

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 265
5394652

BETWEEN WENDY MEYRICK
 Applicant

A N D PORTAGE LICENSING TRUST
 Respondent

Member of Authority: Rachel Larmer

Representatives: Michael Meyrick, Counsel for Applicant
 Bruce Lotter, Advocate for Respondent

Investigation Meeting: 14 May 2013 at Auckland

Submissions Received: 22 May 2013 from Respondent
 30 May 2013 from Applicant

Date of Determination: 24 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Portage Licensing Trust (the respondent) operates a range of liquor outlets and licensed premises throughout West Auckland. It employed Ms Meyrick as a part time Duty Manager at King Dicks Glen Eden Liquor Store under an individual employment agreement dated 21 March 2011.

[2] The respondent's staff are provided with a staff discount card which gives them a 10% discount off full price purchases. The terms of the staff discount card provide that it may not be used in conjunction with a "*gift voucher*".

[3] The respondent also has a Plus Points customer loyalty card scheme which it provides to retail customers. The loyalty card allows customers to accrue loyalty points and when a certain number of points are obtained the customer receives a \$10

voucher to redeem against future purchases. The customer only receives points if they present the card at the time of purchase. Staff and trade customers are not permitted to have a Plus Points customer loyalty card.

[4] On 8 August 2012 Ms Meyrick was working as the Duty Manager at the Glen Eden store when she served a customer who had a Plus Points card, but who did not have the card on her, purchased products to the value of \$761. Another employee (who I refer to as OB and who was a friend and subordinate of Ms Meyrick's) overheard the customer making her purchase without using her loyalty card. OB asked the customer in Ms Meyrick's presence if he could use his Plus Points card to obtain the loyalty points the customer had earned on her transaction.

[5] Ms Meyrick says she felt uncomfortable when she overheard OB ask to put the customer's loyalty points on his Plus Points card but did not intervene because she felt it was a matter between OB and the customer.

[6] The customer agreed with OB's request so he used his Plus Points card and obtained the loyalty points the customer had earned on her \$761 purchase. As a result of the customer's loyalty points being credited to him OB earned a \$10 voucher. Later that same day Ms Meyrick served OB when he made a purchase using his \$10 voucher (obtained from the customer's loyalty points) together with his staff discount card.

[7] Ms Meyrick was summarily dismissed on 5 September 2012 for:

- (a) Allowing OB to obtain the loyalty points of a customer who had not had their Plus Points card on them at the time of their purchase;
- (b) Processing a purchase by OB in which he used the \$10 voucher he received as a result of the customer's loyalty points plus his staff discount card;
- (c) Obtaining and using a Plus Points loyalty card.

[8] Ms Meyrick claims she was unjustifiably dismissed. She seeks lost remuneration and distress compensation. The respondent says Ms Meyrick's dismissal was justified because it had lost trust and confidence in her.

Issues

[9] The following issues are to be determined:

- (a) Was Ms Meyrick’s dismissal justified?
- (b) If not, what if any remedies should be awarded?

Was dismissal justified?

Justification test

[10] Justification is to be determined in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively determine whether “*the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal action occurred*”.¹

[11] When assessing justification the Authority must consider the four procedural fairness tests set out in s.103A(3) of the Act. It may also consider any other factors it thinks appropriate.² The Authority must not determine a dismissal unjustified solely because of minor process defects which did not result in the employee being treated unfairly.³

[12] There are two elements to justification; substantive justification which relates to whether the employer had a good reason for the decision it reached and procedural fairness which relates to the way in which the employer reached its decision.

Substantive justification

[13] In order to substantively justify Ms Meyrick’s dismissal the respondent must prove on the balance of probabilities it had good reasons for concluding Ms Meyrick had engaged in serious misconduct and that summary dismissal was an appropriate response to her actions.

[14] The respondent seeks to substantively justify its dismissal on three grounds: (i) allowing OB to take a customer’s loyalty points; (ii) allowing OB to use a loyalty

¹ Section 103A(2) ERA.

² Section 103A(4) ERA.

³ Section 103A(5) ERA.

voucher and his staff discount card on the same purchase; and (iii) obtaining and using a Plus Points card. I deal with each of these concerns in turn.

(i) Allowing OB to take a customer's loyalty points

[15] I find a fair and reasonable employer could not have concluded in all the circumstances that Ms Meyrick had engaged in serious misconduct because she did not stop a customer from passing their loyalty points to OB to use.

[16] Whilst this was inappropriate and should not have happened, Ms Meyrick had not received any training around this issue and she says it was usual for customers to pass their loyalty cards over to friends to use. I consider this concern was an instance of misconduct not serious misconduct so it did not justify summary dismissal.

(ii) Allowing OB to use a voucher and staff discount in the same purchase

[17] Ms Meyrick admitted during the disciplinary meeting that she knew the back of the staff discount card states it could not be used in conjunction with gift vouchers. She said:

[...] I was stupid in processing it, it will be something I will always regret doing, I am kicking myself for doing it, I never should have done it, it was a stupid mistake, I knew in my head it was wrong and I don't know why I did it, stupid.

[18] Ms Meyrick resiled from this at the Authority's investigation, saying she did not know the Plus Points voucher was a 'gift voucher' so did not know it could not be used with the staff discount card. However, justification is to be assessed based on the information the respondent had at the time it dismissed Ms Meyrick. The respondent was therefore entitled to rely on the explanation she gave at the disciplinary meeting which was that she knew what she had done was wrong and that she should not have done it.

[19] Ms Meyrick was on notice her conduct was not acceptable because she had signed the staff discount terms and conditions of use which record the card could not be used "in conjunction with a gift voucher". The terms and conditions of use also stated that breach of them may result in disciplinary action including termination of employment.

[20] I consider the respondent was justified in concluding Ms Meyrick had engaged in serious misconduct. It was open to a fair and reasonable employer in all the circumstances to have concluded that her actions in breaching the terms of use of the staff discount card fundamentally undermined the trust and confidence inherent in the employment relationship.

[21] I also consider the nature of Ms Meyrick's Duty Manager position meant it was open to a fair and reasonable employer in all the circumstances to respond to her allowing OB to misuse his staff discount card with summary dismissal. I conclude summary dismissal is substantively justified for this disciplinary concern.

(iii) Obtaining and using Plus Points customer loyalty card

[22] I find a fair and reasonable employer could not have concluded in all the circumstances that Ms Meyrick's use of the Plus Points card was serious misconduct in the absence of any prior training or advice about that.

[23] Ms Meyrick told the disciplinary meeting she did not know staff were not allowed Plus Points cards. The respondent discounted that explanation because it assumed Ms Meyrick had been told she was not allowed a Plus Points card. However the respondent did not make any inquiries to establish what Ms Meyrick had been told about the Plus Points card.

[24] The small print terms and conditions on the Plus Points application form states "*[S]taff do not qualify for Plus Points rewards.*" Ms Meyrick says she did not read the small print and even if she had she would not have understood staff were not allowed to have or use a Plus Points card because she did not understand what "*qualify*" meant.

[25] I consider that if Ms Meyrick had read the terms and conditions then it should have been clear she was not entitled to loyalty points. However, it was unfair for the respondent to treat the use of a Plus Points card as serious misconduct without first communicating that to staff. That did not occur so summary dismissal for this disciplinary concern was not justified.

Compliance with statutory obligations

[26] A fair and reasonable employer is expected to comply with its statutory obligations. In this case these include the good faith and procedural fairness obligations contained in the Act.

(i) Good faith

[27] Section 4(1A) of the Act requires an employer which is considering making a decision which may adversely impact on an employee's on-going employment to provide the employee with access to information relevant to that decision and an opportunity to comment on it before a final decision is made.⁴

[28] I find the respondent did not comply with its good faith obligations because the decision-maker had information relevant to the decision about Ms Meyrick's ongoing employment which was either not shared with her at all or was shared in a way that did not give her a reasonable opportunity to respond to it.

[29] The notes of the disciplinary meeting involving OB in which he stated he was aware he was not entitled to have a Plus Points customer loyalty card was information which influenced the respondent in concluding Ms Meyrick knew staff were not allowed a Plus Points card. This information should have been disclosed to Ms Meyrick but it was not.

[30] A significant factor for the respondent's rejection of Ms Meyrick's explanation about the Plus Points customer loyalty card issue was it had formed an adverse view of her credibility. That adverse view was based on Ms Meyrick's explanation that she only used the Plus Points card to purchase items on special.

[31] The respondent had a print out of Ms Meyrick's purchases but it did not share that with her until after it had committed her to saying a number of times she only used her Plus Points card to purchase items on special. At that point Ms Meyrick was presented with a print out of her purchases but was not given time to consider the

⁴ Section 4(1A)(c) ERA.

information before being required to explain why items not on special had also been purchased.

[32] Ms Meyrick pointed to one item she said was her daughter's purchase. However, the respondent concluded Ms Meyrick had no explanation in relation to the other purchases of items that were not on special because she did not address every purchase. This led the respondent to form an adverse view of her credibility. I consider that was unfair because it did not put the other purchases to her to explain or give her time to consider the new information before responding to it.

[33] A fair and reasonable employer would have provided Ms Meyrick with this information in advance of the disciplinary meeting so she could review it and identify any purchases other family members had made.

(ii) Section 103A(3) procedural fairness tests

[34] I find the respondent did not fully comply with any of the four tests in ss.103A(3)(a)-(d) of the Act which relate to natural justice and procedural fairness.

[35] The respondent breached s.103A(3)(a) of the Act because it did not investigate what if any training or instructions Ms Meyrick had been given on the use of the staff discount card and Plus Points customer loyalty cards before it decided to dismiss her.

[36] The respondent also failed to fairly or properly raise its concerns with Ms Meyrick before dismissing her, contrary to s.103A(3)(b) of the Act. The disciplinary letter did not put any specific allegations to her, it merely provided a narration of the OB issues and referred to her having a Plus Points card. It was therefore unclear what the respondent's specific concerns were which was unfair because Ms Meyrick was not fully informed of the matters she would be expected to respond to during the disciplinary meeting.

[37] I find the respondent failed to comply with s.103A(3)(c) of the Act because it did not give Ms Meyrick a reasonable opportunity to respond to its concerns before she was dismissed. The respondent considered Ms Meyrick had lied on a number of occasions but it never put that to her to respond to.

[38] I find the respondent did not comply with s.103A(3)(d) of the Act because it did not genuinely consider Ms Meyrick's explanation that she was not aware staff were not entitled to apply for or use a Plus Points card.

[39] If the respondent had genuinely considered Ms Meyrick's explanation it would have made inquiries to establish what staff had been told and/or what training had been given on the issue. That did not occur. The respondent admitted at the Authority's investigation meeting that its assumption Ms Meyrick had been instructed she was not permitted to have or use a Plus Points card was unfounded.

Other factors

[40] There was less than 24 hours between Ms Meyrick being given the disciplinary letter and her being required to attend the disciplinary meeting. I consider this was insufficient time to enable her to take advice (should she have wished to do so) and prepare her response to the issues of concern particularly when her on-going employment was in jeopardy.

[41] The disciplinary letter did not identify whether the respondent viewed its disciplinary concerns as serious misconduct or misconduct. I consider that was unfair to Ms Meyrick who says she did not appreciate the seriousness of the respondent's concerns from its disciplinary letter.

[42] Ms Meyrick's father is a lawyer and he represented her at the Authority's investigation. Had Ms Meyrick been put on notice that the respondent was viewing all three disciplinary concerns as examples of serious misconduct then she may have taken advice before attending the disciplinary meeting. She could at least have made an informed decision not to take advice.

[43] It was also unfair that all relevant information was not attached to the disciplinary letter. That failure meant Ms Meyrick could not consider the information the respondent was relying on in advance of the disciplinary meeting so was unable to prepare her explanation or response to it.

Disparity

[44] Ms Meyrick claims there was a disparity in the way she was treated compared with other staff. Two days after she was dismissed the respondent held an amnesty

where staff were encouraged to return their Plus Points cards on the basis that anyone holding an active card after the expiry of the indemnity period would be subject to disciplinary action up to summary dismissal.

[45] Ms Meyrick says she did not receive the benefit of the amnesty. I have already concluded that Ms Meyrick should not have been summarily dismissed for using a Plus Points card without first being clearly made aware of her obligations in that respect.

[46] Ms Meyrick also claimed other named staff were treated differently from her because they also held Plus Points cards but were not dismissed. I find that each of the people she identified were in a different situation than she was.

[47] Two staff had obtained a Plus Points loyalty card before they became employees but neither of them had used the card. The respondent says these two staff knew they were not allowed to use their Plus Points card once they became employees. OB was summarily dismissed for using his Plus Points card. Another employee was disciplined for obtaining a Plus Points card in his girlfriend's name but he resigned before the disciplinary meeting was held.

[48] I find that there was no disparity of treatment.

Misleading information

[49] I consider the respondent gave Ms Meyrick misleading information during the disciplinary meeting. She was told by Ms Martha Gibbons "*it clearly states in the application form that staff are not allowed them*". I find the form did not clearly state that - it just says staff do not qualify for rewards.

Conclusion Ms Meyrick had lied

[50] Ms Gibbons and Ms Gaughan concluded Ms Meyrick had lied to them. They relied on her not recalling the transaction OB did using the voucher he had obtained from the customer's points together with his staff discount card. However, it was not put to Ms Meyrick that she had lied about that.

[51] Whilst Ms Meyrick initially said that she did not recall the transaction when she was showed a video of her serving OB, she agreed she had processed OB's purchase. I find it was not a reasonable conclusion for the respondent to draw that

Ms Meyrick had lied on this basis. Ms Meyrick did not recall processing OB's purchase but accepted she had when shown video evidence of her processing the sale.

[52] Ms Gibbons and Ms Gaughan also concluded Ms Meyrick had lied when she said that she used a Plus Points card to purchase items on special only. I consider this was an unfair conclusion in the circumstances because Ms Meyrick had not been provided with a printout of her transactions and her card had been used on at least one occasion by another family member to purchase items that were not on special.

Are these process defects minor?

[53] I find that the process defects identified are not minor and they did result in unfairness to Ms Meyrick. Section 103A(5) of the Act therefore does not prevent the Authority from finding Ms Meyrick's dismissal was unjustified.

Outcome

[54] I find that the respondent's dismissal of Ms Meyrick was procedurally unjustified because the respondent did not arrive at the decision to dismiss her after a fair and proper process which complied with its statutory obligations. I also find that two out of the three disciplinary concerns for which she was dismissed could not be viewed by a fair and reasonable employer as serious misconduct as they were at worst instances of misconduct.

[55] Although one of the three disciplinary allegations could have been viewed by a fair and reasonable employer as serious misconduct warranting summary dismissal, the process defects mean that I have found Ms Meyrick's dismissal procedurally unjustified.

What remedies should be awarded?

Credit card insurance compensation

[56] This new claim was raised for the first time in closing submissions. Ms Meyrick says her credit card insurer declined to pay out her credit card because she had been dismissed. Apparently she will be reimbursed by her credit card insurer if her dismissal is held to be unjustified. I consider this new claim was not supported by evidence so I decline to award compensation for Ms Meyrick's credit card.

Lost remuneration

[57] Ms Meyrick's conduct in allowing OB to use a loyalty voucher and his staff discount card on the same purchase was capable of being viewed as serious misconduct so dismissal on that basis was substantively justified. That means Ms Meyrick is not entitled to recover lost remuneration because a fair and proper process would still have resulted in her dismissal.

Distress compensation

[58] I am satisfied Ms Meyrick suffered distress and stress as a result of her dismissal. She faced very real financial pressures and felt humiliated having to explain to people that she had been dismissed. The respondent is ordered to pay Ms Meyrick \$4,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity, and injury to feelings she suffered as a result of her unjustified dismissal.

Contribution

[59] Having determined Ms Meyrick has a personal grievance the Authority is required by s.124 of the Act to consider whether she contributed to the situation which gave rise to her dismissal grievance and if so to reduce remedies accordingly. Contribution denotes some blameworthy conduct which must be established on the balance of probabilities.

[60] I find Ms Meyrick did contribute to the situation which gave rise to her grievance because she:

- (a) Applied for a Plus Points loyalty card without reading the terms and conditions which stated staff did not qualify for loyalty rewards;
- (b) Allowed OB to obtain a customer's loyalty points and thereby obtain a \$10 discount voucher without making a purchase;
- (c) Processed OB's purchase in which he used the voucher and his staff discount to reduce the price of his purchase to nil. This was contrary to the terms and conditions of the staff discount card which Ms Meyrick had signed and which stated that breaching them could result in dismissal.

[61] As a Duty Manager Ms Meyrick held a position of trust and was expected to be a good role model to other staff and to adhere to the respondent's policies and procedures. I consider her conduct was culpable because she clearly fell below the standards expected of someone in her position.

[62] I order that Ms Meyrick's award of distress compensation be reduced by 50% to reflect her contribution to the situation which gave rise to her dismissal grievance.

Costs

[63] The applicant as the successful party is entitled to a contribution towards her actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible Ms Meyrick has 14 days of the date of this determination to file a costs memorandum with the respondent having 14 days within which to respond. Proof of actual costs incurred must be provided in support of any application for costs.

[64] The Authority will adopt its usual notional daily tariff-based approach to costs.⁵ This will then be adjusted on a principled basis to reflect the particular circumstances of the case. The parties are invited to identify any factors they say should result in the tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority

⁵ The current daily tariff is \$3,500.