New Zealand Employment Relations Authority Decisions

Weti v The Warehouse Limited (Christchurch) [2011] NZERA 942; [2011] NZERA Christchurch 178 (18 November 2011)

Last Updated: 24 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 178

5306609

BETWEEN ELAINE WETI First Applicant

JUDITH O'BRIEN Second Applicant

A N D THE WAREHOUSE LIMITED Respondent

Member of Authority: M B Loftus

Representatives: Peter Cranney, Counsel for Applicants

Mr Neil McPhail, Advocate for Respondent Investigation Meeting 2 November 2010 at Christchurch Submissions Received: At the investigation meeting

Date of Determination: 18 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Both applicants, Ms Elaine Weti and Ms Judith O'Brien, claim to have been unjustifiably dismissed from the employ of the respondent, The Warehouse Limited (Warehouse), on or about 7 April 2010.

[2] The Warehouse contends both dismissals were justified as the result of a loss of trust and confidence which stemmed from what they believed to be a serious breach of the company's rules – namely the unauthorised use of a staff discount facility.

Acknowledgement

[3] Unfortunately a considerable period of time has passed since the investigation meeting with a large portion of this being occasioned by an inability to access the file

due to February's earthquake. I appreciate the parties patience and regret any inconvenience suffered.

Background

[4] This is a matter which is, in some ways, unusual in that there is almost no dispute about the facts. The actions that led to the dismissals were recorded on an internal surveillance camera and there are notes of the subsequent disciplinary interviews that all concerned accept as accurate. Those actions were the purported breach of company rules pertaining to team member (ie: staff) discounts, and, in particular, entitlement thereto.

[5] The Warehouse's handbook contains the following:

WHO IS ENTITLED TO DISCOUNT?

All permanent full-time or part-time team members are eligible to apply for a discount Team Card. Team members may apply by submitting an application form for approval to their manager.

If you are married or in a legally recognised defacto relationship, then your spouse or partner can also enjoy the use of a Supplementary Team Card. Alternatively, if you live with your parents, then you can nominate both parents as Supplementary Cardholders.

...

Please note that your Team Card may not be used by your children, unauthorised family members or friends.

[6] As is common with most large employers, the Warehouse also has 'Company House Rules'. Contained therein is a list of offences which may be deemed serious and for which dismissal may ensue *following a fair inquiry*. The list includes:

5. Failing to ring on every product presented at checkout including returns; and/or unauthorised transactions at POS including price overrides, product or transaction deletions, voids, or serving family or friends.

...

7. *Abuse of discounts including but not limited to unauthorised staff discount, resale of discounted purchases etc.*

[7] These rules are reiterated in the form upon which an employee applies for a Team Card - the card that must be used when making a staff purchase. Contained therein is advice that:

Only the following people are eligible for Staff discount: Any permanent full or part time Team Member. If living with their parents then they also receive this discount, it does not apply to any other family members or friends. If married or in a de-facto relationship, your spouse is given discount. It does not apply to your children.

...

Team cards are not to be used by anyone other than the person whose name appears on the card.

...

These purchases must be for personal use. Any attempt to on-sell goods bought under the staff discount policy or to purchase them on behalf of any other person is unacceptable.

[8] On the reverse of the card itself, and below the employee's signature, is the following advice:

Company policy when used for Staff Discount. Any permanent part time or full time staff member will receive discount. If living with your parents, then your parents also enjoy this discount. Discount DOES NOT apply to other family members or friends. If married or in a defacto relationship, your spouse will receive discount. It DOES NOT apply to your children. This card must be presented prior to purchase.

[9] The first applicant, Ms Weti, has been employed by the Warehouse for some

13 years. She has an unblemished disciplinary record and had previously been named worker of the year in her branch. She has held responsibility in the past and accepted, when responding to questions from Mr McPhail, that she is expected to know the rules inside out, that she had previously been required to show other staff how to do things correctly and that she should be an example to others. She accepts that she has previously signed documents acknowledging that she has read and understood the company rules and that she knew that unauthorised staff discount transactions were, potentially, a serious breach the Warehouse's rules.

[10] The second applicant, Ms O'Brien, is Ms Weti's daughter. She has been employed by the Warehouse for 18 years and, like her mother, has previously acknowledged that she has read and understood the company rules and those applying to the use of her team card.

[11] The incident that led to the dismissals occurred on 5 April 2010. About the incident Ms Kylie Machon, the manager of the relevant store at the time, says:

... it came to my attention that a possible breach of staff discount rules had occurred. I was advised that Elaine Weti and Jude O'Brien

had served a family member (Elaine's son, Jude's brother) and granted him staff discount in breach of the rules. Two employees had witnessed this event.

[12] Ms Machon goes on to give a reasonably accurate summary of what was shown on the surveillance film that she then obtained. She says:

The video footage showed Elaine's son waiting alone by the Entertainment Counter. He wanders around for a bit, then returns to the counter with Jude. Jude looks at the DVDs that he has placed on the counter, then goes behind the counter, and proceeds to serve him. Elaine then appears holding her wallet. At this moment another employee, Michelle appears behind the counter, appears to speak with the three of them then leaves, but returns again briefly. Elaine wanders off to one side for a short while, as Jude finishes finding the DVDs, then Elaine returns to the counter as her son is ready with his Eftpos card, and swipes her discount card after which he swipes his Eftpos card then walks off, then returns again while Jude completes the transaction, takes a pen and signs the docket. All three then leave the counter.

[13] The value of the two DVDs was $36.98 before application of the discount which reduced the price by $4.62.

[14] Ms Machon, having viewed the video, concluded she had sufficient evidence to justify a formal disciplinary inquiry. Warehouse staff are advised of such an investigation via a standard form which Ms Machon then completed for both Ms Weti and Ms O'Brien. Ms Weti's form advises that she is being required to respond to an allegation of *Using your discount card for unauthorised transaction* in breach of *rule 7 unauthorised discount – abuse of discount*. The form further advises that *If the allegation against you is found to have substance, the most serious disciplinary action that may be taken against you is: dismissal* (with the last word being added by hand).

[15] Ms O'Brien's form advises that she is required to respond to an allegation of

Serving a family member and applying discount card. She is alleged to have breached rule

5. serving family or friends – unauthorised transaction, in addition to rule 7. She was also advised that the most serious consequence was a possible dismissal.

[16] Both were initially asked to attend separate disciplinary meetings on 8 April but as a result of the unavailability of their chosen representative this was changed, by agreement, to 7 April.

[17] Ms O'Brien's meeting occurred first and she was accompanied by Mr Ken Young, a National Distribution Union organiser. The meeting opened with Ms Machon asking Ms O'Brien whether she knew what the meeting was about. Ms O'Brien replied *I served my brother and my Mum swiped her discount card* before she acknowledged that she knew the card was not to be used for friends or family. Her explanation was, according to the meeting notes:

I did not mean to do it, my brother was staying at Mums. I just did it, just served. Have no explanation. I don't know why I did it. I didn't purposely want to rip the company off.

[18] That, essentially, is Ms O'Brien's defence and its gist was later repeated with comments such as *[it] just didn't register,* that she *just didn't think* and that she *stupidly put the sale through.* A similar response was given when asked why she was even there as she was not rostered to work in Entertainment that day.

[19] The meeting with Ms Weti followed and she was also represented by Mr Young. Her approach differed from that of Ms O'Brien and can be best summarised by the following quote: *I thought I could use it* [the discount card] *for my immediate family.*

[20] She also said that it was she who was going to buy the videos and that her son then said he would pay for them, but contradicted that approach by accepting that it was he who initially sought to purchase the goods and that the DVDs were for him.

[21] Both meetings were interspersed with adjournments during which time Ms Machon considered her approach and on at least two occasions sought advice from the Warehouse's employment relations manager in Auckland. Here, and as an aside, it should be noted that one of the early accusations was that that manager had in fact made the decision to dismiss but that is not supported by the evidence.

[22] It should also be noted that Ms Machon initially sought to have an extended period (overnight) to consider her initial verdict but could not do so as Mr Young was on leave the following day. Her initial view was that Ms O'Brien be dismissed to which Ms O'Brien replied that she felt that harsh after 18 years and felt a warning more appropriate. Ms Machon clearly disagreed and confirmed the dismissal before the meeting ended. About her decision Ms Machon says:

With regard to Jude, I felt she knew exactly what she was doing. The video showed that she did not have to serve her brother, because

there was another staff member (Michelle) present. I took the view that she chose to serve him and knew he was getting discount. I felt she had breached trust by deliberately serving her brother and allowing discount to be provided by her mother. She had no excuse not to know the rules.

I did take account of the fact that there were other options available, as provided in the Warehouse Way. In this instance I felt Jude's long service counted against her, because she should have known better. The breach of trust was made worse because of

this.

[23] The end to Ms Weti's meeting differed in that when the preliminary view was advised Ms Weti got up and left, slamming the door as she went. No further discussion ensued. Ms Machon explains that decision as follows:

With Elaine, the same sort of considerations applied. She also had quite long service, and should have known the rules. She was contradictory in her understanding of the rules, claiming that she could use the card for "immediate family" but at the same time acknowledging she could not use it for "the kids". Viewing the video footage, it was clear that she waited around until her son was ready to make the purchase and then swiped her discount card to get him the discount. It appeared to be deliberate, not an oversight.

[24] Ms Machon goes on to say:

The rules surrounding discounts are strict and we enforce them strictly. ... Giving a discount against the rules is the same as putting your hand in the till and taking the money yourself. The company looses the money just as though it was stolen.

[25] The decisions were subsequently confirmed on 14 April 2010. In both instances the letters refer to the fact that the allegations were admitted before going on to say:

Unauthorised use of Team Discount is taken very seriously and I believe this is a serious breach of trust that you have displayed through your actions. I have therefore lost trust and confidence in you as a team member and as a result my decision was to dismiss you.

Determination

[26] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and

reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[27] That test is used as the cause of action arose prior to the present test coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[28] Both parties proffered detailed submissions though I shall not repeat these in detail. Suffice to say, by way of simplistic summary, Mr Cranney argued on behalf of the applicants that:

i. The penalty was overly severe given the 'offence', with labels such as a "slight negligence" and "a small event" being applied;

ii. The outcome was preordained and that while Warehouse policy provided for a range of disciplinary outcomes including, but not limited to, dismissal, Ms Machon had closed her mind to alternatives; and

iii. There were major flaws in the process adopted by Ms Machon in that she did not, especially in respect to Ms O'Brien, allow comment on what proved to be factors which had a significant influence on her decision making.

[29] For the respondent it is argued that there was a breach and that is undisputed; that the Warehouse takes a firm line in relation to such breaches and strictly enforces the rules pertaining to use of discount cards. It is argued, with reference to various Court and Authority decisions, that dismissal can be justified where such a culture exists; especially given the fact the Warehouse suffered a monetary detriment and that the circumstances were such that it felt it could no longer trust either applicant.

[30] Having said earlier that the test of justification applicable as of 1 April 2011 is not that to be applied here, I believe it appropriate that it be referred to. I do so given the approach of both representatives, especially Mr Cranney, and a view that the new tests' content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The new provision requires that:

(3) In applying the test in subsection (2), the Authority or the court must consider—

...

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[31] There is no doubt that that both Ms Weti and Ms O'Brien were appraised of the Warehouse's concerns, but I have serious doubts as to whether or not the Warehouse gave a reasonable opportunity to respond and whether or not it genuinely considered the explanation tendered, especially in respect to Ms O'Brien.

Ms O'Brien

[32] While the second applicant, I shall deal with Ms O'Brien's application first. [33] Ms O'Brien has consistently accepted that she did wrong but did so

unintentionally and without thinking. The Warehouse's view can be best summarised by quoting from Mr McPhail's submission. He says;

An accidental breach of rules will not justify a dismissal; ***Glengarry Hancocks v Madden*** [1998] 3ERNZ 361. *In the present case, however, the video evidence demonstrates that the breaches of rules were blatant and deliberate... The video shows deliberate actions, not oversights.*

[34] As said earlier Ms O'Brien has been consistent in pleading, for want of a better word, stupidity as opposed to deliberate malfeasance in respect to her actions. Ms Machon, as the Warehouse's prime witness and the decision maker, accepts if that were the case she would not have dismissed but states that she did not believe Ms O'Brien and considered her actions deliberate. She made that assertion on a number of occasions and expressed the view that conclusion was the paramount factor in her decision to dismiss. The Warehouse's other witness, its Employee Relations Manager Ms Mary Marshall, also agreed that a *blond moment* would not have warranted dismissal for this offence.

[35] The key flaw with that is that Ms Machon never advised Ms O'Brien of her views and therefore never allowed an opportunity to respond. Ms Machon accepted,

when answering questions from Mr Cranney, that she never advised Ms O'Brien of her views and the notes show that Mr Young actually asked whether Ms Machon considered Ms O'Brien's action premeditated and that Ms Machon responded by saying she *can't answer.* The failure to put a prime consideration and seek a comment thereon is a clear breach of the basic right of response which has been extant for some time and is now codified under the present s.103A(3)(c).

[36] Another flaw is that Ms Machon stated, in answering questions, that another significant factor in her decision was a conclusion that she could no longer trust Ms O'Brien. Unfortunately the interview notes show this key consideration was not put to Ms O'Brien until after Ms Machon had delivered her preliminary verdict.

[37] Next there is Mr Cranney's allegation that dismissal was, essentially, a predetermined outcome. Mr McPhail responds by submitting that *It is clear that Kylie Machon considered, in an appropriate manner, what alternatives to dismissal should apply. The company's disciplinary forms required her to".*

[38] Notwithstanding what the forms required, I have to conclude the evidence does not support Mr McPhail's submission and that the allegation has substance.

[39] Ms Machon states that she did not make her decision until an adjournment and that she was aware of instances upon which breaches of company rules, and in particular these rules, had not resulted in dismissal. Indeed she referred to a disciplinary meeting she herself conducted for unauthorised transactions which did not result in dismissal, though she differentiated this occurrence on the grounds that the Warehouse suffered no monetary loss. Contradicting the impression of an open mind were statements, repeated more than once, that she just had to look at the video (which she viewed well before the disciplinary interviews) to know the acts were deliberate, that a loss occurred which amounted to theft and that in such circumstances not to dismiss would have rendered the rules a joke. Indeed she went so far as to state, at one point, that breaking the rules meant *you're out.*

[40] Furthermore there was Ms Machon's acceptance that she was not *au-fait* with the Warehouses disciplinary process and the six principles it required be considered when the process was applied, along with her admission that she sought counsel and advise from a senior manager that neither applicant had the chance of addressing – indeed they did not even know of his input. This is a reference to the fact that

Ms Machon consulted her partner (who was also a regional manager with the Warehouse though not the one to which Ms Machon answered) about the process and outcome.

[41] In these circumstances, I must conclude that Ms O'Brien's dismissal was unjustified and not a decision a fair and

reasonable employer could make given inadequacies in the investigation. She had a consistent excuse that, if considered valid, would have seen her retention but which Ms Machon rejected without allowing an opportunity to comment on the reasons for that rejection and with evidence of a predetermined view as to outcome.

[42] The conclusion Ms O'Brien's dismissal was unjustified means a consideration of remedies is required. She seeks reinstatement, lost wages and an unspecified amount as compensation for hurt and humiliation.

[43] The claim for reinstatement is, in this instance, pursued with some vigour and therein lies a problem. At the time the cause of action arose, and at the time of the investigation meeting, reinstatement was a prime remedy. It no longer is, with the change occurring as a result of amendments to the Act effective 1 April 2011 (see s.125 of the Act).

[44] In this instance I conclude it appropriate to proceed on the basis that reinstatement remains a prime remedy. I do so for two reasons. The first is s.7 of the Interpretation Act 1999 and the provision that *An enactment does not have retrospective effect*. There is nothing which provides that the amended s.125 Act is to be applied retrospectively. The second is that had the file not become inaccessible due to the Christchurch earthquake this determination would undoubtedly have been issued prior to the change coming into effect. Ms O'Brien should not be disadvantaged by an act of nature over which she had no control.

[45] The previous s.125 provides that reinstatement, when sought, be granted

wherever practicable.

[46] Neither Ms Machon nor Ms Marshall proffered any evidence in support of an argument that reinstatement was impracticable. Indeed the only suggestion this may be the case came from the bar with Mr McPhail stating that the claim was opposed and that a high degree of contribution precluded it.

[47] I can not agree. That Ms O'Brien contributed to the situation in which she found herself is clear – she did wrong and admits it, but is the level of contribution so high it would preclude reinstatement. The answer is no. The Warehouse's evidence is that had Ms O'Brien's explanation been accepted, she would not have been dismissed and that implies that the offence, in itself, is not necessarily an impediment to reinstatement. Given that, the fact Ms O'Brien was not given an opportunity to comment on the Warehouse's rejection of her excuse and that it was not believed, and the lack of an argument against reinstatement from either of the witnesses, I am unaware of any reason as to why reinstatement is impracticable.

[48] Given the above, I consider it appropriate to order Ms O'Brien's reinstatement to her previous position with the Warehouse.

[49] That raises the issue of lost wages. They are now considerable but in the same way that I did not consider it appropriate to burden Ms O'Brien with the consequences of a natural disaster, I take the same approach to the Warehouse. They should not suffer the consequences of delay in this decision occasioned by the earthquake and, in any event, I am unaware of whether or not Ms O'Brien has managed to mitigate her loss since the date of hearing, especially given her evidence that she is enrolled with Work and Income and actively seeking work. In the circumstances I believe it appropriate to order the payment of ordinary time wages from the date of dismissal until the date of the investigation meeting (2 November

2010). On the information I have, the loss amounts to $11,933.50. That will then be reduced for contribution (see 51 below) and wages earned during the period. In this last respect, I note Ms O'Brien's evidence that she obtained cleaning work but had to relinquish it due to the hours and an inability to care for her children.

[50] Last, there is a claim for compensation (s.123(1)(c)(i)) at an unspecified amount. Whilst Ms O'Brien offered evidence that her mother was upset and that she had suffered fiscal pain, there was negligible evidence of any humiliation she may have suffered. That said, it is clear that she must have suffered some hurt as a result of the dismissal but the lack of evidence means the award must be minor. In the circumstances I conclude $2,000 to be appropriate.

[51] The conclusion that remedies accrue means that I must, in accordance with the provisions of s.124, address whether not Ms O'Brien contributed to the situation she found herself in. The answer must be yes. She did wrong and admits it. She also

accepts that given her experience she should have known better and in the circumstances I consider the level of contribution is significant. I conclude 50% an appropriate measure and reduce both monetary awards accordingly.

Ms Weti

[52] One argument tendered on Ms Weti's behalf (and also on Ms O'Brien's) was that the crime was, to use one phrase applied by Mr Cranney, *de minimus* in light of long and blemish free records and that it did not, therefore, warrant the penalty.

[53] I cannot accept that approach. As is argued by the Warehouse, a loss is a loss and while the amount involved was minor, Ms Weti now accepts that she knew the rules and that she knew the Warehouse took a serious view of such breaches. Here it should be noted that one item of evidence was a union newsletter advising members that most retail employers took a view

that even minor indiscretions could, and often would, lead to dismissal.

[54] That said, the issue of predetermination remains with Ms Machon again accepting the video indicated a premeditated action and that view was present from the time she saw it. That, in itself, supports a finding of unjustified dismissal given the opportunity to respond was not reasonable in that it does not appear genuine and that options other than dismissal were not considered with an open mind. Again the dismissal must, in the circumstances, be unjustified.

[55] That conclusion again raises the question of remedies and, like Ms O'Brien, Ms Weti seeks reinstatement, lost wages and compensation under s.123(1)(c)(i).

[56] With respect to reinstatement I conclude that notwithstanding the lack of evidential opposition from the Warehouse, there are impediments to reinstating Ms Weti. A key factor is the excuse tendered by Ms Weti. Unlike Ms O'Brien who admitted wrong and expressed remorse, Ms Weti responded to the allegation by saying she understood her actions were within the rules. That is implausible. It is contradicted by the rules themselves (which she has, more than once, acknowledged she has read and understood); her acceptance that she should know the rules and had previously been required to train and mentor others and her (albeit subsequent acceptance at the investigation meeting) that she was actually aware of the rules and that the Warehouse took a dim view of breaches of those pertaining to staff purchase rights.

[57] Not only was the excuse offered at the time implausible, Ms Weti's present answers would support a conclusion that she knew so all along. I must also consider other answers given to Mr McPhail which indicate that while she accepts she broke the rules, she sees little wrong in what she did. These issues leave me far from convinced that the Warehouse can trust Ms Weti to the level required for the maintenance of a viable employment relationship and, for that reason, I conclude reinstatement is, for her, impracticable.

[58] Turning to the claim for lost wages. Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Ms Weti accepted, when answering my questions, that she made no attempt to find alternative employment or otherwise mitigate her loss. In such circumstances I conclude there is no justification for considering a loss beyond the minimum period of three months. The amount involved (prior to any reduction for contribution) is $7,378.80.

[59] Lastly I turn to compensation. Whilst Ms Weti offered slightly more evidence of hurt than Ms O'Brien, it remained superficial and incapable of supporting a significant award. Again, the evidence supports a relatively low award and I again consider $2,000, prior to deduction for contribution, appropriate.

[60] Again, and like Ms O'Brien, there is an issue in respect to contribution. Like Ms O'Brien I consider Ms Weti's contribution to be significant. Ms Weti did wrong and should have known so yet, unlike Ms O'Brien who immediately said *mea culpa* and apologised, Ms Weti aggravated the situation by proffering an implausible excuse which, notwithstanding the Warehouse's predetermined approach, would probably have resulted in her dismissal in any event. Indeed, she still appears unable to accept a degree of fault and that is evidenced by her current lack of remorse, continued attempts to justify her actions by arguing confusion as to what a 'kid' is and suggesting hers was not a dishonest action whereas removing the same amount from the till is.

[61] Her demeanour and responses indicate an even greater element of fault and contribution than Ms O'Brien but that is offset against the fact she failed to attain reinstatement. Again I consider a 50% contribution appropriate and reduce both monetary awards accordingly.

Orders

[62] For the forgoing reasons it is concluded both applicants have a personal grievance and the following orders are made;

i. The respondent, The Warehouse Limited, is to reimburse the first applicant, Ms Elaine Weti, $3,689.40 as recompense for wages lost as a result of the dismissal;

ii. The Warehouse is to pay Ms Weti a further $1,000.00 as compensation for humiliation, loss of dignity and injury to feelings pursuant to section

123(1)(c)(i) of the Act.

iii. The Warehouse is, should the second applicant Ms Judith O'Brien so wish, to reinstate her to the position she occupied prior to dismissal;

iv. The Warehouse is to reimburse Ms O'Brien $5,966.75 as recompense for wages lost as a result of the dismissal. This sum shall be further reduced by any wages received by Ms O'Brien during the period 14 April 2010 to 2 November 2010;

(ii) The Warehouse is to pay Ms O'Brien a further $1,000.00 (one thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[63] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Mesdames Weti and O'Brien wish to seek a contribution toward their costs, they are required to lodge and serve an application within 28 days of this determination. The Warehouse is to file any response within 14 days of the application

M B Loftus

Member of the Employment Relations Authority
