Determination Number: CA 70/06
File Number: 5036810

*Under the Employment Relations Act 2000*

# BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

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| **BETWEEN** | Marlene Ann Hunt and Shirley Tamaiparea (Applicants) |
| **AND** | Christchurch Yarns New Zealand Limited (Respondent) |
| **REPRESENTATIVES** | Greg Lloyd, Counsel for the applicants<br>Peter Zwart, Advocate for the respondent |
| **MEMBER OF AUTHORITY** | Helen Doyle |
| **INVESTIGATION MEETING** | 12 May 2006 |
| **DATE OF DETERMINATION** | 15 May 2006 |

## DETERMINATION OF THE AUTHORITY

### *The employment relationship problem*

[1] The applicants, Marlene Hunt and Shirley Tamaiparea, were summarily dismissed by the respondent on 21 March 2006 for breaching its house rules when they clocked each other in at work. Ms Hunt and Ms Tamaiparea seek interim reinstatement to their positions with the respondent as textile workers.

[2] It was agreed that both applications be heard together as they arise out of the same factual background.

[3] The respondent, Christchurch Yarns NZ Limited ("Christchurch Yarns") is involved in the business of manufacture of carpets. It opposes the application for interim reinstatement.

[4] The parties have attended mediation in an attempt to resolve the matter, but without success.

[5] Section 127 (1) of the Employment Relations Act 2000 provides that:

> *The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.*

[6] I dealt with the application on the basis of the affidavit evidence provided and with the assistance of submissions from Mr Lloyd and Mr Zwart. I also viewed a short video which was relevant to the matter.

[7] I set out below the relevant facts which provide the necessary background to the employment relationship problem. They are not in dispute.

### *The facts*

[8] Ms Hunt commenced her employment with Christchurch Yarns in October 1999. Ms Tamaiparea commenced her employment with Christchurch Yarns in April 1994.

[9] The Christchurch Yarns house rules contain rules that attract summary dismissal. The relevant house rule in this matter is the first rule that provides:

> *Falsification of company records including clocking another employee's time-card.*

[10] Over the Christmas break 2005/2006 security cameras were installed in the main cafeteria at the respondent factory and over the clock machine. Ms Hunt and Ms Tamaiparea were unaware of the cameras.

[11] The General Manager of Christchurch Yarns, Glenn Wilcock said in his affidavit evidence by way of background to the installation of cameras that there was a concern about thieving of employees' food from the fridge. He also said the company suspected that people were clocking each others cards and stopping work early and standing by the clock out machine.

[12] When the cameras were up and running properly Mr Wilcock prepared and put out a memorandum in each employee's pay packet. It was dated 7 February 2006 and provided with respect to clocking in and out:

> *I would like to remind everyone, that clocking other peoples' clock cards is Serious Misconduct as stated in the house rules. Any one caught clocking in or out another workers card will face disciplinary action, and eventually dismissal.*
>
> *While on the issue of clocking in, I would like to remind everybody that the working hours finish on the hour, not 10 minutes to, as in the case of a few people, the Company pays up to the hour for your labour, not for you to stand in front of the clocking machine for up to 10 minutes.*
>
> *Things are tough enough at the present time with the high dollar and competition from offshore, we need all the efficiencies we can get.*

[13] A review of the camera records initially showed that Ms Hunt had clocked Ms Tamaiparea in on 14 March 2006. A disciplinary meeting took place on 15 March 2006 with Ms Hunt. She admitted clocking Ms Tamaiparea in and was then suspended on full pay pending further investigation.

[14] A further perusal of the tapes by Mr Wilcock on 16 March 2006 showed that Ms Tamaiparea had clocked Ms Hunt in on at least one occasion prior to 14 March 2006. A disciplinary meeting was held on 16 March 2006 and the allegation put to Ms Tamaiparea. Ms Tamaiparea was then suspended until further investigations could take place.

[15] Between 16 March and 21 March 2006 Mr Wilcock established from the camera that Ms Tamaiparea had clocked Ms Hunt in on 28 February and 6 and 8 March 2006.

[16] There is no dispute that at the time of clocking in each other on the dates referred to in paragraphs 14 and 16 both Ms Hunt and Ms Tamaiparea were on site. Ms Hunt says in her affidavit about the incident on 14 March 2005 in paragraph 4 that:

> *On that occasion myself and Shirley were due to begin work at 10.00pm. We arrived early so we could have some dinner before starting work. At 9.45pm I clocked both myself and Shirley in on my way to the cafeteria. Shirley was outside having a cigarette.*

[17] It appears that the clocking in was done for convenience and before work started when both Ms Hunt and Ms Tamaiparea were on site. Both travelled to work together and often got something to eat before commencing their work. There was no financial gain for either worker to the clocking in. Both accepted that they had seen the 7 February 2006 memorandum about clocking in.

[18] Mr Wilcock sets out in paragraph 12.3 of his affidavit the main issues for the company. He deposes amongst other matters to the importance of maintaining accurate company records as significant in its own right. In addition to pay calculations he says in his affidavit the clocking time cards show who is in the factory at any given time which is significant for health and safety and security issues.

[19] On 21 March 2006 Mr Wilcock met firstly with Ms Hunt and then with Ms Tamaiparea. There was a discussion during the meetings about the allegations and the fact that they were recorded on camera. There was also consideration given to Bob Brough's view as the union organiser from the National Distribution Union representing both employees that neither Ms Hunt or Ms Tamaiparea gained from the action. Mr Wilcock concluded that the actions were a repeated breach of the company code and that it was serious misconduct. Both Ms Hunt and Ms Tamaiparea were summarily dismissed.

### *The issues*

[20] An injunction requires the exercise of a discretion. It is recognised that the answer to an interim injunction is not in the rigid application of a formula but there are two broad enquiries; first whether there is a serious question to be tried and secondly, where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies - *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

### *Is there a serious and arguable issue to be tried?*

[21] The respondent maintains that there is no arguable case on the basis that the facts are not really in dispute and the applicants accept that they did clock each other in on four occasions. There are house rules that provide clocking another time card is serious misconduct and the procedure adopted to investigate the concerns was fair and reasonable.

[22] The applicants' case is that their actions amount to a technical breach of the house rules only and do not amount to serious misconduct and that had the respondent properly considered all the relevant circumstances it would or should, have concluded that dismissal was not justified in the circumstances.

[23] I am satisfied that there is a serious and arguable issue in this case. The issue is whether the breach of the rules by Ms Hunt and Ms Tamaiparea substantively justified dismissal. This needs to be considered in terms of section 103A of the Employment Relations Act 2000 which was inserted by the Employment Relations Amendment Act. Section 103A provides:

> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 or action occurred.*

### *Balance of Convenience*

[24] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the applicants being reinstated or not in terms of considering the balance of convenience.

### *Damages as an adequate remedy*

[25] The respondent says that damages are an adequate remedy. There is an investigation meeting date scheduled for 22 June 2006.

[26] Both applicants gave evidence of financial hardship. Ms Hunt has custody of her 12 year old granddaughter and has had to borrow $2000.00 from her parents to pay bills and support her grandchild. Ms Hunt is now in receipt of a benefit although there is not a lot left over for food and other necessities after making mortgage payments.

[27] Ms Tamaiparea has found some casual employment but only knows the hours she will be working on a week to week basis. Ms Tamaiparea pays her cousin board of $120.00 per week.

[28] I take into account the strong emphasis in the judgement of Travis J in *Auckland DHB v X (no 1*) [2005] 1 ERNZ 487 of the value of the right to work when considering the adequacy of other remedies.

[29] Whilst the date for a substantive investigation meeting is only a few weeks away an allowance will have to be made for time from 22 June 2006 for the making of a determination.

[30] Taking all these matters into account I am not of the view that in terms of the applicants financial difficulties and the value of the right to work damages are an adequate remedy for the applicants.

### *Issues of trust*

[31] Mr Wilcock says that he cannot have trust in the applicants and they work on night shift with little or no management supervision. He also says that neither of them has shown remorse for their actions. He also says the applicants' attitude is that this wasn't a *big deal.*

[32] There is a comment in Ms Hunt's affidavit in paragraph 11 that *I really can't understand what the big deal is…………I just can't understand why the company has made such a big deal.* Most of the contents of Ms Hunt's affidavit including that paragraph are accepted by Ms Tamaiparea in her affidavit. The use of those words in the affidavit is unhelpful. Clocking in and out by employees is a significant issue for Christchurch Yarns and it expects its employees to obey its rules.

[33] I am of the clear view though that Ms Hunt is deposing in her affidavit to the fact she was summarily dismissed for her actions rather than an overall attitude to the company rules. I do not therefore place a large amount of weight on this matter. I am also not persuaded that at this stage a lack of remorse should prevent the interim reinstatement of the applicants.

[34] I have taken into account that both applicants have previously unblemished work records. They have both worked in excess of five years for Christchurch Yarns, Ms Tamaiparea for over ten years. There is nothing to suggest that if reinstated on an interim basis they would not be able to carry out their work in their usual manner and clock themselves in.

[35] The applicants have both given undertakings as to damages. I accept Mr Zwart's submission that the applicants' ability to meet their undertakings would be limited although this is not so much of an issue if both applicants were to work during their period of reinstatement.

[36] I have weighed up the relative hardship to Christchurch Yarns if interim reinstatement is granted and it was then found that Christchurch Yarns acted justifiably with the relative hardship to Ms Hunt and Ms Tamaiparea if they are not granted interim relief and it is later determined they have a justified claim. I am of the view that the balance of convenience favours the applicants in this case.

### *Overall Justice*

[37] I now consider the overall justice of the case by standing back and having regard to the situation in a more general way. I consider the following matters. I have found there to be an arguable case. Section 125 of the Employment Relations Act 2000 provides reinstatement to be the primary remedy which is a significant factor. I do not find on the untested evidence

before me a strong foreseeable likelihood that permanent reinstatement would be refused if the applicants are ultimately successful in their claims that their dismissals were unjustified (*Counties Manukau District Health Board v Trembath* [2001] 1 ERNZ).

[38] I am satisfied that the overall justice in this case favours the applicants.

[39] I make an interim order that Marlene Hunt and Shirley Tamaiparea be reinstated to the previous positions that they held with Christchurch Yarns NZ Limited. I shall give the parties 48 hours to make any necessary arrangements and the order is to take effect from Thursday 18 May 2006.

***Costs***

[40] As discussed with Mr Lloyd and Mr Zwart I intend to leave the issue of costs until after the substantive matter has been dealt with.

Helen Doyle
Member of Employment Relations Authority