

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Billie Pauline Berquist (Campny) (Applicant)

AND The Warehouse Limited (Respondent)

REPRESENTATIVES Christopher Tennet, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent

MEMBER OF AUTHORITY Janet Scott

INVESTIGATION MEETING 29 May 2006

DATE OF DETERMINATION 20 September 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant has brought a number of problems to the Authority seeking resolution.

[2] In late 2004 the applicant applied for parental leave. That leave was approved to commence in January 2005. Prior to the scheduled date for commencing her parental leave the applicant submits the respondent promised to pay out her annual holiday pay whilst allowing her work in an alternative position. The respondent then reneged on its promise and forced her to take seven week's annual leave. As a result she lost the opportunity to continue working and lost remuneration in the sum of \$2,192.40. The applicant's statement of problem referred to this as a parental leave complaint.¹

[3] The applicant also submits she was unjustifiably dismissed on a false accusation and that the procedure adopted by the respondent in respect of dealing with her over that allegation was unfair and oppressive.

[4] To remedy her alleged grievances the applicant seeks arrears of wages in the sum of \$2,192.40 and compensation pursuant to s.123 (1) (c) (i) to address the hurt and humiliation caused her in respect of the holiday pay issue. In respect of the unjustified dismissal she seeks lost remuneration and compensation for hurt and humiliation pursuant to s.123 (1) (c) (i).

[5] The respondent submits that the applicant is out of time to raise any complaint in respect of her parental leave (unjustified disadvantage) and it does not consent her raising the claim out of time. In any event the respondent submits that the applicant was not forced to take annual leave prior to the commencement of her parental leave. The respondent also denies the applicant was

¹ In fact it has been treated by the parties as a claim of unjustified disadvantage and will be addressed by the Authority as such.

wrongfully prevented from drawing down holiday pay whilst continuing to work in a different role before she commenced maternity leave.

[6] Lastly, the respondent denies that Ms Berquist was unjustifiably dismissed. It is the respondent's position that she was justifiably dismissed for serious misconduct.

Background

[7] The applicant commenced employment with the Papamoa Branch of The Warehouse Limited (TWL) in June 2004. She had previously been employed part time at the Fraser Cove store. The applicant was employed as a Loss Prevention Officer.

[8] At the time she commenced work at the Papamoa store the applicant was pregnant. She confirmed this with her employer approximately one month after she commenced employment at Papamoa.

[9] By November it was clear that the applicant was finding it difficult to stand for long hours. There were discussions between Ms Berquist and the Store Team Leader (Francie Harris) on possible alternative roles that she might take up. The parties disagree on the outcome of those discussions, but it is not disputed that at this time the applicant sought to have her holiday pay paid out to her in a lump sum whilst she continued her employment. There is a dispute about whether it was agreed that the applicant could have her holiday pay paid out. In the event however, the applicant took annual leave from 19 December 2004. She had previously applied for parental leave and that had been approved. Her parental leave was to commence on 10 January 2005 and to continue until 9 January 2006.

[10] On June 9, 2005, whilst she was on parental leave, the applicant went with a friend (Ms Rankin) to the Papamoa Branch of TWL. Ms Berquist and her friend planned to make some purchases. Whilst Ms Berquist's went to shop elsewhere in the store her friend selected two rings at the jewellery department. Eventually Ms Berquist joined Ms Rankin at the jewellery counter and Ms Rankin paid for the rings she had selected. Ms Berquist used her staff discount card to obtain a discount on the purchase of the rings. Once that transaction was completed Ms Berquist made other purchases using her discount card.

[11] The jewellery purchase was brought to the attention of Ali Gibson, Store Manager, on her return from annual leave on 13 June 2005. Ms Gibson carried out a preliminary investigation into the purchase as it presented a possible breach of the house rules relating to the use of staff discount cards.

[12] Ms Gibson rang Ms Berquist on 29 June 2005 to advise her that the company wished to have a preliminary meeting with her prior to commencing a disciplinary investigation in respect of her use of the staff discount. A preliminary meeting was required to go through the allegations with Ms Berquist. Ms Berquist suggested that she meet with Ms Gibson on 30 June 2005.

[13] Ms Berquist attended a meeting with Ms Gibson on 30 June 2005. The Assistant Store Manager, Tasha Vickers, was also present at that meeting. At this meeting Ms Gibson went through the Step 1 Form (a formal process followed by The Warehouse in initiating disciplinary proceedings). She explained the nature of the allegations, the company house rule that was applicable, and that the outcome of the process could result in Ms Berquist's dismissal.

[14] Ms Berquist requested that the disciplinary meeting be held there and then. However, it was the company's position that it could not convene the proposed disciplinary meeting for at least 24 hours as it was important for Ms Berquist to have time to find a support person and to gather such

information that would assist her in providing an explanation to the company's allegations. It was left to Ms Berquist to get back to Ms Gibson with a suitable time and date for the disciplinary meeting to take place.

[15] By way of letters dated 20 July, 27 July and 8 August 2005, Ms Gibson made requests for Ms Berquist to contact her with regard to a suitable date, time and venue to hold the proposed disciplinary meeting. Ms Gibson also attempted to make telephone contact with Ms Berquist regarding organising a meeting, but Ms Berquist advised by letter that she did not wish to communicate other than in writing.

[16] Despite making several requests (over a period of six weeks) for Ms Berquist to either attend a disciplinary meeting set by the employer or to nominate a suitable date, time and venue for a meeting and advice to her that her failure to attend would mean that The Warehouse would have to make a decision on the information it had before it and could dismiss Ms Berquist, Ms Berquist failed to attend on meetings dates set by the company or to nominate an alternative time, date and venue that was convenient to her.

[17] In a letter from Ms Berquist dated 4 August 2005 she advised she would not be attending a disciplinary meeting and she asked Ms Gibson to make a decision on the matter.

[18] By way of letter dated 8 August 2005 Ms Gibson advised Ms Berquist once more if she did not contact her by 18 August 2005 the company would have to make a decision in relation to the allegations of serious misconduct based on the information available to it. On 24 August 2005, after the attempts to meet with Ms Berquist to discuss the allegations had come to nothing, Ms Gibson made a decision to terminate Ms Berquist's employment for serious misconduct.

Position of the parties

Applicant's position

Disadvantage (Holiday Complaint)

[19] The applicant's position is that in November 2004 she discussed alternative roles with the Store Team Leader, Francie Harris. It was agreed between them that she would finish her 12 hour shifts at the end of November 2004 and that she would commence working 30 hours per week in the toy department. This involved a reduction in her hourly rate and she would be required to sign a new contract. It was agreed that her holiday pay would be paid out to her in full when she signed the new contract.

[20] One week prior to commencing her new position, Ms Berquist says she was told she could not have her holiday pay paid out. She was also given an ultimatum - to quit and have her holiday pay paid out (thereby disentitling her to maternity leave) or to take annual leave then and there and to commence maternity leave as planned in 6 to 7 week's time. Ms Berquist submits that Ms Harris was promoting the option that she leave and take her holiday pay.

[21] By this time the toy department job (which was for a fixed term period over the Christmas period) was no longer available. In the event Ms Berquist decided to take her annual leave in order to preserve her right to return to work following her planned parental leave. She also submits she was told that if she took her annual leave in a lump sum it would have been paid out at the lower rate applicable to the toy department job rather than the rate she enjoyed as a Loss Prevention Officer.

[22] Ms Berquist complains that because her holiday pay was dribbled out she did not have the option of working in the toy department as originally agreed and that thereby she has lost the wages she would have earned during that period.

The Dismissal

[23] Ms Berquist submits she went to The Warehouse on 9 June 2005 with a friend intending to purchase two items of jewellery as gifts. She also intended to make some other purchases. Ms Berquist says that prior to going to the store she gave money to her friend for the jewellery items. One item was for her friend and the other was for a mutual friend. Ms Berquist says she gave the money to her friend to pick out the jewellery whilst she (Ms Berquist) went to choose the other purchases she wished to make. They agreed to meet later at the jewellery counter.

