

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 415
5368760

BETWEEN

JANICE TAYLOR
Applicant

A N D

PAUL AND KYM SAMUELS
LIMITED t/a NEW WORLD
SOUTHMALL
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Paul Craggs, Advocate for the Applicant
Rodger Pool, Counsel for the Respondent

Investigation Meeting: 17 September 2012 and 6 November 2012 at Auckland

Date of Determination: 23 November 2012

DETERMINATION OF THE AUTHORITY

A. Ms Taylor's dismissal for serious misconduct was justified.

Employment relationship problem

[1] The applicant, Ms Janice Taylor, claims she was unjustifiably dismissed by the respondent, Paul and Kym Samuels Limited, (the company) trading as New World Southmall, on 9 January 2012.

[2] Specifically, Ms Taylor claims:

- Her dismissal was unjustifiable in that, even though she acknowledged her conduct in taking a loaf of banana bread without paying for it was in breach of the company's business rules, she intended paying for it;

- The procedure undertaken by the company in dismissing her was not fair and reasonable.

[3] Ms Kym Samuels, one of the owners and directors of the company denies that Ms Taylor was unjustifiably dismissed. Ms Samuels claims that Ms Taylor, an experienced supervisor at New World Southmall, was very familiar with the staff purchasing procedure contained in the company's business rules and as a supervisor was responsible for enforcing the procedure. Despite knowledge of the procedure, Ms Taylor took the banana bread for the purposes of gifting it to a customer without paying for it. The breach was deliberate, went to the heart of the employment relationship and amounted to serious misconduct for which dismissal was justifiable.

Issues

[4] The following issues require determination:

- Was Ms Taylor's conduct in taking the banana bread knowingly in breach of the company's staff purchasing procedure and later stating that she intended paying for it, conduct which constituted serious misconduct for which she could be dismissed?
- Did the company follow a fair and reasonable procedure in dismissing Ms Taylor?

Background

[5] Ms Kym Samuels and Mr Peter Samuels are the directors of Paul and Kym Samuels Limited (the company) trading as New World Southmall, a supermarket located in Manurewa, Auckland. New World Southmall, as with other New World supermarkets, belongs to the Foodstuffs co-operative. Other supermarkets belonging to the Foodstuffs co-operative include Four Square and Pak n Save. The stores are individually owned and each owner has shares in Foodstuffs.

[6] Prior to the company purchasing New World Southmall, it owned Ellerslie Four Square and Papakura New World. Ms Samuels has had approximately six years experience in the supermarket business.

[7] On 19 September 2011, the company purchased New World Southmall. As part of the purchase, all existing employees at New World Southmall were retained. The applicant, Ms Taylor, was one of the staff retained by the company.

[8] Upon purchasing New World Southmall, Ms Samuels arranged for individual employment agreements to be signed, together with business rules. Most of the conditions of employment and business rules were identical to those of the former owner of New World Southmall. However, Ms Samuels introduced changes in relation to health and safety policies, introduced tighter security measures around staff purchase stickers, and the gifting of promotional products. Following the purchase of New World Southmall by the company, Ms Samuels had meetings with all staff in groups of two to six members to explain the changes to their employment agreements and to the business rules. The procedure relating to staff purchases contained in clause 50 of the business rules did not change.

[9] Ms Taylor had worked for the New World supermarket chain for approximately 10 years, had held two management positions and when the company purchased New World Southmall was a supervisor. Ms Taylor was responsible for enforcing the staff purchasing procedures and in her own words was a “*stickler for the rules*”. Ms Taylor accepted that any items purchased by staff in the supermarket had to be purchased in strict accordance with the staff purchasing procedures and that the point of purchase was when the item was scanned at the counter.

[10] Ms Taylor signed her individual employment agreement on the 13th September 2011. Clause 27 of the individual employment agreement contained a declaration which includes as follows:

27. ***DECLARATION***

I declare that I have read and understood the Terms and Conditions of Employment detailed in this agreement, and attachments, and I accept them fully. I acknowledge that I was given a reasonable opportunity (at least five working days) to seek independent advice before entering into this agreement. I also acknowledge that; the Company Rules are to be read in conjunction with this agreement.

[11] The business rules are attached to the individual employment agreement and section 2 signed by Ms Taylor on the 13th September provides as follows:

Business Rules

I acknowledge that I have read, understood and accept the Business Rules of New World Southmall, and agree to abide by them at all times.

[12] Clause 50 of the business rules provides as follows:

50. Staff Purchases

New World Southmall appreciates your patronage and we hope you and your family will shop with us regularly. The Rules applying to staff purchasing are simple and easy to follow. Staff may shop:

- a) Before commencing work, but not before 7:00am or after closing;*
- b) During meal breaks and rest periods;*
- c) Upon completion of work each day;*
- d) Any day off.*

A strict condition of employment is that all your purchases must have your employee number registered at the till at the time of your purchase.

Your employee number will be supplied to you on commencement. This condition applies at all times, including your days off. If the goods you purchase are for consumption on the premises (including staffroom and carpark), the Checkout Supervisor on duty at the time must place a staff purchase sticker on the goods you purchase. This is part of our security system and is to protect all concerned. It is also mandatory for the Checkout Operator serving you to ensure the system is followed. There will be NO exceptions. All purchases must be paid for, and in no circumstances are IOUs permitted.

*Any groceries not being taken out of the building at the time of purchase must be left in the designated area with your name written on each bag, along with the number of bags and the receipt attached. Arrangements for collection must be made with the Checkout Supervisor on duty at the time. At no time may bags of goods that have been paid for be taken back through Checkouts into the shop. **Checkout Operators are not permitted to ring their own or their family's purchases.***

*This security system has been set up to ensure security for the business along with protection for employees. It must be adhered to at all times, including your days off – **no exceptions.***

*Failure to comply with the staff purchasing procedure is considered **Serious Misconduct** and may result in instant dismissal.*

New World Southmall operates a staff discount scheme entirely at the discretion of the Company. Details of the operation of the scheme will be advised to you from time to time.

[13] Clause 55 of the business rules contains New World Southmall's warning process and in relation to serious misconduct provides as follows:

Serious Misconduct

The following are examples of types of behaviour or conduct which constitute Serious Misconduct which shall result in instant dismissal. Please note warnings are not limited to repetition of the same offence.

- ...
28. *Failure to follow staff purchases as prescribed in rule 50 of these Rules...*

[14] The code of conduct repeats the procedure in relation to staff purchases and states that a “*Breach of these rules will be regarded as Serious Misconduct and may result in summary dismissal*”.

[15] The code of conduct also contains a process in relation to disciplinary action which provides as follows:

“Southmall New World may dismiss an employee without notice if, after full investigation, they believe that serious misconduct or poor performance has taken place and is serious enough to warrant dismissal.

Prior to every disciplinary meeting the employee will be given advance notice of the allegations, notification that the matter is serious and could result in a warning or dismissal, and the opportunity to arrange a support person or representative.

...

Misconduct

Misconduct where a warning, a summary dismissal or instant dismissal is deemed appropriate. Serious instances of this type of behaviour may elevate the conduct to one of serious misconduct.

The descriptions of conduct listed below as examples of misconduct, are indicative and not exhaustive.

- ...
14. *A breach of any of the policies as indicated in this handbook, such as alcohol, drug or smoking policies; staff purchasing policies etc.”*

[16] The code of conduct also provides a separate provision in relation to serious misconduct which provides as follows:

Serious Misconduct

Serious Misconduct – the following are examples of Serious Misconduct which may result in summary dismissal (dismissal without notice) ...

23. *Failure to comply with the company’s staff purchasing procedures*
- ...
40. *Breach of any of the company’s rules or policies.*

[17] New World Southmall took the “*staff purchasing*” policy very seriously. Supermarkets are in the business of purchasing and selling mainly food items on a cash basis. Given the nature of the supermarket business, they are particularly vulnerable when it comes to managing product through loss or theft.

[18] Ms Taylor accepts that she had intimate knowledge of the staff purchasing procedure contained in the business rules and enforced them in her role as supervisor. Ms Taylor says “*she knew fully*” what the staff purchasing procedure meant and how it operated. Ms Taylor knew that any breach of the staff purchasing procedure could result in disciplinary action including dismissal. Ms Taylor was aware that another staff member had been dismissed not long before she was dismissed for breaching the staff purchasing rules but did not know the details of the breach. Ms Taylor accepts she was at the Manager’s meeting on 22 November 2011 during which staff were informed of the other staff member’s dismissal. A note of the meeting records as follows;

“Staff purchases – remind staff about staff purchase rule #50 – give staff number when purchasing goods – this comes under serious misconduct if they do not.”

Issue One

Was Ms Taylor’s conduct in taking the banana bread knowingly in breach of the company’s staff purchasing procedure and later stating that she always intended paying for it, conduct which constituted serious misconduct for which she could be dismissed?

[19] The facts as to what occurred on 6 January 2012 and which lead to Ms Taylor’s dismissal are largely undisputed.

[20] Each Thursday morning Ms Taylor was telephoned by a regular New World customer, Robyn with her grocery order. Robyn rang her order through rather than packing her order herself, because she is blind. Ms Taylor says she would take the order, pick the items from the supermarket shelves and have them scanned at the checkout. The order is then placed to one side until Robyn came into the store to pay and pick up the order.

[21] On the 6th January 2012, Ms Taylor prepared Robyn’s order as usual. On this occasion Ms Taylor decided to put a loaf of banana bread into the order as she thought

it would be nice to gift the bread to Robyn who she knew liked bananas and might like this new product. Ms Taylor says she intended paying for the banana bread herself and gifting it to Robyn.

[22] At approximately 8:50am on 6 January 2012, Ms Taylor brought Robyn's order to the checkout for scanning. Ms Taylor had Robyn's groceries in a supermarket trolley but had the banana bread out of the trolley in her right hand. Ms Taylor put the banana bread to the end of the counter without it being scanned by Kate Dong, who was operating the checkout at the time. Ms Dong says when Ms Taylor put the banana loaf through, she told her that she had not scanned the banana bread. Ms Taylor told Ms Dong "*no, don't scan that one*". Ms Dong did as she was told, and did not scan the item. Conny Malo, another supervisor, was packing the order and saw the interaction between Ms Taylor and Ms Dong over the banana bread. Ms Malo says she expected an explanation from Ms Taylor as to why the banana bread was not to be scanned but never received one. Ms Malo did not ask for an explanation from Ms Taylor as she felt uncomfortable doing so. The grocery items including the banana bread were packaged in plastic bags and put on hold for Robyn. Robyn came in to the supermarket just after 9:30am to pick up her order.

[23] Ms Taylor did not pay for the banana bread at the time it was scanned because she says she did not have any cash on her, and carrying cash during work time was not permitted. Ms Taylor says she intended paying for it during her morning tea break when she could get cash. Ms Taylor had her morning tea break at approximately 9:00am. Ms Taylor says she finished morning tea but had not cleaned her cup or gone to the toilet when she was requested to return to the supermarket store because there was a kitten inside the supermarket. This interruption, Ms Taylor says, meant she forgot about paying for the banana bread.

[24] Ms Taylor had her lunch break at approximately 12:00 noon but says she completely forgot about paying for the banana bread. It was not until approximately 1:00pm when Ms Taylor was asked to meet with Ms Samuels about the banana bread that she remembered that she hadn't paid for it. Ms Samuels undertook a disciplinary investigation which resulted in Ms Taylor's dismissal on 9 January 2012.

[25] Ms Taylor claims her dismissal was unjustified. It is for the company to establish that the dismissal was justified pursuant to section 103A of the Act. Section 103A(2) states:

103A Test of justification

- (1) *For the purposes of section 103A(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.*

[26] Section 103A was considered by the Employment Court in *McKean v Ports of Auckland Limited* [2011] NZEMPC 128. At para [37] Judge Inglis at states:

A question under section 103A, as amended, is whether the decision to dismiss was one that a reasonable and fair employer could have taken in the particular circumstances. It is apparent that Parliament intended to widen the circumstances in which an employer can justify dismissal. This is reflected in the substitution of the word "could" for "would". It is tolerably clear that, as amended, section 103A reflects a statutory acknowledgement that there is likely to be a range of responses open to a fair and reasonable employer in any particular case. The question of whether a dismissal is justifiable is to be determined on an objective basis.

...
Serious misconduct will usually be "conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship".

[27] Ms Taylor has admitted knowingly breaching the staff purchasing procedure. Ms Taylor knew that the banana bread must be scanned and paid for but still proceeded to tell the checkout operator not to scan the banana bread. The banana bread was packaged up and placed to one side with the customer's order. The customer collected the order and took it out of the supermarket which meant the banana bread could not be scanned. Ms Taylor had ample opportunity to raise the matter and to pay for the banana bread but she took no steps to do so before the matter was raised with her by Ms Samuels more than four hours later.

[28] Ms Taylor was a supervisor, was thoroughly familiar with the company's business rules, knew the importance of and the reasons for having the staff purchasing rules and knowingly breached the rules. Even though Ms Taylor says she intended paying for the banana bread, Ms Taylor did not. It is my finding Ms Taylor's conduct in knowingly breaching the rules in the circumstances, fell within the definition of serious misconduct which is conduct that deeply impairs or is destructive of that basic confidence or trust that is essential in employment relationships.

Issue Two

Did the company undertake a fair and reasonable process in dismissing Ms Taylor?

[29] Section 103A(3) of the Act requires consideration by the Authority of a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner. Factors include whether the employer:

- Sufficiently investigated the allegations, having regard to available resources;
- Raised its concerns with the employee before dismissal;
- Gave the employee a reasonable opportunity to respond to the employer's concerns before dismissal;
- Whether the employer genuinely considered the employee's explanation before dismissal.

[30] Ms Samuels undertook a thorough investigation in my view. Ms Samuels met with Ms Taylor shortly after becoming aware of the issue and asked for an explanation. Ms Samuels obtained the video showing Ms Taylor failing to scan the banana bread and asked for her input. A further meeting was held later in the day during the course of which Ms Samuels gave Ms Taylor a letter inviting her to a disciplinary meeting and providing her with a copy of Ms Malo's statement. A further meeting was held on Monday 9 January 2012 at which Ms Taylor had her support person present. Ms Taylor was given the opportunity to comment and respond to the claim that she was in breach of the staff purchasing procedures. Ms Samuels genuinely considered Ms Taylor's responses.

[31] It is my finding that the company complied with its obligations and accordingly I find Ms Taylor's dismissal one that a fair and reasonable employer could have reached in all the circumstances.

[32] For these reasons I conclude that Ms Taylor's dismissal was justified.

[33] If I am wrong and the termination of Ms Taylor's employment is deemed unjustified, I am required to consider Ms Taylor's contribution under s124 of the Act. Ms Taylor was entirely responsible for the events giving rise to the personal grievance

and any remedy to which she may have been entitled would be reduced accordingly and no order for remedies made.

Costs

[34] Costs are reserved. The parties are invited to reach agreement on the matter. If the parties seek a determination from the Authority, a memorandum on the matter is to be filed by the company on the matter within 14 days from the date of this determination. Ms Taylor has 14 days from the date she received the company's memorandum as to costs, to file her reply. Such submissions should address the fact that the investigation meeting on 17 September 2012 had to end prematurely because Ms Taylor had not seen the company's witness statements. This meant that the investigation meeting on 17 September 2012 had to be vacated and rescheduled causing delays and costs.

Anna Fitzgibbon
Member of the Employment Relations Authority