IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 164
5353996

	BETWEEN	NIGEL BAIN Applicant
	AND	AIR PARKING MANAGEMENT LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	D Vinnicombe, advocate for applicant P Craggs, advocate for respondent
Investigation Meeting:	4 April 2012
Determination:	15th May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nigel Bain says his former employer, Air Parking Management Limited (APML) dismissed him unjustifiably on the ground of serious misconduct following an alleged breach of company policy.

[2] APML says the conduct was admitted. The conduct breached company policy and amounted to serious misconduct. APML says further that it followed a fair and reasonable process when deciding on and implementing the dismissal.

Background

[3] APML is based at Auckland airport and trades as Koru Valet Parking and Air NZ Parking. In June 2009 it employed Mr Bain as a driver for the Koru Valet Parking service. Mr Bain's job was to drive customers' cars between the passenger

terminals at Auckland airport and the secure parking compounds located in the airport area.

[4] The disciplinary procedure in the parties' written employment agreement provided in part:

> *25. 1*
> *There are two stages in the formal disciplinary procedure that will generally be imposed before dismissal (except for serious misconduct):*
>
> *1. Written warning*
> *2. Final written warning*
> *3. Dismissal*
>
> *25.2*
> *Before entering into a formal process, the Employee will be advised of the Employer's concerns and be given a reasonable opportunity to improve. The intent is to encourage the Employee to behave in a manner that is appropriate to their employment. In some cases it may be more appropriate to move directly to the formal procedures ...*

[5] The employment agreement also provided:

> *11.1 The requirements contained in the Employer's House Rules/policy and procedure manuals/Handbook are incorporated into this agreement. The employee must observe and comply with all rules, policies and procedures in force, and failure to do so could result in disciplinary action or dismissal.*

[6] Clause 18.7 of the agreement contained a list of conduct that may give rise to summary dismissal. Of the conduct listed, the conduct most approximating Mr Bain's conduct here was: '*unauthorised use of the Employer's, a customer's ...property/equipment'*.

[7] APML's rules included:

> *COMPANY POLICIES*
> ..
>
> - *Never touch anything inside a customer's vehicle. ...*
> - *Never touch ANY personal items inside a vehicle.*
>
> *This includes: Rear View Mirror,*
> *Car stereos – don't change the station,*
> *Cash, personal items or items that may be termed as scrap,*
> *Air conditioning settings*

[8] The rules also included a list of the behaviour considered serious misconduct for which the penalty was instant dismissal. I observe that it is not the same as the list in the employment agreement, which should be rectified. Included in the list in the rules was:

- *Unauthorised use of any equipment, materials or vehicle.*
- *Unauthorised tampering with any fittings or accessories in a customer's car other than for safety reasons*.

[9] Mr Bain received a copy of the rules at the commencement of his employment.

[10] APML took the 'don't touch' policy seriously. Its client base comprised what it described as the cream of the New Zealand business community, and it sought to provide a high standard of service. It had received feedback from these clients to the effect that, for example, the changing of radio and air conditioning settings in their vehicles by APML employees adversely affected their trust in the company. The 'don't touch' policy was implemented after APML received a series of complaints about such actions, and it took the view that the actions created a threat to its business.

[11] In October 2010 a customer complained that the setting for the radio station in her car had been changed. The complaint was referred to Sera Manapouri, the manager of Koru Valet Parking's driving department. Ms Manapouri ascertained that Mr Bain was the driver. She informed him of the complaint, reminding him that she had spoken to him before about touching the radios in customers' cars. He admitted changing the station and promised he would not touch customers' radios again. Ms Manapouri expressed her disappointment that the message had not got through to him, but no further action was taken.

[12] On or about 26 May 2011 a customer was waiting outside the airport terminal for his car to be returned from the car park. He heard loud music coming from the car's radio as the vehicle was approaching. He was very angry about this and shouted at Mr Bain, who was the driver.

[13] The incident was recorded in the shift report for the day, and came to the attention of Terry Baker, APML's managing director, the next day. Mr Baker spoke to the customer, who acknowledged that he had been very angry at the time and expressed regret about his own conduct. Mr Baker said he advised that there would be a disciplinary investigation, but denied a suggestion that he discussed whether Mr Bain would be dismissed and there was no evidence that he had such a discussion.

[14] The incident was referred to Dion Dobbs, the manager to whom Ms Manapouri reported. Mr Dobbs sought a preliminary account from Mr Bain, who responded that he had turned the volume of the radio up but that he believed the customer had over-reacted. Mr Bain explained in evidence that he turned the volume up because a song he liked was being played.

[15] Mr Dobbs advised Mr Bain that the matter was serious, and that there would be a formal meeting about it on 31 May. He also advised Mr Bain that he could bring a support person, and that his job was in jeopardy. Meanwhile Mr Bain was stood down on full pay.

[16] The meeting went ahead on 31 May. Mr Bain explained that the radio was already on, and he turned it up without thinking it was very loud. At the collection point the customer approached him, was abusive and accused him of using the vehicle as his personal disco. Mr Bain had apologised, and believed that was the end of the matter. He asked the company to take into account his: unblemished record; length of service; flexibility; and agreeable and professional behaviour.

[17] The meeting was adjourned while APML considered its decision.

[18] The decision to dismiss was conveyed to Mr Bain in a letter dated 2 June 2011. The reasons set out in the letter were that Mr Bain had failed to follow company policy that radios were not to be touched, and that this had been raised with him before yet he continued to touch the radios. The trust and confidence of customers was vital to the business, and Mr Bain's actions had put this in jeopardy.

[19] Mr Bain received one week's pay in lieu of notice.

Determination

[20] The test of justification for the dismissal is set out in s 103A of the Employment Relations Act 2000. It concerns 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 occurred. In applying the test the Authority must consider whether the employer: sufficiently investigated the allegations before dismissing the employee; raised its concerns with the employee before dismissing the employee; gave the employee a reasonable opportunity to respond; and genuinely considered the explanation before dismissing the employee.

[21] The principal question raised in this employment relationship problem was whether - despite the conduct being admitted and the explanation being unacceptable - the decision to dismiss was so harsh as to be beyond what a fair and reasonable employer could have done in all the circumstances.

[22] In support of that proposition Mr Vinnicombe cited *New Zealand (with exceptions) Woollen Mills etc IUOW v Woolrest International* Limited.[1] The Arbitration Court, as it then was, noted that in cases of serious misconduct the conduct must be of sufficient gravity to warrant the severe consequence of dismissal, and found on the facts that the conduct in question did not reach that level of seriousness. In doing so the court also pointed out that, although house rules are not absolutely binding on it, the existence of the rules strengthens the case of an employer complaining of breach provided employees are adequately informed of them.[2]

[23] Here a relevant house rule was in existence, and was known to Mr Bain. I do not accept the submission that Mr Bain's conduct was not serious misconduct as defined in the company policy in that Mr Bain did not 'tamper' with the radio, because the submission relied on what I consider too narrow a definition of the word 'tamper'. Applying common usage of the word, coupled with the 'don't touch' rule, is sufficient to bring the conduct within the category defined in the rules as serious misconduct. By increasing the volume of the radio Mr Bain breached the 'do not touch' rule and in doing so he tampered with the radio. Similarly, in breaching the

[1] [1985] ACJ 643
[2] at p 647

rule he made unauthorised use of the customer's radio. Further, his explanation of his conduct was unacceptable.

[24] On its own this does not mean the conduct met the legal test for the existence of serious misconduct justifying a dismissal – namely conduct that deeply impairs or is destructive of the basic confidence or trust that is essential in an employment relationship.[3] Rather, as indicated in *Woolrest*, it strengthens the employer's case.

[25] Particular factors applicable to the business of APML render Mr Bain's more serious than it would be in most circumstances. The factors concern the high level of customer service APML sought to offer, the fact that the car Mr Bain was driving did not belong even to the company but rather to one of its customers, and that minor though the conduct might seem in itself it had implications for customers' perceptions of how the company treated the vehicles entrusted to it.

[26] Secondly, Mr Bain had transgressed before and had promised not to do so again. His breaking that promise for no good reason also affected the trust and confidence the employer had in him, in particular its trust in any further promise that he would not break the 'don't touch' rule.

[27] Thirdly, the approach taken to this matter suggests Mr Bain still does not appreciate the importance of the 'don't touch' rule or its extent. That is not the result of a failure on APML's part. As Ms Manapouri had put it, the message still did not seem to have got through to Mr Bain.

[28] In a related point I have considered whether the failure to take formal disciplinary action against Mr Bain as a result of the earlier breaches of the 'don't touch' rule vitiates the justification for his dismissal.

[29] APML's answer was to refer to clause 25.2 of the employment agreement, and say its preferred approach was to correct behaviour rather than to impose punishment. Unfortunately the attempts to correct had failed and no further leniency was extended to Mr Bain. Since there was no real uncertainty about the contents of the rule or of

[3] *NDU v BP Oil* [1992] 3 ERNZ 483, 487

the employer's expectations, I find APML was not under an obligation to continue to observe that lenience when Mr Bain did not correct his behaviour.

[30] Finally, although not expressly relied on, I discerned at least a suspicion on Mr Bain's part that the decision to dismiss was caused or influenced by the customer's angry reaction. There was no evidence of that, and I find that Mr Bain's conduct was the focus of APML's concern.

[31] For these reasons, and in the context of the requirements of this employment relationship, I find the conduct met the level of serious misconduct.

[32] Accordingly I conclude the dismissal was justified.

Costs

[33] Costs are reserved.

[34] The parties are invited to agree on the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file in the Authority and copy to the other party a written statement of what is sought and why. The other party shall have 14 days from the date of receipt of the statement in which to file and copy any written response.

R A Monaghan
Member of the Employment Relations Authority