

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 279  
3047972

BETWEEN CHARLIE ALLISON  
Applicant

AND CENTURION GSM LIMITED  
Respondent

Member of Authority: TG Tetitaha

Representatives: M Nutsford, advocate for the Applicant  
B Sing and L Baird, advocates for the Respondent

Investigation Meeting: 21 February 2019 at Auckland

Submissions Received: 21 February 2019

Date of Determination: 10 May 2019

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**DETERMINATION OF THE AUTHORITY**

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- A. Charlie Allison was unjustifiably dismissed by Centurion GSM Limited.**
- B. Centurion GSM Limited is ordered to pay Charlie Allison lost wages of \$3,699.63 within 14 days of this determination.**
- C. Centurion GSM Limited is ordered to pay Charlie Allison compensation of \$15,000 within 14 days of this determination.**
- D. Centurion GSM Limited is ordered to pay Charlie Allison \$4,500 towards his costs within 14 days of this determination.**

## **Employment Relationship Problem**

[1] Charlie Allison alleges he was unjustifiably disadvantaged then dismissed by the actions of his previous employer, Centurion GSM Limited. Centurion submits its actions were justified because Mr Allison had breached its code of conduct.

### **Relevant facts**

[2] Centurion GSM Limited trades under the name Digital Mobile. Digital Mobile is a “channel” partner with Vodafone. It provides sales and service for Vodafone products.

[3] Mr Allison was employed as a retail sales and service representative. He worked in a Digital Mobile store located in Warkworth, north of Auckland.

[4] Mr Allison had never been previously employed in a retail or sales position or within the technology industry. His previous work experience had been manual labour.

[5] He attended a two week training course in Auckland. This included training upon a program known as Siebel. He started working in the Warkworth store on or about 14 February 2018. At the time Centurion employed four other people, including a store manager, his second in command and two other sales reps.

[6] During his employment the majority of his training was undertaken “on the job” and provided by the two other sales reps. This training included the stores multiple sales systems and two computerised tills and one computer without a till.

[7] It appeared that Mr Allison did well at his job. He was sent on a temporary assignment with another company associated with Centurion to work in Christchurch. He assisted with the setup of business phones for a large business client located there.

[8] At some stage the Warkworth staff numbers were reduced from five to three and a new manager was appointed. During the material time primarily Mr Allison and one other sales rep were operating the store. Sales reps from Auckland would also help out when there were only two staff members in the store.

[9] The majority of Mr Allison’s work involved data transfers and “SIM swaps”. SIMs are small cards used in cellphones to communicate with the cellphone carrier such as

Vodafone or Spark. SIM swaps occurred for a variety of reasons from faulty SIM cards to a customer swapping carriers to Vodafone from another network.

### **Final Warning**

[10] On 2 July 2018 Mr Allison attended a customer (PB) whom had requested a SIM card swap. In the process of undertaking the SIM swap, Mr Allison disconnected another customer (VM)'s number and transferred her number to the new SIM card provided to PB.

[11] VM complained to Centurion about the disconnection on 3 July 2018. She had been in Australia when this occurred and had had no access to her employer's cellphone network for most of that day. It is understood she was reconnected the following day without any damage occurring.

[12] On 10 July she wrote to Centurion speculating about a correlation between the disconnection of her cellphone number whilst overseas and a fraud issue that occurred for her employer at the end of June. She provided screen shots of calls made from her number to PB's number and another employee's number on 3 July. At some stage Centurion was made aware this employer had been the victim of possible bank fraud of \$27,000.

[13] On 11 July 2018 Mr Allison's Warkworth store manager received a phone call from Stuart Buckerfield, area manager. Mr Buckerfield was following up on the complaint and inquiring about the SIM swap that had been undertaken using the manager's sales ID. Mr Allison noticed his manager looking at a screen shot of the transaction that he recognised as having done on 3 July. He told the manager he had done the SIM swap and it was implied this may have resulted in \$27,000 of banking fraud.

[14] Mr Allison was worried and contacted Mr Buckerfield later that same day. He recorded their conversation. During the conversation Mr Allison described how he undertook the SIM swap. Mr Buckerfield confirmed to him there was potentially a case of banking fraud to the value of \$27,000, the person who owned the number that had been swapped was actually in Australia at the time and that he needed to be extra secure and always get pins, driver licenses and ask security question regardless. Mr Allison agreed and the conversation ended shortly thereafter.

[15] On 18 July 2018 Mr Allison was invited to a disciplinary meeting held on 20 July 2018. The alleged concerns were:

- (a) On 2 July 2018 a customer came to the Warkworth store and he did a sim swap without correctly verifying the customer. Further, this customer was not authorised to act on behalf of the account.
- (b) He also sim swapped two different numbers on this occasion, this raised concerns around lack of clearance process and caused inconvenience to the customer who was at the time in Australia and as a result the customer's phone stopped working.
- (c) Even though there were "coms" sent out by Vodafone on 20 June 2018 regarding the process of sim swap, he failed to follow the correct process.
- (d) On this occasion, he did all the transactions under [his managers] sales ID instead of his own, again failing to follow the correct process as per the Vodafone code of conduct.

[16] It was noted this was potentially an issue of misconduct or serious misconduct as outlined in the Group Policies and Procedures Handbook below:

**Misconduct**

- (i) Failure to carry out reasonable instruction from management;
- (ii) Serious misconduct;
  - Serious breach of the code of conduct policies and procedures;
  - Failure to observe Vodafone code of conduct.

[17] Mr Allison was warned that if the allegations were proven they may take disciplinary action up to and including termination of employment.

[18] The parties met on 20 July 2018. Mr Allison admitted he undertook the SIM swap by sighting the sim card. He believed the number he swapped onto the new SIM card was associated with the SIM card he had sighted and had written in his order notes "sim sighted". This was what he had been directed to do by his previous manager when undertaking SIM swaps. He had been told by his manager this was a much more secure way of undertaking sim swaps then by way of a secure pin that customers often did not have on their accounts. He believed there had not been any issues with it in the past.

[19] Mr Buckerfield disagreed. He believed Mr Allison's actions showed he failed to perform any of the required verification using the ID processes. Mr Allison also confirmed he used the sales manager's sales ID instead of his own.

[20] At the meeting Mr Allison was also provided with a picture from the instore CCTV. He pointed out the instore customer seeking the sim swap was PB, a former owner of the business that owned the group account that VM's cellphone number was attached to. Mr Buckerfield adjourned to undertake further investigation then returned. He informed Mr Allison that his employment was not being terminated but that it would probably be a written warning. There is a dispute about what (if anything) he was told about the warning.

### **Dismissal**

[21] On 23 July 2018 Mr Allison completed a PRE2POST connection for a customer on a computer without a till. PRE2POST is where the customer moves from a prepaid account to an account. He entered his sales ID and began the transaction to disconnect the prepaid account. However another employee was also logged onto the same computer prior to Mr Allison. When the disconnection order was completed, the recorded sales ID was the other employee's not Mr Allison's sales ID.

[22] This was brought to the attention of Centurion. Mr Allison received another invitation to attend a disciplinary meeting on 24 July 2018. The allegations were:

- (a) On 23 July 2018 he completed a PRE2POST disconnect order under another sales person's ID instead of using his own sales ID.
- (b) Centurion had addressed a similar concern with him on 20 July 2018 however he had again failed to follow the correct process as per the Vodafone code of conduct.
- (c) The transaction and CCTV picture was attached.
- (d) This is noted as a breach of the Group Policies and Procedures Handbook including:
  - (i) Misconduct
    - Failure to carry out reasonable instruction from management;
    - Serious misconduct;

- Serious breach of the code of conduct, policies and procedures;
- Failure to observe Vodafone code of conduct.

[23] A meeting was held with Mr Allison on 25 July 2018. Mr Allison accepted that he was helping a customer on terminal 3 where another sales person was logged in with his sales ID and VDI. He had changed the terminal to his own sales ID to complete the transaction but was unaware he was still in the other sales person's sales ID and VDI. He further stated that although he was in the VDI he forgot the next order would auto populate to that sales person's ID.

### **Final warning & termination**

[24] On 27 July 2018 Mr Allison received two letters. The first letter stated he was being given a final warning in respect of his behaviour on 2 July 2018 namely that he did a SIM swap and issued a new sim but did not perform any verification as per the ID process. It also referred his use of his manager's sales ID instead of his own. His actions resulted in a final warning for serious misconduct "i.e. you have breached Vodafone Code of Conduct by failing to follow the policy and procedure as set out in the ID process by Vodafone breaching our Group Policies and Procedures."

[25] The second letter advised that he was terminated. It stated he went to terminal 3 where another employee was logged on with his sales ID and VDI, changed it to his sales ID and completed the PRE2POST transaction but was unaware he was still in the other employees sales ID and VDI. It noted a similar concern had been addressed with him on 20 July 2018 when he had used his manager's sales ID. This was serious misconduct because it breached the Vodafone Code of Conduct and the Group Policies & Procedures. His employment was terminated pursuant to clause 13.3 of his agreement for serious misconduct inconsistent with trust and confidence as defined by the Handbook and Policies and Procedures.

[26] Mr Allison raised a personal grievance on 9 August 2018 for unjustified disadvantage and unjustified dismissal.

### **Issues**

[27] At a telephone conference on 18 January 2018 the parties agreed the following issues were for hearing:

- (a) Was the applicant unjustifiably disadvantaged and or dismissed by:
- (i) Being warned at the same time as the dismissal?
  - (ii) Insufficient conduct to justify dismissal and or a final warning?

## Law

[28] It is accepted Mr Allison's employment was terminated. The onus falls upon the employer to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[29] If the procedural defects were minor or did not result in the employee being treated unfairly, the Authority must not determine the dismissal/disadvantage unjustifiable (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.<sup>1</sup>

[30] Serious misconduct "... will generally involve deliberate action inimicable to the employee's interests... [it] will not generally consist of mere inadvertence, oversight or negligence however much that inadvertence, negligence or oversight may seem an incomprehensible dereliction of duty"<sup>2</sup>. It is conduct which "deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship"<sup>3</sup>.

[31] The Court has noted that even one off acts of inadvertence, oversight or negligence can depending upon the overall circumstances amount to serious misconduct justifying dismissal.

[The Authority] is to stand back and consider the facts or findings and evaluate whether a fair or reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus 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

<sup>1</sup> *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

<sup>2</sup> *Makatatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 [EmpC] at 319

<sup>3</sup> *Northern Distribution Union v BP Oil NZ Limited* [1992] 3 ERNZ 483

circumstances of the breach. Thus, a careless act can lead to dismissal for serious misconduct, but the matter needs to be considered in the light of all the circumstances and ultimately must revert back to the primary consideration to be made under s 103a of the Act.<sup>4</sup>

### **Final Warning**

[32] There are defects in the process leading to the warning and the issuing of the final warning itself. The CCTV footage and the systems printout showing the transaction were only provided to Mr Allison for comment at the meeting on 20 July. He never received a copy of the complaint or information showing how his actions were connected with the fraud allegation of \$27,000.

[33] The employer had no evidence other than speculation by the complainant that the sim swap Mr Allison completed was involved in any fraudulent activity. This would have been a motivating factor for Centurion in deciding to institute disciplinary action and its outcome of a final warning as opposed to graduated warnings or performance improvement measures. Without more compelling evidence, this concern and subsequent action appears unfair.

[34] Mr Allison also did not receive a copy of the policy he had allegedly breached. At hearing Centurion produced the Vodafone NZ Policy “business Rules for Customer Representatives” with highlighted parts it alleged had been breached by Mr Allison. This was not provided to Mr Allison at the time of dismissal.

[35] Even if the policy had been provided, I am not persuaded Mr Allison’s actions were serious misconduct. There was no point in Mr Allison obtaining customer ID for PB whom was known to him. Mr Allison also identified him on the CCTV footage. No further identification of PB should have been required.

[36] In my view the evidence points to Mr Allison making a mistake about the number he was swapping from the old card to the new SIM card. The number that was swapped to the new SIM was from a group account with multiple MSISDN (cellphone) numbers associated with it. PB did not have authority to make changes upon the group account. However Mr Allison was aware PB was an ex-employee of the owner of the group account.

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<sup>4</sup> *Heinz v Eastland Port Limited* [2018] NZEmpC 79 at [78] citing *Harman Hinnock v New Zealand Steel Limited* [2010] NZEmpC 30 at [25] citing *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [36].

[37] It is more likely he opened the wrong account and changed the wrong number to the new SIM card. As a result Mr Allison mistakenly disconnected V's number instead of PB's. Whether PB had his own account or was part of the group account was not addressed in evidence. Given he has attended the store previously I assume he had his own account that has operated this without incident.

[38] I accept Mr Buckerfield's evidence the SIM card the number was associated with was in Australia. Both parties also accept Mr Allison did not act fraudulently.

[39] I also accept Mr Allison was directed to undertake SIM swaps in this manner by his previous manager because no contradicting evidence was produced. This means Mr Allison had two competing instructions for completing SIM swaps. This does not appear to have been given any weight by Centurion.

[40] There was little to show Mr Allison was acting wilfully to contravene any policy. He had an honest belief his conduct was appropriate based upon his manager's instructions.

[41] The completion of the transaction under another employee's sales ID also does not appear to have been discussed at any length. This is relevant given the later conduct leading to dismissal and the parties' evidence about the sales systems. No consequence has been shown for this conduct. It also did not appear to be the basis for the finding of serious misconduct because the stated reasoning related to customer ID not sales ID issues.

[42] Standing back I am not convinced this was conduct that could have deeply impaired trust and confidence between these parties. There was evidence this conduct may have been attributable to training deficiencies, equipment and staffing issues. This appears to be an issue of performance failures as opposed to serious misconduct as alleged.

[43] The process leading to dismissal was also defective in terms of the information provided and the issuing of a written warning at the same time as the dismissal. This did not allow Mr Allison any opportunity to improve his performance or avoid repetition of this conduct within the period of the warning because he had not been warned about it.

**Dismissal**

[44] The termination letter explicitly refers to actions that formed part of the final warning namely using another person's sales ID. This dismissal is causally related to the final warning.

[45] Both parties were candid about the number of complex systems that Mr Allison had to operate within the store to complete transactions. It was accepted there were issues for sales representatives in this store being able to log in and out of each system in a timely manner to complete transactions quickly. Further one of the three computers did not have a sales till (non-till computer) requiring the completion of any sales transaction on a computer with a sales till (till computer). The transaction that gave rise to Mr Allison's dismissal occurred on both the non-till computer and till computers giving opportunity for mistakes to occur.

[46] Mr Allison's explanation that while completing his sales transaction on another till computer, the disconnection order prepopulated to the other employee's sales ID on the non-till computer appears to be a clear issue of mistake. Given the systems and equipment issues instore, there was a high likelihood of this type of sales ID error occurring. I understood from the evidence that this mistake was not unusual. Further no damage appears to have resulted from the error other than to Mr Allison.

[47] The evidence showed there was added pressure for sales representatives to complete transactions quickly creating time pressures and again more room for error.

[48] Standing back I have come to the conclusion that this conduct was not serious misconduct.

[49] The procedural defects were not minor. There was unfairness to Mr Allison.

[50] Charlie Allison was unjustifiably dismissed by Centurion GSM Limited.

**Remedies**

[51] As Mr Allison has a proven grievance he is entitled to seek lost wages and compensation. Mr Allison has mitigated his damage by finding another job. There was a five and a half week period where he was unemployed. He is entitled to recover his wages for that period.

[52] He seeks lost wages in the sum of \$4,444.00 holiday pay of \$355.52 and KiwiSaver contribution of \$133.32. The sum of \$4,932.84 shall be awarded subject to any reduction for contributory conduct.

### **Compensation**

[53] In terms of compensation Mr Allison gave evidence of the effects of the dismissal upon him. He suffered moderate depression and anxiety and was treated for the same. I understand this may have also been prompted by rumours regarding the circumstances of his departure but it is difficult to connect these to any action of the respondent. Many of the alleged rumours were plainly wrong. However I accept Mr Allison did suffer as a result of the dismissal and the warning leading up to it.

[54] I have assessed there is evidence of moderate damage to Mr Allison as a result of these actions.

[55] For cases involving moderate damage the Courts have awarded up to \$20,000<sup>5</sup> to \$25,000.<sup>6</sup> I am awarding \$20,000 compensation.

### **Contribution**

[56] Mr Allison's admitted actions did result in both disciplinary matters. His actions were also blameworthy and require some reduction. In my view 25% is sufficient to reflect his contributory behaviour.

### **Costs**

[57] Both parties sought imposition of the daily tariff if successful. Given Mr Allison has been successful, the costs award shall be \$4,500.

### **Orders**

[58] The following orders are made:

- A. Charlie Allison was unjustifiably dismissed by Centurion GSM Limited.

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<sup>5</sup> *Archibald v Waikato District Health Board* [2017] NZEmpC 132.

<sup>6</sup> *Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123.

- B. Centurion GSM Limited is ordered to pay Charlie Allison lost wages of \$3,699.63 within 14 days of this determination.
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- D. Centurion GSM Limited is ordered to pay Charlie Allison \$4,500 towards his costs within 14 days of this determination.

**TG Tetitaha**  
**Member of the Employment Relations Authority**