

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 326/09
5155459

BETWEEN LOUIS PANI
 Applicant

AND TRANSPORTATION
 AUCKLAND CORPORATION
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Greg Lloyd, Counsel for Applicant
 Rachel Larmer, Counsel for Respondent

Investigation Meeting: 3 August 2009

Submissions Received 19 August 2009 from Applicant
 31 August 2009 from Respondent

Determination: 10 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Louis Pani, says that he has been justifiably dismissed by the respondent, Transportation Auckland Corporation Limited (“TACL” or “the company”). Mr Pani began his employment with the company on 15 May 2006 as a trade assistant. In April 2007 he transferred from that role to being an apprentice coach builder.

[2] Mr Pani was employed by TACL in the Metrolink City Business Unit and worked primarily at the Halsey Street premises. His employment was terminated summarily on 23 January 2009 on the grounds of serious misconduct for either being involved in taking, or assisting Mr Mani Suemo, to take items from Christmas hampers which were being gifted to employees by the company.

Christmas hampers

[3] During December 2008 the company arranged to purchase and distribute Christmas hampers to its 2,500 staff. The hampers were picked up from the warehouse by the company on Tuesday 16 December 2008 and distribution to staff at the city depot in Halsey Street began that day. The hampers were stored on two buses, the doors of which were closed but not locked. The workshop was locked overnight but cleaners would have had access. Workshop employees were instructed to remain clear of the two buses that the hampers were stored on. There was no reason for anyone to be on the buses unless they were receiving their own hampers.

[4] The Christmas hampers were handed out in various shifts by management to individual employees who were required to sign for receipt of the hamper. Notices about the process were sent to managers and posted on to the depot notice board.

[5] Each hamper contained a number of items, including for the purposes of this matter, a box of 7 x 275gms Ferrero Rocher chocolates, two boxes of sampler biscuits and 1 x 240gm box of scorched almonds. All the items were assembled in one coloured rubber hamper and the top was wrapped in cellophane. The cellophane was tucked into the inside edges of the hamper but not secured and was then tied at the top to make it look festive. Ms Kirsten Hooper, the People and Performance Adviser, said it would have been easy for anyone to slip their hand inside the hamper and remove items without disturbing the cellophane much.

Items taken from hampers

[6] On 17 December 2009 Mr Nitin Chandra (also known as Bob) told Mr John Connell, the second in charge of the workshop, that he had seen Mr Mani Suemo (a Beaurepaires employee) and Mr Pani on the bus twice. The first time he saw them bobbing up and down inside the bus. He said he did not think much of it at the time. He assumed they were fixing something on the bus. The second time was about twenty minutes later when they were standing on the steps of the hamper bus. It looked like they had things stuffed into their overalls. He asked them what they were doing because everyone had been told to keep away from the buses. This had happened around 11.30 or 11.45 am. He said they just smirked at him. Mr Pani said he had not been on the bus but had been hanging around and that Mr Chandra had not spoken to him.

[7] Mr Chandra said after lunch he looked in Mr Suemo's van. He poked his head in the window of the cab and could see some Ferrero Rocher chocolates poking out of the side of some clothing which was covering them. He lifted the corner of the clothing and saw a pile of chocolates and some Griffins biscuits in a red packet.

[8] He said he did not know exactly how many there were as he did not lift up all the clothing but he assumed there were other chocolates and biscuits under the rest of the clothing. He estimated there were approximately 35 boxes of Ferrero Rocher chocolates, 8 packets of biscuits and 6 boxes of Nestle chocolate scorched almonds.

[9] Mr Connell said that if there was a problem with staff it was generally raised with him first and that as he had a trade union background he tried to sort out problems in a low key fashion. He went to the Beaurepaires truck. Mr Pani was leaning in through the window speaking to Mr Suemo who was in the driver's seat. Mr Connell said he believed they had been seen taking stuff out of the Christmas hampers and if they had had any involvement they should put the stuff back because it was not worth putting their jobs on the line for a couple of boxes of chocolates.

[10] Mr Connell looked in through the open window of the truck and could see that under a raincoat was a box of Ferrero Rocher chocolates of the same sort as were in the hampers. He asked Mr Suemo what they were doing there and he said he had bought them from a service station. Mr Connell said he may have seen some biscuits but he was not sure.

[11] Later that day Ms Hooper asked him about the matter. He told her what he knew and then put it in writing.

[12] Ms Hooper also spoke to Mr Chandra and obtained a written statement from him.

[13] At this stage the hampers were moved into the office of Mr Gavin Cook, the General Manager. The office was able to be locked. Ms Hooper went through each hamper and cross-checked the contents against the list of what should have been in each hamper. She ascertained that the hampers were missing 16 boxes of chocolates, 3 boxes of almonds, 3 packets of sampler biscuits, 1 big bag of chips had been broken open and some small packets of chips removed.

[14] By then Ms Hooper had already received two reports from people in the pump service department that they were missing chocolates from their hampers. She did not ascertain when they had collected their hampers. One person did not get any scorched almonds and another person did not get any chocolates. They were aware items were missing because they were a close knit team who had discussed the hamper contents with their colleagues. Ms Hooper said she did not announce to staff that there was a problem with the hampers, nor were they given a list of items that should have been included. No cross checking was done on hampers that had already been distributed. Their inquiries focused solely on the hampers that had not at that point been collected by staff.

Investigation

[15] Ms Hooper gave Mr Pani with a “please explain” letter dated 22 December 2008. In a reply dated 29 December Mr Pani denied any wrongdoing.

[16] Ms Hooper also spoke to a woman named Kate at Beaurepaires. Kate asked for details of the allegation and she told her what was in Mr Chandra’s note. Kate then called Mr Suemo into her office while Ms Hooper was on the phone and asked him what was in the back of his van. Ms Hooper could hear what Kate was saying and she could hear Mr Suemo responding but his exact words were unclear. Kate then repeated Mr Suemo’s response to her. She said he had stated he had pornography and alcohol in his truck. When asked about the chocolates he said he had purchased the box of Ferrero Rocher chocolates for his wife from the BP service station. When asked if he had a receipt he said he did not because it was a present for his wife and his wife had the receipt. Ms Hooper found that odd.

[17] She tried unsuccessfully to get a written statement from Mr Suemo.

[18] Ms Hooper said she was not sure when Mr Pani was provided with a copy of Mr Chandra’s complaint but she would have expected it to have accompanied her letter of 22 December 2008, although with Mr Chandra’s name blacked out.

[19] Meeting on 20 January 2009

[20] The meeting was attended by Ms Hooper, Mr Bernard Downey, the workshop manager and Ms Sarah Crabbe who took notes. Mr Pani was asked whether he wanted a representative, which he declined. They then went through Mr Chandra’s

statement. Mr Pani said he had been hanging around the area but he had just been talking to Mr Suemo. He said the Beaurepaires truck had contained a box of Bourbon, a porno magazine and biscuits.

[21] Ms Hooper asked him why someone would make this allegation against him, meaning was he engaging in any conduct that someone could have misinterpreted. Mr Pani said he did not know. They then went through the allegation. Mr Pani was told there would need to be a disciplinary meeting with Mr Cook.

23 January 2009 disciplinary meeting

[22] This meeting was attended by Mr Pani, his Union representative, Mr Mohammed Faiaz, and it was conducted by Mr Cook. Ms Crabbe took notes; Ms Hooper was present as well as the workshop manager, Mr Downey.

[23] Mr Cook started by discussing the complaint and the company's evidence. Mr Pani was also asked about a telephone call during which he had been overheard making to Mr Suemo. He said he had phoned him to ask if he had taken anything. Mr Suemo had said he had not.

[24] Mr Pani said that on 17 December, shortly before the lunchtime break, he began walking to the body shop to wash his hands. To get there he had to go around the far end of the workshop, passing Pit 6 and 7. He saw Mr Suemo who was changing tyres at Pit 6. Mr Pani stopped to chat with him. Mr Suemo had clothes in the back of his truck and he noticed a packet of biscuits, not like those in the hampers, just a normal cylinder of biscuits.

[25] While they were talking Mr Suemo reached into his truck and pulled a magazine that was X rated from under a tee shirt to show him. When he did that he saw he also had some Bourbon in a box, about six cans. That was all he saw in the truck. After they had had a chat Mr Pani went to the body shop, washed his hands and went upstairs to the smoko room.

[26] At the time he was talking to Mr Suemo Mr Sione Kaifoto was working in the inspection pit and Mr Pani said he would have had a clear view of the hamper bus. Mr Kaifoto later gave a signed statement that he did not see Mr Pani near that bus. However, that statement was not produced to the employer prior to the dismissal

being effected. I am also satisfied that is extremely unlikely that Mr Kaifoto would have been able to see anything because he was in the pit.

[27] There were a number of adjournments. During one of those Mr Cook and Mr Faiaz spoke with Mr Chandra. They then reconvened to discuss what they had been told.

[28] Mr Cook concluded the meeting by saying he believed that Mr Pani was involved in taking the goods with Mr Suemo. He regarded that as serious misconduct and Mr Pani was advised that his employment would terminate that day because the company no longer trusted him.

[29] Mr Cook said he believed Mr Chandra's version of events over Mr Pani. When reaching that decision he took into the account the fact that there had not been any previous issues or animosity between Mr Chandra and Mr Pani. Mr Chandra had no reason to lie or make up a story. Items were clearly missing and Mr Suemo's explanation for having the chocolates was unconvincing. There was no legitimate reason for Mr Pani to have been on the bus. He believed Mr Chandra had seen Mr Suemo and Mr Pani on the bus otherwise why would he have gone and looked in the back of the van. If Mr Chandra had only seen the items by looking in the back of the van then there would have been no reason for him to have referred to Mr Pani in the complaint.

[30] Mr Cook said that the stairway to access to the smoko room was an internal stairway. Mr Pani would not need to access it by walking past the doors of the buses containing the hampers. The stairway was accessed by either of the walkways at either end of the lane. It was not possible to walk across lanes due to open pits. Mr Pani was working in one of the lanes so he would have had no need to have been on the bus or around the bus doors where the hampers were stored.

[31] Mr Cook said he did not speak to other staff who might have been in the area because disciplinary investigations were a private matter. He said the company only followed up with people who were referred to in a complaint or who were likely to have evidence about the complaint. He did not consider it appropriate to talk to all the employees who were in the depot. When staff are working in the pits or servicing buses, they have buses above or around them which block the view about what is

going on anywhere else in the depot, so he did not consider there would be any useful information to be obtained by talking to other people.

[32] I made a site visit and I accept the veracity of Mr Cook is saying.

[33] Mr Cook said he dismissed Mr Pani because he genuinely believed that Mr Chandra had seen him on the bus with goods stuffed into his clothes. He drew the inference that Mr Pani was on the bus, either taking goods or assisting Mr Suemo to remove items from the Christmas hampers. He concluded that Mr Pani's actions had fundamentally undermined trust and confidence.

Decision

[34] Section 103A requires an assessment of whether the dismissal was unjustifiable and 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.

[35] Ms McNally submitted that Mr Pani worked at TACL with his father and a number of relatives. It was more than a job. The workplace and people were part of his social community and it was unlikely that he would risk that and steal from his fellow employees.

[36] I accept the submission the employer could not be precise about the occasions when the bus was left unattended and that they were left unattended at night and that people were working in and around the depot into the small hours. The buses were never locked. It is possible that someone entered the hamper buses unobserved and took the items. It is however probability and not possibility that I have to consider.

[37] I do not accept that the employer should have concluded that there was no reliable evidence placing him on the bus and that there was no evidence of him taking anything out of the bus.

[38] Ms McNally submitted that it was highly improbable that Mr Pani went on to the bus, stole goods, disguised them on his person, walked a significant distance and hid them in the busy workplace without having been seen to do any of those things. Mr Chandra said he saw him.

[39] In *New Zealand with exceptions Shipwright Union v. Honda New Zealand Limited* [1990] 3 NZILR 33 the Court stated that the evidence in support of the allegation against an employee needs to be as convincing in its nature as the charge is grave. An accusation of dishonestly taking property from ones employer and in consequence someone's work mates is extremely serious.

[40] The employer carried out a fair investigation. Mr Pani was given notice of the allegation and an opportunity to respond to it. There was no bias in the investigation or the consideration of Mr Pani's explanations. He was aware who the complainant was and his Union representative was permitted to question Mr Chandra.

[41] Mr Chandra's observations were backed up by Mr Connell's. On the balance of probabilities and an objective basis the employer was entitled to conclude that Mr Pani had been on the bus and had either removed or helped Mr Suemo to remove items from the hampers.

[42] Mr Pani was justifiably dismissed and does not have a personal grievance.

Costs

[43] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 1 days of receipt of the respondent's memorandum

Dzintra King
Member of the Employment Relations Authority