

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 155
3046754

BETWEEN	NICK HOLDER Applicant
AND	DEE GEE HOLDINGS LIMITED TRADING AS CHEAPSKATES WELLINGTON Respondent

Member of Authority: Michele Ryan

Representatives: Bill Calver, counsel for the Applicant
Mark Champion, for the Respondent

Investigation Meeting: 22 August 2019 at Wellington

Submissions Received: 22 August 2019 from the Applicant

Date of Determination: 16 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nick Holder was employed by Dee Gee Holdings Limited trading as “Cheapskates Wellington” (Cheapskates) at its Wellington retail store for almost three years. At the time of his dismissal on 15 October 2018, he held a position as team leader/duty manager.

[2] Mr Holder says the matters for which he was dismissed cannot be fairly characterised as serious misconduct but, rather, were performance issues. He says his dismissal was substantively unjustified and procedurally unfair. He seeks corresponding remedies.

[3] Cheapskates says it no longer trusted Mr Holder to perform his role and the dismissal was justified. It says there are two separate incidents, each of which gave it independent

grounds for dismissal. The first involved Mr Holder's failure to process inward goods according to its procedure. The second incident concerns Mr Holder's late arrival at work on 1 October 2018. Cheapskates says both events occurred shortly after Mr Holder had received retraining on how to process inward goods and had been formally warned regarding late attendance.

The Authority's investigation

[4] Mr Holder was legally represented at the Authority's investigation and provided two written statements to the Authority. Cheapskates was represented by its General Manager, Mark Champion. Both he and Cheapskates director, Dave Green, provided written evidence to the Authority.

[5] Both parties provided accompanying documents and all three witnesses helpfully answered questions from the Authority, and during cross – examination.

[6] As is permitted by s 174 of the Employment Relations Act 2000 ("the Act") I have not referred to all the evidence produced, nor every issue of dispute between the parties. This determination has made findings of fact and law necessary to dispose of Mr Holder's claims, and has been issued outside the timeframe set out at s 174C(b) where the Chief of the Authority has decided exceptional circumstances exist.¹

Information relevant to Mr Holder's dismissal

[7] The Wellington store was staffed by 5 employees inclusive of Mr Holder and a store manager. Mr Holder was 3IC.

[8] Mr Champion says Mr Holder held attributes that were of value to Cheapskates. He says however, a small number of concerns regarding Mr Holder's performance emerged which it sought to address.

[9] Mr Champion reports that Mr Holder was often late to work despite Cheapskates adjusting his start time to 10:00 am early in the employment relationship. He then points to a letter Cheapskates gave to Mr Holder on 1 August 2017 which reminded him that he had been late on three of the four days worked the previous week including, in one instance, up to two and ¾ hours. That letter advised:

¹ Pursuant to s 174C(4)

... start time (sic) are a fundamental of any employment and it is very important for all employees that they are adhered to. Please can you make whatever adjustment you need to in your personal schedule to ensure that you arrive at work on time.

[10] Another issue for Cheapskates was the way Mr Holder (and other staff) processed inward coming goods at the Wellington store and the impact this had on accounting and financial records. To remedy that matter, in February 2017 Mr Champion provided all staff with one-on- one training for dealing with inward goods.

[11] Irregularities with the inwards goods' procedures continued to intermittently occur and on 6 August 2018 Mr Champion wrote to Mr Holder. He made arrangements to meet the following day to discuss a recent invoice which had not been marked off in accordance with the training given earlier in the year. The letter also set out several other issues and referred to "*Employer and Employee obligations; Willingness to follow Company Procedures/Policy; Willingness to complete tasks as requested*" as matters for discussion. Cheapskates advised it did not regard the meeting as disciplinary, rather it was "*looking to get a better picture of events around the issues mentioned above*".

[12] The parties met on 7 August 2018. They each have a different perspective regarding the content and outcome of the meeting.

[13] Mr Holder considers the meeting was positive and part of a wider discussion with staff. Cheapskates agrees it had met with the store manager regarding the processing of goods around the same time, but says the meeting with Mr Holder was to signal to him there were concerns about that matter and aspects of his performance. It is common ground that Cheapskates canvassed the parties' obligations, and its expectations of Mr Holder as an employee. Cheapskates accepts the issue of his performance as a matter of concern was not put directly to Mr Holder at the meeting where Mr Holder agreed at the meeting to "*step up*" and take more responsibility in his role.

[14] After the meeting, Mr Holder was given a document entitled "*Inward Goods Retraining Module*". The document noted several invoices to the value of \$6,500 has not been entered into its accounting programme recently which had led to financial misreporting. The module document advised the goal of the training was to ensure processing of all inward goods was performed correctly and why this was critical. It set out in exacting detail the

actions needed to be undertaken when processing inward goods, including where there was something different or out of the ordinary.

[15] The following summarizes the material portions of the policy relevant to the dismissal. When processing incoming goods staff Mr Holder was required to:

- (a) ensure boxes/cartons that had been delivered aligned with the number of cartons recorded in the delivery record and/or recorded on the boxes; and
- (b) open the delivered boxes/cartons one at a time to check the number of items (and sizes) contained within the box aligned with the quantity and descriptors of items set out in the invoice and associated documentation - often this activity required the box to be emptied- and
- (c) mark these off against the invoice, and;
- (c) return all items to the respective box and reseal it.

[16] The policy emphasised that to maintain the integrity of contents contained in a box/carton no deviation from the procedures should occur. After the processing tasks had been completed, staff were not to take any further action with a delivery until all corresponding documentation had been placed with the store manager who was responsible for printing price and product identification stickers.

[17] The final page of the module stated the following:

10/ Failure to Follow the Above Procedures

Due to the lack of compliance since this training was first undertaken with all staff members in February 2017 we have been forced to re-evaluate our procedures around any further non-compliance. The advice we have received from our company accountant is that failure to correctly record and account for incoming goods is as serious as failure to not record (sic) all outgoing goods.

Therefore we are now reclassifying any non-compliance relating to inward goods from a Disciplinary issue to a Serious disciplinary issue.

If it is determined after a discussion that you failed to follow the above procedures you will be required to attend a serious disciplinary meeting. If it is decided that your actions or lack of actions were beyond what could be deemed a normal mistake then please be advised that **immediate dismissal** could occur as an outcome of this serious disciplinary meeting.

[18] Mr Holder initialled each of the recorded steps and signed a declaration section confirming: he had read and understood all aspects of the training, would follow the procedures, and understood the consequences if he failed to do so.

[19] On Monday 24 September 2018 Mr Holder received a written warning regarding five instances of late attendance for the fortnight beginning 3 September 2018. He was again asked to adjust his personal schedule to ensure he arrived at work on time. The letter also stated *“Because this is not the first letter or time we have spoken about this I am issuing you with a Written Warning on this occasion.”*

[20] On the same day the Wellington store manager was invited to attend a disciplinary meeting to address, amongst other things, Cheapskates concerns as to how incoming goods, processed either on the 20th or 21st of September, had been dealt with.

[21] Mr Holder spent the weekend of 29-30 September 2018 in Hawke’s Bay for a family celebration. He returned to Wellington on Monday 1 October 2018 by car, but did not arrive at work until mid-day or thereabouts. Mr Champion called Mr Holder later that day to inquire about his lateness. He also asked about Mr Holder’s recollection in respect of the inwards goods that had been delivered on or about 20 September.

[22] Mr Holder responded in two separate emails dated 2 October 2018. In the first, he informed Mr Champion of the family event and said he had planned to drive back to Wellington on Sunday night but *“due to unforeseen circumstances (health) had decided to wait until Monday morning and head back early as to be at work at the rostered time.”* He said he had *“got on the road at 6.30am ... about an hour and a half I was feeling really tired and had pulled over to have a break as to not crash.”* He said he *“ended up sleeping close to 2 hours”* and when he woke he exchanged text messages with the other person scheduled to work that day. He says she told him the store was quiet. He therefore did not consider he needed to inform the store manager to get staff cover. Mr Holder acknowledged in his email that he had made a mistake leaving Hawke’s Bay when he did but that this was due to sickness and apologised for his late attendance. He advised *“please know I am working on my punctuality”*.

[23] The second email set out a chronology of events surrounding the invoice and goods received earlier on the 20th or 21st of September 2018. I shall return to this matter.

[24] On 11 October 2018 Mr Champion wrote to Mr Holder and requested the parties meet on 15 October 2018. He advised Cheapskates wanted to discuss the following:

1. Failure to correctly process inward goods, [an invoice number was inserted] as per Re the training module 3.8.18.
2. Late to work on Monday 1 October due to travelling to Wellington after being away for the weekend.

[25] The letter recorded Cheapskates concerns about the seriousness of the matters and advised if proven, may amount to misconduct or serious misconduct which could lead to dismissal. Mr Holder was encouraged to bring a support person.

[26] The parties met on 15 October 2018. There is no dispute Cheapskates considered Mr Holder's responses. It found Mr Holder's explanations unacceptable, and on this basis his employment was terminated.

[27] The parties have been unable to resolve their differences and it is left to the Authority to now determine the matter.

Issues for determination

[28] As Mr Holder was dismissed by Cheapskates, the onus lies with it to justify that decision.

[29] Section 103A of the Employment Relations Act 2000 (the Act) requires the Authority to determine whether a dismissal is justifiable by considering on an objective basis:

... 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 or action occurred.

[30] In practical terms the Authority's inquiry involves an examination not only as to whether the grounds on which Cheapskates relies for the dismissal are such that a fair and reasonable employer could reasonably conclude dismissal was warranted in the circumstances, but also whether the process taken to reach that conclusion was fair. Section 103A(3) of the Act sets out a range of procedural matters the Authority must consider when undertaking its assessment.

[31] Having assessed the process Cheapskates undertook prior to its decision to dismiss Mr Holder I am satisfied it complied with minimum standards of procedural fairness set out at

s 103A(3).

[32] I therefore need to determine whether the grounds on which Cheapskates relies to justify its decision to dismiss were jointly, or separately sufficient to justify Mr Holder's dismissal.

Were there grounds to dismiss Mr Holder for his late attendance on 1 October 2018?

[33] At issue is whether the decision to dismiss Mr Holder for his late attendance on 1 October 2018 was substantively fair.

[34] Mr Holder accepts he was 2 hours late for work on 1 October 2018. He says he was paid only for the hours he worked so there was no material loss to Cheapskates by his late arrival. I am not persuaded by an inference that Cheapskates was not impacted by his irregular presentation to work. Mr Holder's employment agreement required him to "*Arrive at work on time...*" and he was obliged to do so.

[35] It would, however, be an unusual case where an employer could justify a dismissal based solely on a single instance of late attendance at work.

[36] Cheapskates looks towards both letters given to Mr Holder over the 14 months before 1 October 2018 to demonstrate a pattern of unacceptable behaviour and, as already noted, it relies on the written warning given to him 8 days prior to 1 October 2018. I have already set out the material portion of both items of correspondence.

[37] The difficulty with Cheapskates' position is that it did not, on any occasion, including in the written warning of 24 September 2018, inform Mr Holder that future late attendance may result in disciplinary action. If an employer wishes to rely on a prior verbal or written warning as reason to increase a disciplinary sanction, the warning should advise the employee of that eventuality.

[38] I am unwilling to conclude Mr Holder could have been entirely oblivious to the possibility of some disciplinary action should he arrive late to work again, and at the Authority's meeting he accepted he was concerned about the warning. But the obligation lay with Cheapskates when issuing Mr Holder with the written warning to forewarn him of the likelihood of consequences if the conduct was repeated and the nature of these. That, at its essence, is the purpose of a warning. To impose a sanction as grave as that of dismissal for

an instance of late attendance without some prior indication of that possibility was not the action of a fair and reasonable employer in the particular circumstances. It follows that Cheapskates is unable to justify its dismissal of Mr Holder for late attendance alone based on its prior written warning and communications.

Was the decision to dismiss Mr Holder in respect to his actions regarding inwards goods, the action of a fair and reasonable employer in all the circumstances?

[39] No notes were taken during the disciplinary meeting on 15 October 2018, but it is common ground Mr Holder conceded he had not strictly followed the inwards good procedure when processing a consignment of 10 boxes delivered on 20 or 21 September.

[40] He agreed he had removed the contents of the first nine cartons without first checking the identity of each box recorded as delivered. When he became aware the 10th box did not align with the delivery description he told the store manager who then informed him to halt processing and put the stock aside. As it transpires the store manager left the store to redeliver the wrongly delivered carton.

[41] Mr Holder also accepted he did not return the items to their respective boxes, and that he removed the 9 empty boxes from the store. He said the store manager, on his return, then assisted him to place the unboxed items in a different part of the store.

The law as it concerns behaviour said to justify summary dismissal

[42] In *Emmanuel v Waikato District Health Board* the Court helpfully summarised the nature of an assessment involving behaviour said to be justify summary dismissal, as follows:²

[58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing, or destructive of, the basic confidence of trust essential to the employment relationship, justifying dismissal. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

[59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.

² [2019] NZEmpC 81

...

[61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant to the context.

[62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.*

* Footnotes omitted

Can the conduct for which Mr Holder was dismissed capable of being regarded as serious misconduct

[43] At issue for Cheapskates was that its procedure regarding stock management had not been followed. The employment agreement between the parties required Mr Holder to “*comply with all reasonable and lawful instructions ...*”.

[44] Mr Holder had been formally instructed on the Incoming Goods” procedure in early 2017 and had further met with Cheapskates in August 2018 for the purpose (at least in part) to discuss irregularities with the handling of delivered goods. That meeting resulted in the provision of an explicit retraining document which Mr Holder signed to signify he understood the process. It is notable that the training material/procedure indicated that non-compliance would be considered a serious disciplinary issue would could result in immediate dismissal if the actions leading to the breach was “*beyond what could be deemed a normal mistake*”.

[45] Simply labelling a particular action or behaviour as conduct that warrants dismissal as a justifiable sanction does not necessarily make it so. What is required for such an outcome to be justified is conduct that deeply impairs, or is destructive of, the basic confidence or trust essential to the employment relationship.

[46] I accept the evidence given on behalf of Cheapskates that the failure to process delivered goods through its system had the potential to seriously affect the company's operations and financial viability including its financial reporting, GST payments, as well as its management of purchasing and disposing of stock. I accept also that Mr Holder's position as a team leader were an essential aspect of its retail operations and his tasks and functions were integral to Cheapskates' system by which it managed stock. I am satisfied also that it

was open to Cheapskates to increase the sanction for failure to follow the inward good procedures where it had communicated the increased difficulties it was experiencing as a result of non-compliance to Mr Holder and concurrently provided him with additional training on the matter.

[47] It follows that I find Cheapskates was entitled to view a failure by a team leader to comply with the inward goods procedure, where the failure was more than a normal mistake, was an action (or omission) that was inconsistent with the company's financial and operational interests such it may be destructive of the trust and confidence necessary for the relationship.

[48] I am satisfied a breach of the inwards good procedures in a way that cannot be characterised as genuinely accidental, could be properly regarded as warranting serious disciplinary action by Cheapskates.

Could Mr Holder's actions or lack of actions be "deemed as beyond a normal mistake"?

[49] Mr Holder's written statement to the Authority advised, "*As to the missing box – I repeat again if I took a shortcut then this was because [the store manager] wanted it done this way*". The inference I understand Mr Holder wished the Authority to take from this evidence is that he considered he was unable to process inwards goods in accordance with the procedure where he was answerable at first instance to the store manager who took a different approach to Cheapskates procedures.

[50] Cheapskates says this explanation was never given to it during the disciplinary meeting. I have preferred the testimony of Mr Green and Mr Champion on this issue: the testimony of each was given in a straight forward manner and, both conceded without difficulty, on some areas of dispute before the Authority.

[51] I find it unlikely that Mr Holder provided the response that he now advances as reason for his conduct with Mr Green and Mr Champion during the disciplinary meeting. The Authority is only able to assess the reasonableness of the employer's decision to dismiss against the information the employer had, or should have had, at the time the dismissal occurred. Had Mr Holder advised Cheapskates that he had been instructed or encouraged by the store manager to truncate procedures, because of the store manager's approach and/or

style, I am satisfied, that Cheapskates would have made further inquiry on that matter before making a decision to dismiss.

[52] My finding that the explanation purported by Mr Holder was not provided during the disciplinary meeting is bolstered by Mr Holder's initial account (as set out in an email below) of the events at issue:

[The store manager] ... then went and dropped the Amazon box off at their store and as he did I piled up the newly opened cardboard boxes together to be taken to recycling as there was so much of it that had filled up the processing area and was making the store look untidy and making it unable to walk easily behind the counter. Then [the store manager] gets back from Amazon so I take all the boxes to the recycling bin ... up the alley from us. We then move the Cheapskates stock upstairs in the staff only area as we assume the missing Cheapskates box must still be with the courier.

From then on it was out of my hands and I am not sure what steps were taken next.

...

[53] There is no suggestion in this correspondence that he was instructed or encouraged to process the goods by the store manager in a manner inconsistent with that contained in the policies.

[54] I pause to note there is some strength to Mr Holder's position where it is clear from store manager's written statement to Cheapskates that he assisted Mr Holder to re-store the goods elsewhere in the shop and therefore was aware the items were no longer boxed. It is also notable however, that the store manager was not present when Mr Holder omitted to return the items to the cartons. For reasons that are not necessary to divulge, but which became apparent during the Authority's investigation, I am satisfied the store manager was sanctioned by Cheapskates (although not dismissed) for his part in the matter, noting he attended a disciplinary meeting on the issue.

[55] On balance I have not persuaded Mr Holder's departure from Cheapskate procedure as to management of the inward goods was at the store manager's initiative. I accept however that at the disciplinary meeting Mr Holder sought to place a greater responsibility for the deficient processing of inwards goods on the store manager, not for the store manager's actions but for his inactions. This approach was repeated in Mr Holder's written evidence, as follows:

The mistake that I made that day was that when I discovered the 10th box was consigned to Amazon, I should have re-taped and reassembled the nine boxes and put the stock back in those boxes.

However [the store manager] was fully aware of what I was doing. He had seen me dismantle and flatten the boxes. He helped me carry the contents of the boxes upstairs. At no time did [he] tell me that I should put the stock back in the boxes awaiting the arrival of the 10th.

[56] Cheapskates' evidence is that during the disciplinary meeting with Mr Holder, he was reluctant to be fully answerable for the event. It says, instead his explanation relied heavily on the assertion that the store manager had not "*pulled him up*" on the day in question. It says this response indicated to it that Mr Holder had been willing to deviate from Cheapskates procedures unless or until the store manager remonstrated with him. I accept this evidence demonstrates Mr Holder's actions as regard the inward goods procedure was undertaken consciously and cannot be regarded as a genuine or inadvertent mistake. I am satisfied Cheapskates could in these circumstances reasonably conclude the breach to its at its policy and procedures by Mr Holder was wilful.

Was dismissal warranted in the circumstances?

[57] There was nothing in Mr Holder's testimony to suggest he did not understand the procedures or did not have the skills to perform the tasks required. In this regard I am unwilling to conclude the failing should have been remedied by a performance management plan.

[58] Mr Holder suggests his failure to properly to process the inwards goods on the day in question should not have resulted in dismissal where there was no loss to the business and the goods were secured from other stock in any event. I not persuaded by this submission. I accept the evidence given on behalf of Cheapskates that the failure to process the goods through its system means the stock could go missing without it becoming aware of the matter. I further accept the goods were valuable to it. That there was no negative impact or financial loss to Cheapskates as a consequence of Mr Holder's actions does not alter the conclusion that Mr Holder breached his obligations.

[59] Mr Holder alleges the decision to dismiss was pre-determined where his role was filled within days of his departure. The rapid appointment of another person to the role does provide an appearance of predetermination. On balance I have found the evidence of Mr Champion to be credible and the availability of an ex-employer to perform the role was

incidental to the events leading to Mr Holder's dismissal. I am not persuaded this evidence establishes Mr Holder's dismissal was predetermined.

[60] Although not quite articulated as precisely as follows, I understand from the evidence that Cheapskates assessed Mr Holder's actions and omissions against his explanation for these, alongside his recent training on the procedure, their discussion regarding his obligations as an employee to follow instructions, and his commitment to take greater responsibility in his role, and formed a view that it could not be certain the conduct would not be repeated and it could not rely on Mr Holder to perform to the expectations of his role.

[61] In *Angus v Ports of Auckland*³ the Full Court observed that s 103A contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer.

[62] I accept Mr Holder views his dismissal was too harsh a sanction for his actions and omissions regarding the delivered boxes but a harsh decision does not inexorably mean the decision was unreasonable.

[63] I find Cheapskates' conclusion that it had lost trust and confidence in Mr Holder such that his dismissal was warranted was a decision that falls within the range of responses a fair and reasonable employer could have made in the all the circumstances.

[64] Mr Holder's dismissal was justified and his claim is dismissed.

[65] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

³ [2011] NZEmpC 160