

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 375  
3040631

BETWEEN                      BULMARO BAHENA FABIAN  
Applicant

A N D                              LSG SKY CHEFS NEW  
ZEALAND LIMITED  
Respondent

Member of Authority:        Peter van Keulen

Representatives:              Simon Meikle, counsel for the Applicant  
Daniel Erickson, counsel for the Respondent

Investigation Meeting:        25 March 2019

Submissions Received:        25 March 2019 from the Applicant  
25 March 2019 from the Respondent

Date of Determination:        25 June 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]        Bulmaro Fabian worked at LSG Sky Chefs New Zealand Limited for nearly 17 years. Mr Fabian was employed as a Cleaner at LSG's Christchurch Customer Service Centre.

[2]        At this LSG service centre meals are prepared for flights departing from Christchurch airport. Mr Fabian worked in the service centre production areas where food preparation was completed.

[3] On 26 April 2018, Robert Wilson the LSG Operations Manager for the Christchurch airport facility was told that several bottles of alcohol were missing from one of the service carts stored in one of the store areas at the service centre.

[4] After investigating the incident Mr Wilson concluded that Mr Fabian may have been responsible for taking the bottles of alcohol so he undertook a disciplinary process with him. This process concluded with Mr Wilson dismissing Mr Fabian.

[5] Mr Fabian raised a personal grievance for unjustified dismissal.

### **Issues for unjustified dismissal**

[6] Mr Fabian's main objection to his dismissal is he did not take the alcohol so it must be unjustified. It is not uncommon for employees who disagree with a conclusion reached by their employer on a disciplinary matter, because they maintain their innocence in terms of the allegation, to present as Mr Fabian did.

[7] However, my investigation is not about determining whether Mr Fabian did take the alcohol as concluded - my role when investigating an unjustified dismissal is not to put myself into the shoes of the employer and effectively conduct the disciplinary process again to decide if the employee did or did not do what was alleged. Rather I must decide whether LSG's actions and how it acted were what a fair and reasonable employer could have done in all of the circumstances<sup>1</sup>.

[8] This test translates into two broad questions to answer for Mr Fabian's unjustified dismissal claim:

- (a) Did LSG follow a fair disciplinary process in coming to the conclusion to dismiss i.e. did it act as a fair and reasonable employer could in the course of the disciplinary process?
- (b) Was the decision to dismiss substantively justified i.e. did it reach conclusions on what occurred and then impose the appropriate sanction, which a fair and reasonable employer could have reached in all of the circumstances?

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<sup>1</sup> Section 103A of the Employment Relations Act 2000.

[9] If Mr Fabian is successful with his unjustified dismissal claim then I will need to consider remedies including reimbursement and compensation. I will also need to consider contribution if I award any monetary remedies to Mr Fabian.

**Did LSG follow a fair disciplinary process?**

[10] As Mr Fabian was dismissed the onus is on LSG to satisfy me that the dismissal was justified. The first issue on the justification is whether in coming to the decision to dismiss LSG followed a fair process.

[11] Sections 4(1A) and 103A of the Employment Relations Act 2000 (the Act) are relevant to the issue of whether LSG conducted a fair disciplinary process. The matters for me to consider are:

- (a) Did LSG investigate the allegations of serious misconduct sufficiently;
- (b) Did LSG outline the allegations, explain the possible implications of a finding of serious misconduct and give all of the information it had that was relevant to the alleged serious misconduct, to Mr Fabian for him to consider and respond to;
- (c) Did LSG give Mr Fabian a reasonable opportunity to respond to the allegation of serious misconduct, before it made its decision to dismiss;
- (d) Did LSG consider properly any explanation given by Mr Fabian before it made its decision to dismiss;
- (e) Did LSG give Mr Fabian an opportunity to respond to its decision to dismiss before it imposed that sanction;
- (f) Did LSG consider any responses given by Mr Fabian to LSG's decision to dismiss, before it finally decided dismissal was the appropriate sanction;
- (g) If there was a failing by LSG in any of the steps above, does that render the disciplinary process unfair?

[12] Having investigated and considered each of these areas I am concerned about three aspects:

- (a) Whether LSG sufficiently investigated the alleged theft of the alcohol before coming to a preliminary view that Mr Fabian was responsible and therefore it should commence a disciplinary process.
- (b) Then, whether LSG properly raised its concerns with Mr Fabian and gave him access to the information relevant to the allegations.
- (c) Finally, whether LSG genuinely considered Mr Fabian's explanation before it decided he was responsible for the theft of the alcohol and he should be dismissed.

*Did LSG investigate the alleged misconduct and the relevant circumstances, properly?*

[13] Carts containing alcohol for flights are loaded during the day at the LSG service centre. Alcohol is logged into a book, to track inventory, as it is put into a cart. Tags are attached to the bottles, which match the entries into the logbooks, and these tags are not removed until the alcohol is used in flight. Completed carts are then stored in a fridge, Fridge 10.

[14] The stocking of carts with alcohol occurs throughout the day in a store area in front of Fridge 10, the Bond Store. Alcohol is stored in the Bond Store before it is loaded into carts. Completed carts are moved from the Bond Store to Fridge 10 once finished.

[15] By 4:30 pm, all of the carts are loaded and stored in Fridge 10 and this could be between 25 – 35 carts. These carts will remain in Fridge 10 overnight before being transported to planes the next day.

[16] On 25 April 2018, carts were stocked with alcohol in the normal way and stored in Fridge 10. On the morning of 26 April 2018, a storeman noticed tags lying on the ground in front of one of the carts. One of the Store Supervisors then checked the cart and discovered that five bottles of alcohol were missing.

[17] The Store Supervisor then contacted Mr Wilson and explained what had been discovered.

[18] Mr Wilson then commenced his investigation. This involved reviewing the paperwork, checking who was working that evening and reviewing the service centre's CCTV.

[19] In commencing this investigation, Mr Wilson made three assumptions, which limited the extent of his investigation. These were:

- (a) That the alcohol was removed from the cart in Fridge 10 rather than removed from the Bond Store, largely because of the presence of the tags on the ground in Fridge 10.
- (b) That the alcohol was removed after 4:30 pm as the Bond Store and Fridge 10 would have had a number of employees working in them, and moving through them, during the day.
- (c) That the alcohol was removed by one of the employees working in the service centre after 4:30 pm, excluding the possibility that an employee from an earlier shift may have re-entered Fridge 10 after 4:30 pm, before leaving or that a driver may have entered Fridge 10.

[20] Based on these three assumptions Mr Wilson reviewed the CCTV footage to ascertain if any of the employees working from 4:30 pm were responsible for taking the alcohol.

[21] There were two pieces of CCTV footage that Mr Wilson discovered initially which informed his view that Mr Fabian may have been responsible for taking the alcohol:

- (a) Footage from camera 6 at the pedestrian gate through which employees leave the service centre.
- (b) Footage from camera 9, which is directed into the Bond Store.

[22] The footage from camera 6 showed Mr Fabian leaving the LSG service centre just after 11:00 pm, when his shift had ended. Mr Fabian could be seen exiting through a pedestrian gate, carrying a flattened cardboard box and a plastic bag.

[23] Mr Wilson thought the plastic bag contained bottles because of the shapes and he thought this was possibly the alcohol. The CCTV footage is not close enough nor is the

plastic bag clear enough that bottles can actually be seen. Rather, at best, a shape can be determined, which looks rectangular in profile.

[24] Mr Wilson also thought the cardboard was being used to shield the content of the bag and this supported his view that Mr Fabian might be carrying the missing alcohol in the plastic bag. However, the cardboard is being held in front of the bag, which would conceal it from any security guard in the booth immediately next to the pedestrian gate but there is no security guard on at that time. And the cardboard is not being held behind the bag to conceal the contents from the CCTV camera. Mr Fabian would have known there would be no security guard on at that time of the night and probably would have known where the CCTV camera was – so if it was his intention to conceal the contents of the plastic bag he was carrying then he went about it the wrong way.

[25] The CCTV footage from camera 9 (into the Bond Store) is not very clear. It is at night and the lights are not on in the Bond Store (as no one was working in there at that time of night). Whilst the camera is directed into the Bond Store and in the direction of Fridge 10, Fridge 10 cannot be seen at all.

[26] At time 19:22:28, as recorded on the CCTV footage, a person can be seen entering the Bond Store and walking across it to a storage shelf. The image of the person is nothing more than a shadow highlighted in the little bit of light shining into the Bond Store at the rear. No distinguishing feature can be seen and it is difficult to make out the size or shape of the person nor can any colour be seen which might indicate clothing.

[27] This person can then be seen leaving the Bond Store at 19:22:37. Just after this at 19:23:18 a light becomes visible in the top right of the CCTV footage which Mr Wilson says indicates Fridge 10 being opened. Nothing in the CCTV footage shows a person entering Fridge 10, so the footage does not shed any light on who may have entered Fridge 10.

[28] Then the light is visible again at 19:24:29, which Mr Wilson says indicates the person leaving Fridge 10. The light disappears at 19:24:34, which indicates the door to Fridge 10 is closed then.

[29] Mr Wilson draws two conclusions from this CCTV footage:

- (a) Mr Fabian enters the Bond Store at 19:22:28 and then leaves at 19:22:37.

(b) Therefore, it is Mr Fabian who enters Fridge 10 at 19:23:18, some 41 seconds later.

[30] Based on this CCTV footage, Mr Wilson concludes that Mr Fabian entered the Bond Store and then Fridge 10 and Mr Fabian is carrying the five bottles of alcohol in the plastic bag when he left LSG at 11:00 pm.

[31] So, having come to a preliminary view, based on this investigation, that Mr Fabian took the bottles of alcohol, Mr Wilson met Mr Fabian to progress his enquiries.

[32] In this meeting on 29 April 2018, Mr Wilson met Mr Fabian together with George Oliver, the LSG Production Manager for Christchurch. Mr Wilson asked Mr Fabian why he was in the Bond Store on the evening of 25 April 2018. Mr Fabian said he had gone there to collect paper towels and coffee. Mr Wilson then showed Mr Fabian the CCTV footage from camera 9 and camera 6. Mr Fabian denied taking the bottles of alcohol. On several occasions, he said it was not him and that he did not drink alcohol.

[33] Then Mr Wilson held a formal disciplinary meeting with Mr Fabian and his representative, Adrian Mealing, on 8 May 2018. Also present were Mr Fabian's father in law, for support, and Mr Oliver.

[34] Prior to the meeting Mr Fabian had been given a screen shot of the CCTV footage from camera 6. During the meeting CCTV footage from cameras 9 and 6 was reviewed. Mr Fabian continued to state his innocence, saying he was not in the Bond Store and Mr Mealing explained that Mr Fabian had misunderstood the question in the earlier meeting and was confused about what store he was being asked about. Mr Mealing confirmed that Mr Fabian had been in the Dry Store to collect coffee and paper towels but had not been in the Bond Store on the evening of 25 April 2018.

[35] Following this meeting Mr Wilson reviewed further CCTV footage. This additional review was of most of the evening's CCTV footage to account for the whereabouts of the employees working during that time. Mr Wilson accounted for all employees except for two, Mr Fabian and one other. Mr Wilson eliminated the other employee from his considerations as being the person in the Bond Store as she was bigger than Mr Fabian and could not have been the small image he saw on the CCTV footage.

[36] In terms of Mr Fabian's whereabouts at the time, Mr Wilson reviewed additional CCTV footage from camera 12, which covers the main preparation area. This showed Mr Fabian working in that area before 19:21:00. The footage is much clearer than the camera 9 footage as the lights are on in the preparation area. Mr Fabian can be seen leaving the area at 19:21:00, carrying a bucket.

[37] Mr Fabian is next seen re-entering the main preparation area at 19:24:51, pushing an empty trolley.

[38] Mr Wilson says this supports his conclusions that Mr Fabian was the person in the Bond Store and then the person who entered Fridge 10 as:

- (a) Mr Fabian's whereabouts is unaccounted for from 19:21:00 when he leaves the main preparation area and when he returns to the main preparation area at 19:24:51.
- (b) During this time, a person goes into the Bond Store – entering at 19:22:28 and leaving at 19:22:37.
- (c) Also during this time, that same person goes into Fridge 10 – entering at 19:23:18 and leaving at 19:24:34.

[39] Mr Wilson did not show Mr Fabian or Mr Mealing this additional CCTV footage from camera 12. And then proceeded to hold a further disciplinary meeting after which he decided to dismiss Mr Fabian.

[40] Reflecting on the evidence about Mr Wilson's investigation there are a number of areas of concern:

- (a) Mr Wilson's initial assumptions about the alcohol having been taken after 4:30 pm and only by an employee working, which from the outset limited the scope of his investigation.
- (b) Mr Wilson's conclusions that shapes in the plastic bag evident on the CCTV footage from camera 6 were bottles of alcohol. Further, the cardboard Mr Fabian was carrying was to conceal the bottles in the bag.

- (c) Mr Wilson's conclusion that it was Mr Fabian in the Bond Store and not the other, unaccounted for, employee. And it was same employee from the Bond Store who went into Fridge 10, therefore it was Mr Fabian.
- (d) Mr Wilson's reliance on Mr Fabian's movements between 19:21:00 and 19:24:51 as supporting Mr Fabian being the employee who went into Fridge 10. A closer look at the timing raises some concerns:
- i. At 19:21:00, Mr Fabian leaves the main preparation area and if it is him who then enters the Bond Store at 19:22:28, this is 1 minute and 28 seconds later.
  - ii. If it is Mr Fabian in the Bond Store and then he subsequently enters Fridge 10, then there is a gap of 40 seconds between him leaving the Bond Store and entering Fridge 10 despite it being immediately behind the Bond Store area.
  - iii. If it is Mr Fabian who leaves Fridge 10 at 19:24:34, carrying five bottles of alcohol, it takes him only 17 seconds to walk from Fridge 10 to the main preparation area and on the way, he conceals the alcohol somewhere, as it is clear he is not carrying any bottles when he enters the main preparation area.

[41] I think that the assumptions Mr Wilson made and then the conclusion he reached from his investigation are not safe ones. Given the circumstances of the investigation, I determine that a fair and reasonable employer could not conclude:

- (a) Mr Fabian was carrying alcohol when he left work at 11:00 pm, based just on the shapes in very small portion of the bag that is evident. Nor that Mr Fabian was also carrying cardboard for the purpose of concealing the contents of the bag thus supporting the conclusion that the missing alcohol was in the plastic bag.
- (b) That the shadow seen entering the Bond Store at 19:22:38 could not have been the other unaccounted for employee and must have been Mr Fabian.

(c) That the person who then entered Fridge 10 is the same employee that had entered the Bond Store some 40 seconds earlier and therefore is Mr Fabian.

(d) That Mr Fabian could leave Fridge 10 carrying five bottles of alcohol and walk back to the main preparation area, taking time to hide the bottles of alcohol, in just 17 seconds.

*Did LSG properly raise its concerns with Mr Fabian and gave him access to the information relevant to the allegations?*

[42] I can deal with this rather concisely – LSG failed to give Mr Fabian access to all of the relevant CCTV footage during the disciplinary process.

*Did LSG consider Mr Fabian's response properly before it made its decision?*

[43] LSG put weight on the fact that Mr Fabian admitted he was in the Bond Store in the evening of 25 April 2018, in the first meeting on 29 April. It also then placed weight on the fact that Mr Fabian changed his mind and subsequently said he was not in the Bond Store. I believe LSG placed a disproportionate amount of weight on this. It was clear in the evidence that I heard that Mr Fabian was confused about what the reference to Bond Store was and became more confused when questioned about it.

[44] I also believe LSG failed to give appropriated consideration to two factors:

(a) Mr Fabian does not drink alcohol so why would he take it; and

(b) In almost 17 years of work there had been no issues with Mr Fabian's work, in particular no incidences of dishonesty.

*Conclusion on process*

[45] Given all of the above, I am satisfied that LSG failed to carry out a fair disciplinary process.

**Was LSG's decision substantively justified?**

[46] The disciplinary process was sufficiently flawed that a fair and reasonable employer could not rely on the conclusion that Mr Fabian had taken the alcohol. It follows that

dismissing Mr Fabian was not a conclusion a fair and reasonable employer could come to in all of the circumstances and the dismissal was not substantively justified.

## **Remedies**

[47] As LSG unjustifiably dismissed Mr Fabian, I can award him any of the remedies provided for under s 123 of the Act; Mr Fabian seeks compensation and reimbursement.

### *Reimbursement*

[48] Mr Fabian seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to ss 123(1)(b) and 128 of the Act.

[49] I am satisfied that Mr Fabian has a personal grievance and that he lost remuneration because of that grievance, so pursuant to s 128 of the Act I must award him the lesser of the lost remuneration or three months ordinary time remuneration.

[50] I calculate Mr Fabian's ordinary time remuneration, based on the collective employment agreement to be \$684.00 (gross) per week, which is \$8,892.00 (gross) for three months.

[51] Mr Fabian says his actual loss from his dismissal is \$7,348.50 (net). This represents a gross amount that is slightly higher than three months ordinary time.

[52] I am not persuaded that it is appropriate to exercise the discretion under s 128(3) of the Act to award the greater amount, so I award Mr Fabian reimbursement of \$8,892.00 (gross).

### *Compensation*

[53] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This is about compensating Mr Fabian for the humiliation, loss of dignity and injury to feelings he has suffered because of the unjustified dismissal.

[54] What I must consider is the effects of the dismissal and the behaviour that gave rise to it on Mr Fabian – i.e. identify the harm caused to him and the loss he suffered as a result. Then I must quantify that harm and loss.<sup>2</sup>

[55] Mr Fabian’s evidence shows that as a result of the way he was treated:

- (a) He was devastated, embarrassed and confused by what happened.
- (b) He was upset at the way he was treated and he described himself as being angry and moody.
- (c) He became depressed, although he did not see his doctor about this. He also lost his appetite and could not sleep properly.

[56] So, Mr Fabian is entitled to compensation for the loss and harm caused by the loss of dignity, humiliation and injury to feelings described above. When assessing the value of that compensable loss and harm I have considered the recent decisions of the Employment Court, which provide guidance on the assessments.<sup>3</sup>

[57] I assess the level of harm and loss to be below the middle of the spectrum, and consider that the compensation sits at the lower end of the spectrum. I quantify the compensation payable to be \$12,000.00.

### *Contribution*

[58] As I have awarded remedies to Mr Fabian, I must now consider whether he contributed to the situation that gave rise to his grievance.<sup>4</sup>

[59] When assessing if Mr Fabian’s actions contributed to the situation that gave rise to his grievance I am looking for a causal link between his actions and the situation that gave rise to his dismissal.<sup>5</sup>

[60] I do not accept that Mr Fabian’s actions contributed to his dismissal by LSG. Therefore, there is no contributory behaviour and no reduction in remedies.

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<sup>2</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

<sup>3</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

<sup>4</sup> Section 124 of the Employment Relations Act 2000.

<sup>5</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

## **Conclusion**

[61] LSG unjustifiably dismissed Mr Fabian.

[62] In satisfaction of this grievance LSG must pay Mr Fabian the following amounts:

(a) \$8,892.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000; and

(b) \$12,000.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

## **Costs**

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

[64] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority