

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 375
5548538

BETWEEN GREG NGAWHIKA
Applicant

AND MARKET GARDENERS
LIMITED (T/A MG
MARKETING)
Respondent

Member of Authority: Robin Arthur

Representatives: Mike Harrison, Advocate for the Applicant
Jeff Goldstein, Counsel for the Respondent

Investigation Meeting: 26 November 2015

Determination: 1 December 2015

DETERMINATION OF THE AUTHORITY

- A. The decision of Market Gardeners Limited to dismiss Greg Ngawhika was what a fair and reasonable employer could have done in all the circumstances at the time of his dismissal.**
- B. Mr Ngawhika's personal grievance application is dismissed.**
- C. Costs are reserved (with a timetable set for memoranda).**

Employment Relationship Problem

[1] Market Gardeners Limited (MGL) dismissed Greg Ngawhika from his job as a night shift supervisor at its Penrose warehouse on 18 February 2015.

[2] MGL's branch manager Kerry Baird made the decision to dismiss Mr Ngawhika after conducting a disciplinary investigation into allegations that Mr Ngawhika had taken two silver trays from the warehouse premises on 16 December 2014. He concluded Mr Ngawhika took the trays and "behaved in a suspicious and

inappropriate manner” that breached rules in MGL’s code of conduct against taking company property without proper authority and about conduct that created a serious breach of trust.

[3] Mr Ngawhika lodged a personal grievance application in the Authority. It was not resolved in mediation. In the subsequent Authority investigation the following two issues, raised in Mr Ngawhika’s statement of problem, required determination:

- (i) Were the allegations of serious misconduct made against Mr Ngawhika (taking the trays and acting suspiciously) sufficiently investigated and his explanation genuinely considered?
- (ii) Could Mr Baird, on MGL’s behalf, have reasonably come to the conclusion that the allegations were substantiated and decided to have dismissed Mr Ngawhika as a result?

[4] In the light of conclusions reached on those questions, for reasons set out in this determination, the issue of remedies did not need to be addressed.

The investigation

[5] Mr Ngawhika, Mr Baird, MGL’s human resources manager Greig Pullar and assistant warehouse manager Romero Toailoa each lodged written witness statements for the Authority’s investigation. The four men attended the investigation meeting and, under oath or affirmation, confirmed their own written statements and then answered questions from the Authority member and the parties’ representatives.

[6] The representatives also each provided a written synopsis of their submissions on the facts and law and delivered oral closing arguments.

[7] At the close of the investigation meeting I gave an oral indication of preliminary findings, now confirmed by this written determination.¹

[8] As permitted by 174E of the Employment Relations Act 2000 (the Act), the written determination has not recorded all the evidence and submissions received but has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter.

¹ Employment Relations Act 2000, s 174B.

The standard of justification and evidence required

[9] The main plank of Mr Ngawhika's argument that he was unjustifiably dismissed was that MGL lacked "clear evidence" that he took the trays. He submitted that video evidence relied on by the company did not show him taking the trays. His submission was founded on the principle that a serious allegation – such as the one made in this case of what really amounted to an accusation of theft – required evidence in support of it that was as convincing as the nature of that allegation was grave.² The evidence of MGL, in his submission, was not convincing because it was "relying on a balance of probabilities".

[10] It was an argument that misstated what was required of an employer investigating the situation and making a decision on the information gathered. In conducting his inquiry over the missing trays and his suspicions about Mr Ngawhika's possible involvement in that event Mr Baird did not have to apply a legal standard of proof but had to act reasonably and fairly in what he did and how he made his decision. Once those actions were subject to scrutiny in an Authority investigation, MGL had to show Mr Baird took such a reasonable course in ascertaining the facts and determining they warranted dismissal. It was the reasonableness of Mr Baird's actions (not what Mr Ngawhika may or may not have done) that had to be proved to the balance of probabilities, flexibly applied according to the gravity of the matter.³

[11] The following dicta in the Court of Appeal's decision in *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* has guided the Authority and the Employment Court in making the necessary assessment for many years (emphasis added):⁴

... the decision must be looked at from two points of view, that is, fairness to the employer and fairness to the employee. **From the employer's point of view, he must show that he had reasonable grounds to believe and did honestly believe there had been misconduct by the employee of sufficient gravity to warrant dismissal.**

...

The employer must have more than mere suspicion but need not have proof beyond reasonable doubt of an actual offence by the employee. Good working relations depend on loyalty and confidence, both ways as between employer and employee. **Once the employee destroys that relationship to the**

² *Honda New Zealand Limited v New Zealand Boilermakers Union* [1991] 1 NZLR 392 (CA) at 395 – 396 and *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Ltd* [1989] 3 NZLR 82 (LC) at 85.

³ *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [20].

⁴ [1990] 3 NZLR 549 (CA) at 556; (1990) ERNZ Sel Cas 985 (CA) at 992-993.

extent that the employer has reasonable grounds to believe there has been misconduct by the employee then, depending on the gravity of the situation, dismissal may be justifiable. Similarly, if an employer destroys that relationship by dismissing the employee without reasonable grounds for believing there has been misconduct by the employee, then the employee's dismissal is not justifiable and the employee has a remedy in the personal grievance provisions of the Act.

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault. Obviously, the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.

[12] Whether Mr Baird had fairly established reasonable grounds and reached an honest belief on which he could act to dismiss Mr Ngawhika had to be measured objectively against the following non-exhaustive factors set in the statutory test of justification:⁵

- (a) whether, having regard to the resources available to MGL, Mr Baird sufficiently investigated the allegations against Mr Ngawhika before dismissing him; and
- (b) whether Mr Baird raised the concerns that he had with Mr Ngawhika before dismissing him; and
- (c) whether Mr Baird gave Mr Ngawhika a reasonable opportunity to respond to those concerns before dismissing him; and
- (d) whether Mr Baird genuinely considered Mr Ngawhika's explanation (if any) in relation to the allegations against him before dismissing him.

[13] Other appropriate factors could also be considered, which in this case included the related good faith obligation on MGL, under s4(1A)(c) of the Act, to give Mr Ngawhika information relevant to the continuation of his employment and an opportunity to comment on it before a decision was made.

[14] Mr Baird's actions in investigating the allegations or his decision to dismiss Mr Ngawhika could not, however, be determined to be unjustified solely because of

⁵ Employment Relations Act 2000, s 103A.

any defects in the process Mr Baird followed, if such defects were only minor and did not result in Mr Ngawhika being treated unfairly.

The company's inquiry and decision

[15] The missing trays were the property of a catering company that delivered food for a Christmas morning tea 'shout' for MGL staff held on 16 December 2014. When the caterers returned on 17 December to collect the trays and boxes in which food was delivered they reported two trays were missing from the stack of trays that had been left for them to collect. The stack was on a desk in the sales office of the warehouse administration block. After the office manager told him about the missing trays Mr Baird looked at recorded CCTV footage from a camera in the sales office. The camera was one of more than 30 in the site's CCTV system.

[16] From looking through that footage Mr Baird identified only one period of activity where he thought the trays might have been taken. It was between 10.03 pm and 10.07 pm. In those minutes a person – that Mr Baird identified as Mr Ngawhika – entered the office twice. The footage showed Mr Ngawhika turned the lights off in the office and left but then returned about three minutes later in the dark. He could be seen sitting at one desk and then moving about in the office, at times illuminated by a light emanating from a mobile phone, then standing near the desk on which the trays were stacked, and then leaving the office. The lighting was not sufficient to clearly identify whether Mr Ngawhika was carrying any trays but Mr Baird believed what could be seen from the silhouetted figure in the footage suggested Mr Ngawhika had some object in his hand. CCTV footage from other cameras on the site showed no other images of Mr Ngawhika after 10.07 until 10.24 – some 17 minutes later – entering the warehouse from outside.

[17] On 20 December Mr Baird called Mr Ngawhika to his office and told him about the missing trays and what he had seen on the camera footage. He asked Mr Ngawhika to explain what had happened. A note Mr Baird made of their conversation recorded that Mr Ngawhika asked to see the footage but Mr Baird said he first wanted to hear Mr Ngawhika's explanation. Mr Ngawhika said Mr Baird could search his house but would not find the trays and he did not take them. Mr Baird told Mr Ngawhika there was an "easy way" or a "hard way" to deal with the issue but if the trays were returned to the reception area the next day that the matter would be taken no further.

[18] At 6.26 pm that evening Mr Ngawhika sent Mr Baird the following text (as written):

Kerry I wil leave the phone on yr desk if u have proof of me actually taking the platters then yes im guilty that's all I have to say but if not then i don't take to kindly to pple who call me a theif

[19] Mr Baird said he also received a telephone call from Mr Ngawhika later that evening but found it difficult to understand what he was saying. Mr Ngawhika could not – in his oral evidence to the Authority – remember telephoning Mr Baird that night.

[20] Mr Baird again spoke with Mr Ngawhika about the matter sometime in the following ten days. The two men disagreed whether that was on 22 December or 29 December. During that discussion (on whichever day) Mr Baird showed Mr Ngawhika the CCTV footage he had looked at for the period shortly after 10 pm on 16 December. Mr Ngawhika said two trays of food – left over from the morning tea shout – had been placed in reception for the night staff to eat. Mr Ngawhika suggested they could be the missing trays. According to Mr Baird Mr Ngawhika also repeated the comment or words similar to those he had used in his 20 December text.

[21] Mr Baird then took two further steps to investigate what had happened. He checked whether food left for the night staff was put out on the two missing trays however he was able to establish that the food was put onto plates from the site cafeteria.

[22] He also asked Mr Toailoa to check the CCTV footage for the period from 11.50am on 16 December – when the trays were placed on a desk in the sales office – through to 2pm on 17 December when the caterers arrived to collect them.

[23] Mr Toailoa took several days to check footage of the sales office CCTV camera and other cameras on the site. He provided Mr Baird with notes that identified six other staff who had been in the office during the identified period and who were near the desk on which the trays were placed. They were (firstly) the office manager and another office staff member who put the trays and catering boxes on the desk, (secondly) two temporary staff in yellow overalls who came in to the office at

5.29 pm and looked at the trays, and (thirdly) two night staff who came in and put platters on the desk at 11.44 pm. Mr Toailoa also identified two occasions Mr Ngawhika was in the sales office on 16 December – once at 8.49 pm and then again at the times shortly after 10 pm. Beside his note about the 8.49 pm footage Mr Toailoa wrote that Mr Ngawhika was “going through the trays” at that time.

[24] Apart from the few minutes shortly after 10 pm (when the office lights were turned off by Mr Ngawhika), the lighting in the CCTV footage was sufficient for Mr Toailoa to clearly see that neither Mr Ngawhika nor any other staff had taken any trays from the office at any other time in the hours he reviewed. On getting Mr Toailoa’s report Mr Baird reviewed the footage for 5.29 pm and 8.49 pm to confirm that neither the two temporary staff nor Mr Ngawhika could be seen taking trays at those times.

[25] Mr Baird then had Mr Pullar prepare a letter calling Mr Ngawhika to a disciplinary meeting. The letter set out an account of events from 16 December onwards, including the two discussions Mr Baird had with Mr Ngawhika and information about Mr Toailoa’s review of the footage. It set out two allegations – that Mr Ngawhika had taken two round silver trays and that he had turned the lights off in the sales office to hide his activity. It stated the alleged behaviour was inappropriate and breached MGL’s code of conduct about unauthorised possession of its property and about conduct that created a serious breach of trust. It also advised Mr Ngawhika he could bring a representative to the disciplinary meeting and could review the video footage on request. It also cautioned Mr Ngawhika that his employment could be terminated without notice if the allegations were “established”.

[26] The disciplinary meeting was held on 13 February. Mr Ngawhika attended alone and confirmed he was prepared to proceed without a representative. He was asked why he was in the office with the lights off on 16 December and replied that he was “hard out texting” on his phone. He was also asked why on the CCTV footage he appeared to be using the torch function on his mobile phone and what he was doing near the catering equipment on the desk. He replied that he was walking around texting on his phone. He was asked if he could provide texts that he had sent on his phone at the time but said he could not as he had deleted them. He was also asked if had gone out to his car and driven anywhere after leaving the sales office and, according to Mr Baird’s note replied: “Not that I know of”. Mr Baird told him that he

had checked whether the food left for the night staff was on the catering trays but had confirmed plates, not trays, were used. He told Mr Ngawhika that he would check the footage again and arrange a further meeting.

[27] Mr Baird decided he needed to check Mr Ngawhika's explanation that he had been walking around texting as a reason for going into the sales office but not needing to turn on the light. Mr Baird looked at video footage from a camera in the administration office around the time that Mr Ngawhika first left the sales office after turning off the lights. He found Mr Ngawhika was not walking around texting as he said but had gone to a water cooler in the administration office to get a cup of water and had no phone in his hand.

[28] Mr Ngawhika was called to a further disciplinary meeting held on 18 February. Mr Pullar attended that meeting with Mr Baird but neither man made any detailed notes of their conversation with Mr Ngawhika. Mr Pullar and Mr Baird said the meeting lasted about an hour and began with Mr Baird summarising what he had done to look into the issue. He told Mr Ngawhika that his explanation of "hard out texting", given in the 13 February meeting, was contradicted by camera footage that showed him getting a cup of water.

[29] Asked for an explanation Mr Ngawhika, according to the one note Mr Pullar of the meeting, replied: "If you could brighten the footage and prove that they are trays, then yes I took them".

[30] Mr Ngawhika was then again shown the camera footage from the sales office for the four minute period shortly after 10 pm (which he had seen earlier on 22 December). Mr Baird and Mr Pullar said they went through the video several times with Mr Ngawhika, including pausing it at the point that they considered showed him holding a round object in his hand as he left the office.

[31] Mr Pullar said that Mr Ngawhika referred to advice from a "lawyer friend" about whether he could be dismissed on the basis of the information that the company had and then repeated his comment about brightening the footage. Mr Pullar said he then explained that the company did not need the proof that would be required for a criminal case but, as an employment matter, could decide what to do on the balance of probabilities. He then summarised the information on which the company would make its decision. The meeting ended with Mr Baird telling Mr Ngawhika that he

was to be summarily dismissed. The dismissal was confirmed in writing in a letter dated 18 February 2015.

A fair process?

[32] The evidence of both Mr Baird and Mr Ngawhika established, on the balance of probabilities, that Mr Baird's inquiry was sufficiently thorough in providing information to Mr Ngawhika, checking explanations he gave and exploring possibilities of some other explanation for why the trays were missing. MGL's 27 January letter gave Mr Ngawhika ample notice of the nature and basis of the concerns raised with him and of the opportunity to seek advice and representation at the disciplinary meetings. He did seek some advice but chose to take part in the meetings without the help of a representative.

[33] It was not a process without defect, specifically in the relatively informal way Mr Baird began his inquiries by calling Mr Ngawhika to his office and asking him if he knew what had happened. However it was not, in the particular circumstances, outside the range of what a fair and reasonable manager could have done to sort out a possible problem with someone of Mr Ngawhika's position of relative seniority and trust within the workplace in a prompt and discrete way. There might have been some simple explanation Mr Ngawhika could have given that resolved the matter at that point. If that initial discussion nevertheless included some minor defects in how it was called and what was said, it did not result in Mr Ngawhika being treated unfairly because he was then given ample opportunity in three further meetings to consider the information (including by looking at the video footage) and to respond to it. Two possible explanations – about whether food was left out for the night staff on those trays and whether he was just doing something else in the dark office – were thoroughly checked. Those further inquiries also supported a conclusion that Mr Baird genuinely considered what explanations Mr Ngawhika did offer in response to the concerns raised with him.

[34] Mr Ngawhika submitted Mr Baird's initial inquiry of him on 20 December demonstrated a pre-determination of his culpability which tainted the whole inquiry. For three reasons I concluded that argument was not established to the balance of probabilities as a legitimate criticism of MGL's process and decision.

[35] Firstly, Mr Baird's inquiry carefully sought other explanations for the missing trays. He got Mr Toailoa to do the work of checking to see which other staff had access to the trays and could have taken them, rather than relying on his own initial scan of the footage. It was not a process conducted hastily. Mr Baird waited several days for Mr Toailoa to complete the check. He then held a further three meetings with Mr Ngawhika before implementing any final decision.

[36] Secondly, Mr Baird gave what I accepted as candid and credible evidence that he had not reached a final conclusion until he was clear in his own mind that he had "left no stone unturned to try and understand what happened". He said his experience as a manager was that while sometimes employees appeared to "do crazy things", he had learned not to make assumptions and to try to "get all the facts" before making a decision.

[37] Thirdly, Mr Ngawhika was not suspended from his duties between 20 December and 18 February. He continued to work throughout that period. If Mr Baird had already made a decision by 20 December that he did not trust or believe Mr Ngawhika, it was unlikely that he would have let him stay on at work until the investigation was complete and a final decision made.

A reasonable conclusion?

[38] From his inquiries Mr Baird could reasonably have reached the conclusion that it was more likely than not that Mr Ngawhika was responsible for taking the trays and – by his actions in the darkened office and an account of what he was doing there that was not corroborated by the CCTV footage from both the sales and administration offices – had irreparably damaged the trust that Mr Baird could have in him as a supervisor and employee.

[39] Mr Baird's method of inquiry – carefully checking who had access to the trays and the opportunity to take them – used a process of elimination that was orthodox and rational, and therefore reasonable in the circumstances. There was no evidence to suggest the elimination approach operated from ill-founded premises, such as all the trays not being there from the start or that Mr Baird or Mr Toailoa had failed to notice something else relevant in the CCTV footage they reviewed.

[40] Some inferences Mr Baird drew about Mr Ngawhika's conduct were not beyond the range of what a reasonable employer could fairly do in the particular situation.

[41] Turning off office lights was part of Mr Ngawhika's regular duties as a night shift supervisor but to return in the dark to the sales office (a room where he knew there was CCTV camera that could clearly record his image if the light was on) was behaviour that could reasonably give ground for suspicion.

[42] It was possible that Mr Baird misread what Mr Ngawhika meant in his repeated comments about accepting he was guilty if Mr Baird could provide proof. It may have merely been a very confident assertion that there could be no such evidence because Mr Ngawhika knew he had not taken the trays. However in the circumstances, it was a response that did not displace the other inferences that could reasonably have been drawn, on the objective standard of a fair and reasonable employer, about what he was doing in the darkened room when other explanations for the missing trays had been eliminated.

[43] Similarly Mr Baird's belief that the silhouetted video image of Mr Ngawhika leaving the sales office showed him holding something in his hand was not enough in itself to confirm Mr Ngawhika's culpability. However the clear evidence that Mr Ngawhika was there at the time and that other possibilities had been fairly eliminated made the inference drawn (that Mr Ngawhika was more likely than not to have taken the trays) a reasonable one to reach. The standard of likelihood, that is the balance of probabilities, was the one that Mr Pullar had told Mr Ngawhika on 18 February would be applied by Mr Baird to make his decision.

[44] Overall the evidence at the Authority investigation also established, to the balance of probabilities, that Mr Baird had reasonable grounds for his belief, honestly held, that Mr Ngawhika's actions amounted to misconduct that was so serious and so inadequately explained that his dismissal was warranted.

[45] Ultimately neither Mr Baird at the time, nor the Authority reviewing his inquiry and decision later, needed to establish that Mr Ngawhika had – in fact and indisputably – taken the trays. MGL had only to establish that its conclusions were fairly and reasonably reached and were more likely (that is more *probable*) than not. Of course it remained *possible*, then and now, that Mr Baird's decision was factually

incorrect but that mere possibility did not mean what he did and decided was unjustified. From all of the evidence considered I concluded MGL had met the required statutory standard of justification.

[46] Consequently Mr Ngawhika's personal grievance application for unjustified dismissal had to be dismissed.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[48] If they are not able to do so and an Authority determination on costs is needed MGL may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Ngawhika would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[49] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Robin Arthur
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].