

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 165/07
5051592

BETWEEN Kaycie France
Applicant

AND Robyn Cosmos, t/s Sabotage
Respondent

Member of Authority: Marija Urlich

Representatives: Kerry Single, for Applicant
Hamish Russ, for Respondent

Investigation Meeting: 20 March 2007 at Tauranga

Further information and
submissions received: 30 March from Applicant
26 March and 19 April from Respondent

Determination: 6 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mrs France was employed in two of Robin Cosmos' fashion stores, Sabotage, located in Bayfair, Mt Maunganui and Tauranga from August 2005 until her dismissal on 7 September 2006. Mrs France and Mrs Cosmos have known each other for many years and they both have many years experience in fashion retail.

[2] Mrs France says her dismissal was unjustified and that she has been devastated by the experience. She seeks remedies of lost wages and compensation for hurt and humiliation consequent to her dismissal.

[3] Mrs Cosmos says Mrs France's dismissal was justified. She says she attempted to implement policies and procedures in the Bayfair store and that these attempts were undermined by Mrs France's refusal to comply with those policies.

She says that following a fair investigation the decision to dismiss Mrs France was justified in all the circumstances.

[4] The parties have attended mediation.

[5] At the investigation meeting I received evidence from Mrs France, Mr Donald France (Mrs France's husband), Mrs Cosmos and Melanie Cosmos, Mrs Cosmos' daughter, who is employed in the business operated by her mother.

Issues

[6] Mrs France says her personal grievance arises from a number of allegations of serious misconduct raised with her in August 2006 and the manner in which those allegations were drawn to her attention. To determine this employment relationship problem the Authority must consider whether:

- (i) the suspension was fair and reasonable;
- (ii) the allegations were fairly investigated; and
- (iii) a fair and reasonable basis to dismiss existed.

[7] The statutory test for justification is set out in section 103A of the Act. It provides:

"103A Test of justification

For the purposes of section 103(1)...(b), the question of whether... 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."

[8] In scrutinising this dismissal the Authority must assess whether the employer's actions in dismissing Mrs France can be said to be objectively reasonable in all the particular circumstances of that disciplinary inquiry.

Terms of employment

[9] Mrs France did not have a written employment agreement. The failure to provide a written employment agreement has particular implications for this

employment relationship problem. Mrs France says she was engaged as the store manager, that this was never made clear to staff at the Bayfair store, and that this became an ongoing source of tension between her and the other staff which Mrs Cosmos failed to address.

[10] Providing a written employment agreement is a statutory requirement¹. Mrs Cosmos provided no explanation as to why this statutory obligation had not been complied with.

[11] Having considered all the evidence I think Mrs France's assessment that the failure to have her terms of employment set out in writing as a fundamental cause of her employment relationship problem is a perceptive one. If her role had been clearly set out then her assumptions about her role could have been corrected at an early stage.

[12] There is no dispute between the parties that Mrs France was paid \$16 per hour and that she worked full time hours alternating Saturday, Sunday, Mondays off one week with Sunday Mondays off the following week.

Was the suspension justified?

[13] Mrs France was suspended from her employment on 21 August 2006. Melanie Cosmos said she rang Mrs France and told her she was suspended on full pay pending a disciplinary meeting. Ms Cosmos said she did not tell Mrs France that allegations of serious misconduct were being investigated. Ms Cosmos said she told Mrs France that Mr Russ, the consultant engaged by Mrs Cosmos, would contact her as soon as possible, but that she could not give her a date when that would occur, that Mrs France continued to question her, that she could say no more and had to hang up the telephone in the end.

[14] Mrs France said she received a telephone call from Ms Cosmos at about 7pm on Monday 21 August 2006, that Ms Cosmos told her there would be a meeting the following Wednesday but that she could not tell Mrs France what it was about other than that it was serious and that a lawyer would be present. Mrs France said that

when she asked Ms Cosmos if she should have a lawyer present she was told no and that when she asked for more information Ms Cosmos put the telephone down.

[15] Why was Mrs France suspended? In May 2006 \$1200 went missing from the Bayfield Sabotage till. This sum represented a day's takings. Mrs Cosmos' response was to issue new procedures around cash handling. On Saturday 17 June 2006 Mrs Cosmos faxed to the stores a two page handwritten document outlining these new procedures. The document begins:

"These procedures must be strictly adhered to. Any staff member who doesn't follow procedures will be answerable to me, and [sic] warning will be issued."

[16] The document ends:

"Please read the above memo, as well as the "Notice to Staff Members" attached, then sign below so that I know each person has read & understands what I have written."

[17] Only Mrs France and Ms Cosmos, of the listed staff members, did not sign acknowledging the document.

[18] Mrs Cosmos said it came to her attention that Mrs France was not following the new procedures that the tills continued not to balance and allegations grew that Mrs France had something to do with it to her personal benefit.

[19] In August 2006 Mrs Cosmos was in Australia. In her absence Ms Cosmos was in charge. She received a telephone call from a staff member at the Bayview store who said that the final till balance for that day had been out by \$50 cash, that Mrs France had left the store, returned after hours and that the next till balance was up by \$50. Ms Cosmos telephoned her mother in Australia who advised her to get some advice. Ms Cosmos then telephoned Mr Russ and discussed the situation with him. It was against this background that the decision to suspend Mrs France was then made.

[20] Was the suspension fair and reasonable in all the circumstances? The allegations against Mrs France were very serious; they involved deliberate failure to follow procedures in a situation where the failure to follow those procedures could

¹ Section 65 Employment Relations Act 2000

have resulted in takings being unaccounted for. In such circumstances it may be reasonable to suspend an employee, however, those circumstances would usually require that Mrs France was given a fair opportunity to put her side of the story before a serious disciplinary sanction such as suspension was imposed. This did not occur in this situation.

[21] Mrs Cosmos cannot demonstrate that the decision to suspend Mrs France was fair and reasonable. At this early stage in the investigation the evidence supporting the allegations was entirely untested and speculative, based as they were on staff advising what they thought must have happened to the \$50. In such circumstances Mrs France should have been given a fair opportunity to respond to the allegations before the decision to dismiss was made. The suspension was unjustified.

The allegations

[22] The disciplinary allegations were put to Mrs France in a letter dated 28 August 2006. The basis for the allegations was also provided. There were thirteen allegations in total:

- (i) failing to perform mock balances;
- (ii) operating till when not permitted;
- (iii) performing X offs without permission;
- (iv) failing to follow procedure regarding “No Sales” transactions;
- (v) hand bag stored in incorrect location;
- (vi) leaving the till open;
- (vii) leaving the till drawer open;
- (vii) performing personal transactions;
- (ix) leaving early;
- (x) informing opposition of commercially sensitive information;
- (xi) making personal telephone calls;
- (xii) parking in the wrong area; and
- (xiii) theft as a servant.

[23] All these allegations were characterised as serious misconduct. The allegations concerning use of the till are described as “*insubordinate behaviour, precursor*

actions to theft as a servant and irrevocable breaches of employer's trust and confidence".

[24] On 29 August 2006 Mrs France's then representative wrote to Mr Russ advising that "*Mrs France ... denies absolutely that she has been responsible for any shortfalls in the shop takings.*". The following information was requested; Mrs France's employment agreement, all supporting till dockets, summaries and day sheets for the past three months, the shop address book. The letter also requested that Mrs Cosmos be present at the disciplinary meeting and sought confirmation that the paid suspension would continue.

[25] On the same day Mr Russ replied to the request for information; he confirmed there was no written employment agreement, that the till documents would not be supplied because they were confidential documents and, confusingly, that the till dockets did not exist, the request that Mrs Cosmos be present was declined, and the letter confirmed Mrs France's paid suspension would continue. The penultimate paragraph provides:

I must strongly caution your client to consider her approach. The ever increasing evidence we are obtaining in the current investigation process is now is now at a level of what we feel would be to the level needed to form a prima facie criminal case against your client. The employer has decided not at this point to get the police involved, however if your client frustrates the process and the evidence continues to build against your client, the employer may be left with no option but to report your client to the police."

[26] After a further exchange of correspondence the respondent agreed that Mrs Cosmos would be present at the meeting, further information regarding "X offs" would be provided and Mrs France agreed to attend a disciplinary meeting on 6 September 2006 to respond to the allegations.

[27] The parties meet on 6 September 2006. The allegations were discussed and Mrs France provided responses. Mrs France was accompanied by her husband. Mrs Cosmos was also present.

[28] On 7 September Mr Russ wrote to Mrs France advising the outcome of the disciplinary investigation and that she was dismissed. The allegation of theft as a

servant was not upheld likewise the allegations of operating the till when no permitted, leaving the till open, leaving the drawer open and performing personal transactions. It is unclear from the dismissal letter whether the respondent found that the allegations which were upheld cumulatively or individually amounted to serious misconduct warranting dismissal.

[29] The concluding paragraphs of the letter set out the grounds of dismissal:

“Conclusion:

The employer’s conclusion is to summarily terminate your employment. You demonstrated very vividly throughout the investigation process your own strong personality and that you will always do what you want to do and go against any directive given to you if you disagree about it.

The employer has no trust and confidence that you will obey all policy’s and instructions given to you, furthermore the employer feels that if continuance of employment was to occur, that you would continue to defy policies, namely parking, phone usage, mock balances, hand bag and performing no sales and x-offs without lawful reasons to do so.

The employer needs employee’s who will follow policies and procedures and does not feel that you will or have the desire to follow all policies and procedures as set down by the employer from time to time.

As such, your employment is terminated summarily.”

Was the decision to dismiss justified in all the circumstances?

[30] Mrs Cosmos says Mrs France knew what the till procedures were, that they had been implemented because of the till take being short and that she and Ms Cosmos had spoken to Mrs France on a number of occasions about not following procedures. Mrs Cosmos said she dismissed Mrs France because Mrs France was so adamant in the disciplinary meeting that she would not comply with the procedures.

[31] Mrs France says she saw the 17 June procedures document when she was working at the Tauranga store, that she quickly read through it, that she implemented the procedures where she could, that the document or procedures were never discussed with her and signing the document was never followed up with her.

[32] I do not accept that the 17 June procedures document was ever discussed with Mrs France or that Mrs or Ms Cosmos discussed implementing the procedures with her. No written warning was issued to Mrs France about implementing the procedures, as anticipated in the 17 June document. There was no record or detail of any discussion with Mrs France about this issue prior to the disciplinary proceedings leading up to her dismissal.

[33] Further, I do not accept that it was ever put to Mrs France at the disciplinary meeting on 6 September that if she refused to follow the procedures she would be dismissed. There is no evidence that such a question was put to Mrs France or that Mrs France made any unequivocal statement that she would not follow procedures. The dismissal letter refers to Mrs France's personality, as expressed at the disciplinary meeting, as being the basis for the finding that she would not follow procedures. It would be a most unusual situation where the expression of personality during a disciplinary investigation justified a decision to dismiss.

[34] As I have said above the allegations faced by Mrs France were extremely serious. They concerned theft of monies and failure to follow procedures resulting in monies being unaccounted for. The sums involved were never put to Mrs France and no specific allegation as to how failure to follow particular procedures resulted in particular unaccounted for monies were put to Mrs France. The allegations were so unformed that Mrs France was not in a fair position to give a reasoned response.

[35] The failure to detail whether cumulative or individual failures to follow procedures amounted to serious misconduct is a further flaw in this disciplinary process. For example, it is difficult to see how using the telephone or storing a handbag in the wrong location, could justifiably amount to serious misconduct, when there was no evidence these issues had been specifically drawn to Mrs France's attention prior to the disciplinary investigation and there was no evidence that these actions lead to any loss for the employer.

[36] For these reasons I find Mrs France's dismissal was unjustified.

Remedies

[37] Mrs France has established that she has a personal grievance. She is entitled to a consideration of the remedies she seeks.

[38] Mrs France said that she was unable to find alternative employment until 30 January 2007. She said she looked in the newspapers for advertised positions in retail, but could not find anything suitable. She also said she did not look for a position during this period because she did not have the confidence to look for another position after her dismissal from Sabotage. Mrs France said she was overseas during the month of October.

[39] I am not satisfied that Mrs France has taken reasonable steps to mitigate her lost earnings. I accept that she would have felt shocked following her dismissal however, there was no evidence provided to support her claim that she was unable to look for work and or could not find an advertised position to apply for.

[40] Mrs France is entitled to be reimbursed one months lost wages pursuant to section 123(1)(b) and I so order.

[41] Mrs France seeks compensatory damages for hurt and humiliation consequent to her dismissal. She described her shock at being suspended, the repeated steps taken to understand the basis for that suspension and disciplinary allegations and her disbelief at being dismissed. Mrs France said she had never been dismissed before and that after 14 years in retail she could not believe that this could happen to her. She said she was devastated that an allegation of thief could have been levelled at her and that, in particular, she wanted this allegation cleared.

[42] It is appropriate that a global award is made to address the consequences of the suspension and dismissal on Mrs France. I set that amount at \$8000 pursuant to section 123(1)(c)(i).

[43] There is no evidence to suggest Mrs France contributed in any blameworthy way to the circumstances which gave rise to her personal grievances. The conclusions reached by the employer were unreasonable and unjustifiable in all the circumstances.

Costs

[44] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If this is not possible then Mr Single should file and serve a memorandum as to costs within 28 days of the date of determination. Mr Russ should file any reply within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority