meetings on 18 January 2010, for instance, and the following day Ms Waines undertook further inquiries on her own behalf by going in to the Information Centre's computer system, as a result of which she raised questions which the Information Centre had to seek the answers to. The disciplinary process of meetings between the parties took the space of a week.

[47] Critically, despite Ms Waines' complaint now that she was not given appropriate access to the video footage on which the Information Centre based its complaints, it is important to note that no such request was made by Ms Waines during the disciplinary process. If, as she says now, she ought to have been provided with a copy of the material that raised the employer's concern, then why did she not ask for it at the relevant time? It was available to her to do so and, based on the approach taken by the employer during the disciplinary investigation, it seems likely that the material in question would have been promptly provided. Ms Waines actually asked for the material after the dismissal and it was provided by the employer without complaint. In my opinion, it is not fair to judge the employer on a process that it might have adopted were circumstances different; all that the Authority can do is judge what steps the employer took in the actuality of the moment. The fact is that

Ms Waines did not ask for the video material during the disciplinary process and so her complaint about the process being unfair because she was not provided with the material rather falls away. There was nothing in her behaviour or the interactions between her and the Information Centre which suggested that she was unhappy with the information she was provided with and indeed, on each occasion when she has raised a matter with the Information Centre during the disciplinary process, it had taken the time to consider what she said and to provide further and better particulars.

[48] I am satisfied that the Information Centre was under no legal obligation to provide Ms Waines with a copy of the video material unless she asked for it, and she did not. I reach that conclusion because nothing that the Authority heard by way of evidence would suggest that Ms Waines had any difficulty responding to the allegations and indeed, as the employer remarks in its submissions in reply, it was still 85 days after the dismissal before Ms Waines raised a personal grievance so there was hardly any immediacy about the provision of the video information post-dismissal. What makes the Authority even less inclined to think Ms Waines' argument has any force is that, even with the passage of time, she seems to have been quite unable to offer any explanation for the failure to account on the point of sale matters and of course Ms Waines had accepted that she took the money from *The Chronicle* jar to purchase food during the disciplinary process so no further information would have been of any assistance there. The only matter on which she provided an explanation after the event was the allegation relating to removing money from *The Chronicle* jar and placing it in the till where she said that she was effectively exchanging larger coins for smaller ones. But I am satisfied that even if that whole allegation is removed from the picture altogether, there is still sufficient basis for the employer to ground a finding of serious misconduct because of a complete failure of trust and confidence.

[49] Ms Waines also contends that there were no daily counts and so it was not possible for the Information Centre to reach the conclusions it did. She is mistaken about that. There were daily counts and they were provided to the Authority. The difficulty is that those counts did not assist because the allegations made against Ms Waines are of failing to account, not of removing money for her own use (save for the allegation about *The Chronicle* jar money being used to buy food). Broadly, Ms Waines is facing an allegation not that she was dishonest, but that she failed to follow perfectly standard retail principles enunciated clearly by the employer,

principles which, on the evidence before the Authority, she knew and understood. Ms Waines' suggestion that these were "*performance deficits*" on her part and that she should have been dealt with in terms of the performance issues in her employment agreement, is mistaken. The issues that the employer is relying upon for reaching the conclusion it did go to the root of the relationship; they concern whether the employer can have trust and confidence in the employee who is experienced, financially trained and experienced, clearly understood what was required and had the experience and the training to deliver it, and was frequently working in a sole charge environment.

[50] In her closing submissions, Ms Waines says:

The legal basis of grievance is that there is no evidence that the applicant was engaged in behaviour that was dishonest.

[51] But that is not the basis on which Ms Waines was dismissed. The findings against her that went to trust and confidence were about her ability to follow simple, straightforward, commonly used retail principles which a person of her experience and financial training would not only have been well aware of but would have had no difficulty at all in following, had she chosen to. For whatever reason, the facts established by the employer disclose that Ms Waines had either chosen not to follow the employer's stated policy in respect of the management of cash and the accounting for stock items, or Ms Waines had simply overlooked the necessity to do that. Either way, I am satisfied it was available to the employer to conclude that it could no longer have trust and confidence in her because of that pattern of behaviour.

Determination

[52] I am satisfied on the evidence heard by the Authority that Ms Waines has not demonstrated that she has any viable personal grievance against the Information Centre and on that basis her claim fails.

Costs

[53] Costs are reserved.