[24] Ms Berquist says that when she handed over her staff discount card to the team member serving them at the jewellery counter. That team member questioned her use of the discount card in the belief that Ms Berquist was no longer employed by The Warehouse. Ms Berquist explained that she was on maternity leave and the purchase continued and she received a discount of \$2.55. As she had already given the money to her friend for the purchase of the jewellery, her friend handed over the money for that purchase. Ms Berquist then paid for her other purchases again using her discount card.

[25] On 29 June 2005 Ms Berquist said she received a call from the Store Manager, Ali Gibson, who requested her to attend a meeting to discuss the staff discount privilege. She agreed to meet with Ms Gibson the next day, on 30 June. Ms Berquist's position was that Ms Gibson would not discuss the issue over the phone, and her tone suggested that the problem was a casual one. She was not told she was facing disciplinary action.

[26] Ms Berquist submits that at the meeting with Ms Gibson on 30 June 2005, she was not made aware of the allegation against her and Ms Gibson would not discuss it saying they both needed to gather information in order to address the allegation. It was Ms Berquist's position that she could not possibly gather information to address an allegation if she did not know what that allegation was.

[27] Following that meeting, Ms Berquist wrote to Ms Gibson and requested specific details of the allegations against her and requested that the proposed meeting take place in a less intimidating environment. She also requested that the parties use the services of the Mediation Service.

[28] It is Ms Berquist's position that from that point the respondent put pressure on her to attend meetings. She received letters that were delivered to the wrong address, by which time the dates that had been notified for the meetings allowed her insufficient time to arrange babysitters to attend. She also faced financial problems in arranging for babysitters and transport.

[29] It is Ms Berquist's position that she lost the opportunity to attend a meeting with the respondent despite making it clear that she wanted to be able to defend herself. She was treated rudely and abruptly, and her position was not considered. The respondent went ahead and fired her without due process and without hearing her side of the story.

[30] Ms Berquist denies having done anything wrong and believes that her dismissal was an attempt to get rid of her because of her pregnancy and because she did not fit in with a previous Manager. She submits she has suffered stress for which she has sought medical assistance. Her perfect work record has been tarnished and she is struggling to make ends meet. Her ambition to return to work following parental leave has been shattered over \$2.55.

[31] Legal submissions were filed in support of the applicant.

Respondent's position

Disadvantage (Holiday Complaint)

[32] The respondent submits the applicant is out of time in raising this issue. Nevertheless it did address the complaint.

[33] It was the position of the respondent that it became obvious by mid November 2004 that Ms Berquist was having difficulty standing for the long hours involved in her loss prevention role. She requested Ms Harris, Service Team Leader for a position in check-out. That request was declined because nothing was available at that time and check-out work itself was an unsuitable role for a pregnant person as it required standing for long periods of time. Ms Harris and Ms Berquist did discuss alternative roles for Ms Berquist and she was offered a position in the toy department for 30 hours per week. However, that role did entail a reduction in Ms Berquist's hourly rate and no agreement was reached on Ms Berquist taking that role.

[34] Ms Berquist did request that her holiday pay be paid out as a lump sum and Ms Harris agreed to check with the payroll department on that point. Ms Harris rang payroll and was told that it was against the law to pay holiday pay as a lump sum and if Ms Berquist wanted to be paid her holiday pay she would have to take her annual leave. Ms Harris advised Ms Berquist of this and also advised her that she could take her annual leave prior to the commencement of her planned maternity leave if she wished. Ms Berquist was advised also that the only way holiday pay could be paid out in a lump sum was if Ms Berquist resigned her position with The Warehouse. However there was never any suggestion from Ms Harris or anyone else at the company that Ms Berquist resign her employment. It was simply put to her as an option for her consideration.

[35] In the event, Ms Berquist continued in her loss prevention role albeit she undertook alternative duties and she took annual leave which she commenced from 19 December 2004. Ms Berquist's annual leave was paid out at \$12.80 per hour - the rate that applied to her loss prevention role. Ms Berquist was never forced to commence her annual leave and she was not directed to commence her annual leave from 19 December 2004. Her role as Loss Prevention Officer was available to her on her return from her parental leave and the company hired a Loss Prevention Officer on a fixed term agreement to provide cover for Ms Berquist while she was away on parental leave.

[36] The respondent denies the applicant has suffered any disadvantage or financial loss in this matter.

The Dismissal

[37] Ms Gibson was the Store Manager at the time of the events in question. She returned from leave on 13 June 2005 to be advised by a team leader that a team member had reported an unusual purchase at the jewellery counter on 9 June.

[38] Ms Gibson commenced an investigation into Ms Berquist's purchase of jewellery at the jewellery counter on that date. First, she printed off copies of Ms Berquist's discount usage over the months of May and June and she also printed off copies of the receipts of Ms Berquist's purchases on the day of 9 June. She also viewed the video footage of those purchases.

[39] Next, Ms Gibson met with Ms Wallace, the jewellery team member who served both Ms Berquist and her friend on 9 June. Ms Wallace told her that on 9 June Ms Berquist appeared to have used her discount card for another person's purchase at the jewellery counter. Ms Wallace had reported that she was uncomfortable with the transaction as the customer with Ms Berquist had advised her that one ring was for her and the other was for another person (a sister or a friend). Ms Wallace had questioned Ms Berquist about the use of her discount card because she believed

Ms Berquist had left her employment with The Warehouse. Ms Berquist advised she was on parental leave and that she was purchasing the rings. Ms Wallace completed the transaction and Ms Berquist and her friend made an exaggerated gesture of handing the package (containing one ring²) to Ms Berquist. However, it was Ms Wallace's view that the purchase had not been made by Ms Berquist as it was the friend who had handed over the cash to pay for the purchase and who had advised her that one ring was for her and the other for a friend (or sister).

[40] Ms Gibson viewed the video footage with Ms Wallace and Ms Wallace confirmed that footage showed a customer at the jewellery counter trying on jewellery and making a decision to purchase. Ms Berquist then arrived at the counter. The customer handed over cash for payment for the two rings and Ms Berquist handed over her discount card and to Ms Wallace. Ms Berquist signed for the discount for the rings and Ms Rankin took the change. Ms Berquist then separately paid for other items she had selected using her discount card. Ms Gibson checked the receipt for the ring purchase which confirmed that Ms Berquist had used her discount card for the jewellery and signed for it. She had also used her discount card for the other purchases she had made.

[41] It was Ms Gibson's evidence that the policy regarding the use of team cards is that they are not to be used by team members' children, unauthorised family members, or friends. Only a spouse or de facto partner, or a parent of the team member (if living at home) can use the team card. These rules are set out in the application for a team card and Ms Berquist signed an application for a card on 2 June 2003, together with her then partner Aaron Anderson.

[42] The Warehouse rules stipulate that abusing the staff discount privileges, including use of unauthorised staff discount is serious misconduct and that dismissal may result from any breach. All team members know that unauthorised use of the discount card is serious misconduct that may result in instant dismissal. Ms Berquist signed off on the company's house rules on 16 September 2002.

[43] It was Ms Gibson's evidence that the company places its trust and confidence in its team members when they are given a discount card. They are given up to a 25% discount and abuse of the card is a cost and a loss to the business. The abuse of a discount card is very finely balanced as losses to the business affect the payment of staff bonuses. The Warehouse regards any breach of its discount card as a loss of trust and confidence in the team member concerned. It treats the abuse of discount card as any other dishonesty offending. In a retail environment, where stock is the company's focus, any dishonesty offending is considered a serious breach of trust and confidence.

[44] It is the respondent's position that Ms Berquist, as a Loss Prevention Officer, is required to uphold the store security and there is an expectation that she will uphold the company rules and not act dishonestly herself. Because the loss prevention officers are in charge of store security, the company needs to have trust and confidence in them to carry out their role. Any dishonest actions affect their credibility and the company's ability to trust them to carry out their role.

[45] Ms Gibson had viewed the camera footage, spoken to Pauline Wallace and she had reviewed the purchase receipts. As a result Ms Gibson was satisfied it appeared that Ms Berquist had used her discount card to pay for her friend's purchase and that she had breached the company's house rules. Ms Gibson decided she had to speak to Ms Berquist in a disciplinary setting.

[46] Ms Gibson rang Ms Berquist on 29 June 2005 to organise a meeting to discuss her concerns. Ms Berquist was advised of the nature of the allegations and that the initial meeting was to discuss her staff discount use and the allegations which were quite detailed. Ms Gibson wanted to meet Ms Berquist face to face to talk her through the allegations.

² The evidence was that Ms Rankin wore the other ring.

[47] Ms Berquist agreed to meet with Ms Gibson on 30 June 2005.

[48] At the meeting on 30 June Ms Gibson went through the nature of the allegations, the company house rule that was applicable and she advised Ms Berquist that the outcome of the process could result in her dismissal. Ms Berquist was advised of her right to have a representative and she was advised that the earliest time and date that the company would carry out a disciplinary meeting was after an interval of 24 hours. This was to allow Ms Berquist to obtain representation and to organise such information as she needed to assist her in preparing for the meeting.

[49] Ms Berquist requested that the disciplinary meeting take place there and then. Ms Gibson reiterated that Ms Berquist needed to have time to find a support person and to prepare for the meeting. Ms Berquist was provided with the copy of the Step 1 Form that set out the allegations. Ms Berquist inquired about the cost of a baby sitter and Ms Gibson said that she would need to make inquiries of human resources. She did not give her an answer at that time. Cost for a support person was not raised. However Ms Berquist was advised that the store had team representatives for both union and non-union team members who could support Ms Berquist if she requested it of them.

[50] The cost of Ms Berquist's time for the first meeting was put through payroll office as a manual pay to compensate her for her time in the store.

[51] Ms Gibson left it to Ms Berquist to get back to her with a suitable date and time to attend a disciplinary meeting.

[52] Following that meeting on 30 June, Ms Berquist wrote to the company. She advised of her concerns about the preliminary meeting³ and she requested details of the allegation and requested that the proposed meeting be supervised by Hamilton Mediation Services at a less intimidating venue.

[53] Ms Gibson replied in writing to Ms Berquist in a letter dated 6 July 2005. She set out her account of their conversation, including the fact that the allegations against Ms Berquist had been carefully explained to her at the meeting on 30 June. The detail of the allegations was reiterated. Ms Gibson said she had no issue with the meeting taking place somewhere other than the store, but she was unable to travel to Hamilton, and suggested that she would be happy to meet with a mediator if that mediator would come to Tauranga for the meeting. She also suggested there were two other stores where the meeting could be conducted, and noted that they would need to be able to review CCTV footage.

[54] Ms Berquist was provided with a copy of her personnel file as she had requested.

[55] On 20 July 2005 Ms Gibson wrote to Ms Berquist again as she had not heard from her in response to the 6 July letter. She advised that a meeting had been set for Friday, 29 July 2005 in the Tauranga store at 11 am. She also requested Ms Berquist to contact her as soon as possible if the time did not suit in order to provide an alternative date and time. Ms Gibson explained to Ms Berquist that if she had not made contact by the date of the meeting, that Ms Gibson would assume that she was able to attend, and if she did not attend or contact Ms Gibson, that the meeting could be conducted in her absence with the information available to her. She also requested that Ms Berquist confirm that she had received the previous letter of 6 July 2005.

[56] Ms Berquist wrote to Ms Gibson on 25 July 2005. She explained that she had only just received Ms Gibson's letter dated 20 July. She repeated concerns that she had previously raised

³ That she had made herself available at short notice only to be handed a notice of disciplinary meeting and that she had not been advised of the allegations against her

about the first meeting, she stated she was aware of the security system and that she had already given her explanation to the staff member at the time. Ms Berquist also alleged that the staff member who served her (Pauline Wallace) was rude to her at the time. She asserted that she felt the purpose of the disciplinary meeting was to terminate her maternity leave and her employment contract. She advised she would not be attending the meeting on 29 July 2005 as it was not convenient for her and that she found The Warehouse to be intimidating. Ms Berquist requested Ms Gibson to advise her of her determination following the meeting on 29 July 2005.

[57] It was Ms Gibson's evidence that, despite the fact that Ms Berquist had previously said she would not be attending the meeting on 29 July 2005 and that she expected Ms Gibson to make a decision, Ms Gibson felt it was important to give her another opportunity to attend as Ms Berquist had stated the reason she could not attend on 29 July was because that date and time was not convenient. Ms Gibson sent out a further letter (27 July) postponing the 29 July meeting. She requested that Ms Berquist contact her with a view to setting an alternative date for the proposed meeting. She reiterated that she was happy to consider any date, time, or venue in Papamoa or Tauranga. She explained that she had provided what she believed were sufficient details Ms Berquist to enable her to answer the allegations and responded to Ms Berquist's concerns about the meeting on the 30 June. She explained the company's position that while Ms Berquist was on maternity leave she was still an employee of the company and that the company was entitled to complete its investigation. She reiterated the disciplinary meeting was for Ms Berquist to explain her account of her actions. She confirmed that Ms Berquist's maternity leave was not in question at issue. As her attempts at contacting Ms Berquist had been unsuccessful, she requested that Ms Berquist contact her with a suitable date, time and venue within five days of the receipt of the letter. She provided two telephone contact numbers. Ms Gibson reminded Ms Berquist of her obligation to cooperate as she was still an employee of The Warehouse.

[58] Lastly Ms Gibson explained that if she had no contact from Ms Berquist she would hold the meeting on Friday, 5 August 2005 at 10 am at the Tauranga Central store.

[59] Ms Berquist wrote to Ms Gibson by letter dated 4 August 2005. She advised she had only just received Ms Gibson's recent letter. She acknowledged that The Warehouse was within its rights to hold a meeting without her present and to decide on what disciplinary action to take. In fact she communicated that she thought this had already occurred. She confirmed she would not attend a meeting on 5 August and she would appreciate being advised of the company's decision.

[60] Ms Gibson wrote to Ms Berquist again on 8 August 2005. She asked Ms Berquist to contact her urgently and she provided a further opportunity for Ms Berquist to arrange a suitable venue and date for the disciplinary meeting, and advised if Ms Berquist did not contact her by 5 pm on Thursday, 18 August 2005, she would make a decision on the information she already had. She explained to Ms Berquist that as an employee she was required to attend a meeting. It was Ms Gibson's evidence that Ms Berquist's attitude to the meeting was extremely frustrating and while Ms Gibson felt she was within her rights to make a decision at that point without hearing further from Ms Berquist, she decided to give Ms Berquist one last opportunity to attend a meeting. Ms Gibson thought that if she instructed Ms Berquist to attend she might change her mind and come to the meeting.

[61] Ms Berquist did not avail herself of this last opportunity to meet with Ms Gibson to explain her actions and on 24 August 2005 the company wrote to Ms Berquist advising her that she had breached the house rules by using her discount card for a customer in breach of the company's policy. Ms Gibson stated such a breach was considered to be serious misconduct and the decision had been taken to terminate Ms Berquist's employment, effective immediately.

[62] Ms Gibson's evidence was that the decision to dismiss Ms Berquist was based on video footage of the sale of the rings, as well as Pauline Wallace's account. The footage confirmed Ms Berquist had used her staff discount card to pay for a purchase made by a customer and paid for by that customer. Ms Berquist subsequently used her staff discount card to pay for other purchases and paid cash for those things herself. Ms Gibson also took into account the discussion she had had with Ms Wallace i.e. it was her belief that the purchase had not been made by Ms Berquist and that she did not believe that the rings were for Ms Berquist.

[63] Ms Gibson considered all the information she had in front of her and looked over Ms Berquist's file before she made a decision. The decision was not made lightly and was made in light of the information at the time and not on the information that Ms Berquist now presents. Ms Gibson also took into account the fact that Ms Berquist was given several opportunities to attend a disciplinary meeting with Ms Gibson but had failed to do so. Her failure to cooperate with The Warehouse forced it to make a decision based on the information available.

[64] The Warehouse takes abuse of its discount card very seriously and dismisses team members who abuse the trust and privilege that the company gives them to claim a discount for purchases for themselves, their parents, or their spouse or de facto partner.

[65] For Ms Berquist as a Loss Prevention Officer who upholds the company's store security, there is an expectation she will uphold company rules and not act dishonestly. Any dishonest action by a Loss Prevention Officer affects their credibility and the company's ability to trust them to carry out the role. Given the actions of Ms Berquist on this occasion, Ms Gibson found she could no longer have the trust and confidence that it was necessary for the company to have in her because of her dishonest actions.

[66] Legal submissions were filed in support of the respondent's position.

Legal Considerations

[67] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

103A Test of justification

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[68] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against the actions **a fair and reasonable employer would have taken ...in all the circumstances ...at the time....**

[69] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[70] At paragraph 144 the Court said in respect of the case before it:

[71] “*The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company’s policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her*”.

[72] The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances.

[73] I also note the line of cases that support the proposition, that where an employer affords an employee a reasonable opportunity to explain his or her actions, but the employee refuses or fails to make an adequate explanation or fails to deny the allegation, then an employer may make a decision to dismiss that employee on the basis of the information that is available to it. (*Northern Club v Northern Hotel etc IUOW* [1989] 1 NZ ILR 764; *Northern Hotel etc IUOW v Maintenance Free World (NZ) Ltd* [1989] 3 NZILR 1; *Auckland Chemical Paint etc IUOW v Healtheries of NZ Ltd* [1990] 2 NZILR 701; *Pallet Supplies Co Ltd v Yates* [1998] 1 ERNZ 532.

Discussion and Findings

[74] In arriving at a determination in this matter I have had regard to the evidence, the submissions of the parties and to relevant case law

[75] Firstly I must find that Ms Berquist and her witness Ms Rankin were not credible witnesses. Much of Ms Berquist’s evidence simply did not make sense and there were contradictions between her evidence and that of her witness Ms Rankin.

[76] The respondent’s witnesses gave unembellished evidence that was consistent and supported by the documentary evidence available and it is the evidence of the respondent’s witnesses that I prefer where the evidence is disputed.

Findings

Disadvantage (Holiday Pay Complaint)

[77] I find the applicant did not raise a personal grievance within the statutory timeframe of 90 days in relation to the allegation that her employer reneged on an agreement reached with her to pay her holiday pay in a lump sum while she continued working. Nevertheless as both parties have addressed the issue in full I dealing with it to dispose of it and give certainty in the matter.

[78] I find there was no agreement between the parties in November 2004 that Ms Berquist would terminate her employment as a Loss Prevention Officer and commence working in a new role in the toy department. Had there been such an agreement it would not have involved a termination and restart – it would have involved an internal transfer.

[79] I also find that Ms Harris did not promise Ms Berquist in November 2004 that she could take her annual holiday pay as a lump sum whilst she continued employment in the toy department. I find that Ms Harris told Ms Berquist she would inquire about her request. She later advised Ms

Berquist that it was not possible for her to take holiday pay as a lump sum whilst she continued to work.

[80] That is the correct position. Section 27 of the Holidays Act 2003 provides that holiday pay must be paid when holidays are taken. There is a historical explanation for this rule – it is to ensure that employees are able to take *paid* leave for the purpose of rest.

[81] I find further that Ms Berquist was not forced to take annual leave prior to commencing her parental leave. Her decision to take her annual leave from 19 December was influenced by her entitlement to social welfare benefits. It suited Ms Berquist to take her leave at that time.

Ms Berquist's Dismissal

[82] I am satisfied that Ms Berquist was aware of the company's policies regarding the use of staff discount privileges and that she was aware of that an abuse of the staff discount privilege was treated by the company as serious misconduct a breach of which could lead to dismissal. I find too that Ms Berquist herself was aware and confirmed that the value of any loss to the Warehouse is irrelevant to the company's attitude to shrinkage.

[83] I find the respondent carried out a thorough and fair investigation as far as it was able. While it is clear that no investigation will be considered full and fair unless the worker is given the opportunity to provide an explanation – the requirement is that it is *the opportunity* that must be given. If an employee refuses to take up the opportunity provided then it is open to an employer to make a decision on disciplinary action on the basis of the information before it - providing the elements of the investigation to that point have been thorough and fair.

[84] As noted, I have found the respondent's investigation as far as it went was thorough and fair.

[85] I find too that on 30 June 2005 Ms Gibson gave a full explanation to Ms Berquist as to the specific allegations against her. The respondent also acted appropriately and fairly towards Ms Berquist when it insisted that she take time to obtain representation and gather information to assist her in providing an explanation to the allegations against her.

[86] I find thereafter that Ms Berquist obstructed every opportunity provided to her to allow her the opportunity to attend a meeting to provide her explanation. Every barrier put up by Ms Berquist was responded to by the Warehouse with reason and ever wider opportunities to assist Ms Berquist to attend a meeting where her side of the story could be put for consideration by Ms Gibson. Ms Gibson went beyond what was reasonably necessary to allow Ms Berquist to provide an explanation for her actions. In particular I reject the submission made by and on behalf of Ms Berquist that she was denied the opportunity to provide an explanation to allegations against. To the extent that Ms Berquist relies (in this regard) on her notified wish that the meeting take place in a neutral venue, I find Ms Gibson specifically put it to Ms Berquist in her correspondence of 6 July and 27 July that she could nominate a time, date and venue and venue for their meeting. Ms Berquist failed to take up the invitation or even to advise the employer of the difficulties she now says she experienced in arranging for a meeting at Harrington House. Further, the applicant's actual response to the employer's efforts to encourage her to nominate a suitable time, date and venue was to advise the employer that she would not attend meetings set by the employer (in the absence of any suitable arrangements nominated by herself) and to tell the employer that it should make the decision and advise her of the outcome.

[87] Ms Berquist was not denied an opportunity to meet with the employer to answer the allegations against her.

[88] When Ms Berquist failed to take up the opportunities offered to her to meet with Ms Gibson and twice suggested Ms Gibson just get on with her determination, Ms Gibson accepted that she would have to make the decision without input from Ms Berquist. She was entitled to rely on the information available to her as a result of an inquiry that was thorough and fair (in as far as the employer could take the inquiry without the co-operation of Ms Berquist). The explanation now offered by Ms Berquist was not available to Ms Gibson to consider at the time she was making her decision and it is not relevant to my determination in the matter. I must assess the actions of the employer in all the circumstances at the time the decision was made.

[89] Lastly I find the value of the discount obtained through misuse of the discount card is irrelevant. Ms Berquist was well placed – as a Loss Prevention Officer for the respondent - to know this and she accepted she knew the value of any loss detected by her in her role was irrelevant to the company's position on loss prevention. She was also aware of the terms of usage that applied to the staff discount card and that misuse of the discount card was viewed as serious misconduct justifying dismissal. She signed off on these points when she signed the company rules and the application for a card.

[90] As a Loss Prevention Officer a high level of trust was reposed in Ms Berquist. Her actions were destructive of that trust. I find the decision to dismiss Ms Berquist was what a fair and reasonable employer would have done in all the circumstances at the time.

Determination

[91] Ms Berquist has not suffered a disadvantage or lost remuneration as a result of a failure by the respondent to pay out her annual holiday pay in lump sum whilst allowing her to work in an alternative role. No remedies are available to her in respect of this claim.

[92] Ms Berquist was justifiably dismissed from her employment. She is not entitled to the remedies she seeks.

Costs

[93] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined