

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 87
5301308

BETWEEN PAUL KENNEDY
 Applicant

AND BRAMBLES NEW ZEALAND
 LIMITED t/a RECALL NEW
 ZEALAND
 Respondent

Member of Authority: K J Anderson

Representatives: M Whitehead, Advocate for Applicant
 J Douglas, Counsel for Respondent

Investigation Meeting: 1 October 2010 at Auckland

Submissions Received: 22 October 2010 for the Applicant
 27 October 2010 for the Respondent

Determination: 8 March 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Kennedy, claims that pursuant to s 103(1)(b) of the Employment Relations Act 2000 (the Act), his employment has been affected to his disadvantage by an unjustified action by his employer (Recall); namely a written warning issued to him on 12th March 2010 then subsequently, 10th March 2010. Mr Kennedy asks the Authority to find that he has a personal grievance and order the removal of the warning from his personal employment record and award compensation of \$5,000. Conversely, Recall says that the warning was justified because Mr Kennedy failed to adhere to the company's standard operating procedures and a serious security breach occurred.

Background Facts and Evidence

[2] Recall operates a business involving document storage and management. The evidence of Mr Jayson Hutchins, the Information Centre Manager for the company, is that safety and security are two “key fundamentals” of the business and that Recall’s company “value proposition” is: *your information, securely managed*.

[3] Mr Kennedy has been employed by Recall for approximately eight years; initially on a temporary basis to carry out project work. In July 2004, he became a permanent employee and since December 2008, he has been employed in the role of Night Shift Supervisor and Shift Leader. One of the services provided by Recall involves dispatching documents from the two Recall sites; located at Richmond Road and Onehunga for delivery to various customers that utilise the services of the company. As a Shift Leader, one of Mr Kennedy’s duties is to review all work orders to ensure that the labelling and packaging is correct before despatch from the Recall warehouse.

[4] On 9th February 2010, Mr Kennedy packaged two work orders together in one delivery satchel. The details of the recipient of each order are clearly set out on the respective address labels. One of the orders consisted of 1 file folder and was addressed to:

CHILD YOUTH FAMILY SERVICES
Rotorua
LEVEL 1
1207 PUKUATUA ST
ROTORUA
CONTACT: GAIL LEE, XRH / 700382
PHONE: 07 921 5047

The other order consisted of 9 file folders and was addressed to:

DEPARTMENT OF SOCIAL DEVELOPMENT
Bay of Plenty 422520
LEVEL 2
1207 PUKUATUA ST
ROTORUA
CONTACT: DIANE KLOMP
PHONE: 07 9218 175

There are other details on the address labels including a unique (to that package) work order number and an account number. Both labels also instruct that:

ALL DELIVERIES MUST BE IN A SEALED SACHEL

[5] The evidence of Mr Hutchins is that subsequent to the two orders being dispatched, he was alerted to a security breach, through the Recall computerised system (“Perfect Order”). It recorded an error message relating to the delivery of the two packages. Mr Hutchins contacted the people identified on the respective packages to ascertain if they had received them and how they were delivered. Mr Hutchin’s enquiries revealed that both work orders had been packaged together. But due process requires that they should have been packaged separately in individual satchels for each client. It seems that both clients received their respective package as they were processed in the same mailroom of the building at 1207 Pukuatua Street, Rotorua, and Mr Kennedy says that he had personal knowledge that this would be so. However, Mr Hutchins says that as far as Recall is concerned, there are two different clients and hence their documents should have sent in separate packages and that the failure to do so was a security breach that had the potential for significant damage to Recall’s reputation and to the interests of its clients. The further evidence of Mr Hutchins is that Child Youth and Family and the Department of Social Development entrust Recall with information that is highly confidential, sensitive and of a personal nature and these organisations are two of the top 10 of the company’s clients; hence it is important that Recall provide an excellent service to them.

[6] Mr Kennedy was required to meet with Mr Hutchins on 22nd February 2010 to discuss the security breach. Mr Kennedy asked to record the meeting and because Mr Hutchins wished to seek advice about this, the meeting was adjourned until 24th February 2010. The meeting was recorded and lasted about an hour and a half. The outcome was that via a letter dated 26th February 2010, Mr Hutchins required Mr Kennedy to attend a disciplinary meeting on 1st March 2010. Mr Kennedy was informed that:

To be clear, a possible outcome of this meeting and process is that serious disciplinary action may be taken up to termination of your employment. Based on the possible outcome you are invited to bring a representative or support person to any meeting held.

[7] A meeting subsequently took place on 2nd March 2010. Mr Kennedy was accompanied by another employee, Mr Brian Rubie. Mr Hutchins was assisted (via a

conference call link) by the Human Resources Manager for the company, Ms Violetta Trajcevski. The meeting lasted an hour and was taped. A transcript (of both meetings) has been produced to the Authority. The outcome of the meeting was that in a letter dated 12th March 2010, Mr Kennedy was informed by Mr Hutchins that:

This letter serves to confirm the outcome of the investigation and subsequent disciplinary interviews held on 24/02/2010 and 02/03/2010 where you elected not to have a representative present in both meetings.

On 09/02/2010 it was identified that you failed to follow Standard Operating Procedures and neglected to conduct the second check correctly when dispatching Out of Town work orders resulting in a security breach.

Security and confidentiality is an integral part of the Company's business and it is an expectation of you within the capacity of your role, particularly as Shift Leader, to carry out your work when managing customer items and information in a secure and professional manner. When security breaches of this nature occur because of neglect they are treated seriously in our business and can not be tolerated as they compromise our promise to our customers and our reputation in the market.

This letter serves as a First and Final Warning regarding your continued employment with Recall. Should either your Supervisor or myself be required to take any further disciplinary measures against you, subject to investigation into the circumstances surrounding the incidents, your employment with this Company may be terminated.

As discussed in our meeting on 02/03/2010, I urge you to be more diligent with our Standard Operating Procedures and develop a more positive attitude to your workplace responsibilities.

This letter of warning shall remain on your personal file for the duration of your employment with the Company. I trust you will accept this challenge.

[8] Following the receipt of the warning, Mr Kennedy instructed his advocate to raise a personal grievance; evidenced by a letter dated 12th March 2010. The parties subsequently attended mediation and it appears that following this, Recall appropriately (and as required in my view) reconsidered the duration of the warning. At a meeting with Mr Kennedy on 6th July 2010, Mr Hutchins informed him that the warning would now remain on his personal file for 12 months rather than the duration of his employment. Mr Kennedy subsequently received an amended warning letter from Mr Hutchins with the duration of the warning reduced to 12 months. Oddly, while the original warning letter is dated 12th March 2010, the amended letter is dated 10 March 2010 and informs that:

This letter of warning shall remain on your personal file for 12 months from the date of this letter. I trust you will accept this challenge and I am confident that we can work together in a productive way in the future. I would also like to take this opportunity to remind you that you should treat the contents of this letter as confidential. In particular, you may not discuss this situation with your colleagues at work.

Analysis and Conclusions

[9] In regard to Mr Kennedy's claim of an unjustified action by his employer affecting his employment to his disadvantage, the legal test that the Authority must apply is provided by s 103A of the Employment Relations Act 2000. The Authority must objectively consider 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 that the respective actions occurred.

[10] And in regard to the personal grievance claim, the requirements of s 103(1)(b) of the Act are twofold: an unjustified action on the part of the employer; and the employment must be affected to the employee's disadvantage. This principle was considered by the Court of Appeal in *Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994 at 997. While this case was decided under the jurisdiction of the Employment Contracts Act 1991, the Employment Relations Act 2000 provisions have been carried over from the previous regime. In *Matthes*, upon a finding of an unjustifiable action in relation to procedural fairness, the Court held that:

The only other question for the Employment Court's decision under para (b) was whether the particular employee's employment or a condition of the employment was affected to the employee's disadvantage by that action. In the words of the paragraph it is whether "the employment ... is ... affected to the employee's disadvantage by some unjustifiable action". That necessarily involves focusing on the present employment, considering the changes that have occurred, and assessing their impact on the employee.

[11] Applying the above test to the circumstances faced by Mr Kennedy, the change that occurred was that he had a formal warning imposed upon his employment record where none existed before and clearly having a final warning on his record, initially (and inexplicably) of indefinite duration and then for 12 months, has the potential to make his employment less secure.¹ It follows that I must find that Mr Kennedy has been disadvantaged in his employment. That then takes us to the primary issue that must be determined:

Was the issuing of the first and final warning unjustified?

[12] The submissions for Mr Kennedy are that the warning was unjustified for several reasons. Firstly, there was not a documented procedure in place at the time

¹ *Alliance Freezing Co (Southland) Ltd v NZ Engineering etc IUOW* (1989) ERNZ Sel Cas 575.

and such was only made available in August 2010. However, Mr Hutchins points to an “Engage” team meeting that took place on 23rd June 2009 that Mr Kennedy attended. A record of this meeting shows that under “General Business Item Raised and Discussed” is:

The fact that in the last month we have had 7 security breaches.

And further:

1/ Every member of the team must make sure that they follow SOP's² to the letter.

2/ if implicated in a security breach further action will be taken through Hr, this will also include in some cases the shift / team leader.

Recall have also produced records of Engage meetings that took place on 15th and 17th September 2009. Mr Kennedy attended both of these meetings at which the matter of security breaches was discussed. At the earlier meeting, *CONSEQUENCES OF FURTHER BREACHES* appears to have been discussed. And at the next meeting, a *New Process* relating to security checks was outlined in some detail, including a double check of the work order and a requirement to “*check address.*”

[13] On the weight of the overall evidence I have no doubt that as a Shift Leader, Mr Kennedy was familiar with the due process and knowledgeable in regard to what was required to ensure that appropriate security measures for client documents took place. Also having perused the transcripts of the meetings held with Mr Kennedy, I conclude, as did Recall, that he was (and still remains) most reluctant to acknowledge any fault on his part, and as Mr Hutchins has testified; it was difficult to get a “straight answer” from Mr Kennedy. I also accept that given Mr Kennedy’s overall failure to show any contrition at all for the security breach, the issuing of a final written warning was appropriate.

[14] Mr Kennedy refers to four other employees that he says committed security breaches and were treated differently than him in regard to the sanction that was imposed. Mr Hutchins also gave evidence about the respective circumstances that applied to the other employees. While the evidence surrounding the circumstances that applied to the other four employees is inconclusive, I do not find that there has been any disparity compared with the manner in which Mr Kennedy was treated.

² Standard Operating Procedures.

[15] Mr Kennedy also says that the existence of the warning will have an affect on his performance assessment and subsequent remuneration but the evidence is inconclusive on this matter.

[16] I find that given all the circumstances, particularly the lack of any recognition of fault on the part of Mr Kennedy, the issuing of a final written warning was the action of a fair and reasonable employer. However, there is one element regarding that sanction that I find was unfair and unreasonable. This is that initially, the warning was to remain on Mr Kennedy's personal file for the duration of his employment. While Recall later resiled in regard to the duration of the warning, this was most probably brought about by a realisation (following mediation) that such duration could not possibly survive a legal challenge. This is the second instance that the Authority has had to address this action by the respondent³ and it should now be clear that imposing an initial sanction for the duration of an employee's employment is unjustified and indefensible. While Recall subsequently corrected their position, Mr Kennedy was forced to engage a representative and participate in a dispute resolution process involving a third party to have the matter corrected. While I find that the action of Recall in imposing a warning of indefinite duration was unjustified and hence Mr Kennedy has a personal grievance, there has been no evidence at all forthcoming from him about the affect of this, hence I cannot award any remedy pursuant to s 123(1)(c)(i) of the Act. Nonetheless, the parties should be aware that this is a matter that will be considered in any costs award should they not be able to resolve that issue.

Determination

[17] For the reasons set out above, I find that the issuing of a first and final written warning to Mr Kennedy, in all the circumstances, was a fair and reasonable action by Recall and was justified.

[18] However, the initial issuing of the warning for an indefinite period was an unfair and unreasonable action by Recall and was unjustified. Mr Kennedy has a personal grievance pursuant to s 103(1)(b) of the Employment Relations Act 2000.

³ See *Brian Rubie v Brambles New Zealand Limited t/a Recall New Zealand* [2011] NZERA Auckland 63.

But as there is no evidence that satisfies the criteria set out within s 123(1)(c)(i) of the Act, a remedy is not available to Mr Kennedy. In any event, given the substantial contribution by Mr Kennedy to the situation that gave rise to the personal grievance, pursuant to s 124 of the Act, any remedy that may have been available to Mr Kennedy would have been minimal.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the outcome, my comments above, and that the investigation meeting was completed within half of a day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority