

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 193/08
5086639

BETWEEN NICK FAULKNER
 Applicant

AND THE MILL LIQUORSAVE
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Sally McRae, Advocate for Applicant
 Kylie Pascoe, Counsel for Respondent

Investigation Meeting: 23 September 2008 at Christchurch

Submissions received: 20 October 2008 from Applicant
 6 November 2008 from Respondent

Determination: 15 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nick Faulkner was employed by The Mill Liquorsave Limited at its Linwood store as a shop assistant/driver from 17 July 2006 until his dismissal on 12 March 2007 for breaches of company policy and procedure. I shall refer to the respondent as The Mill Linwood from hereon in the determination.

[2] Mr Faulkner says that he was unjustifiably dismissed from his employment on 12 March 2007 and that he suffered an unjustified disadvantage when he did not receive a written warning letter.

[3] The Mill Linwood say that it acted as a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The Issues

[4] The Authority is required to determine the following issues in this matter:

- Was Mr Faulkner given a first written warning in December 2006?
- Was the decision to dismiss Mr Faulkner on 12 March 2007 justifiable in all the circumstances?
- If it is found that Mr Faulkner was either unjustifiably dismissed or disadvantaged then what remedies should be awarded and are there issues of contribution?

Was Mr Faulkner given a first written warning in December 2006?

[5] Mr Faulkner's individual employment agreement comprised his written letter of appointment together with general terms and conditions. The general terms and conditions of employment contained company rules for employees and classified serious misconduct breaches which may result in summary dismissal and other breaches as misconduct. The disciplinary process set out in the terms and conditions of employment was expressed to be a guide only but it was also recognised that it applied to most cases.

[6] The four step disciplinary process commenced with an employee being asked by letter to attend a meeting to discuss an allegation. A meeting then followed when an explanation or denial was able to be made to the allegation by the employee. The manager then reviewed the notes of the meeting and possible outcomes that may flow from the explanations or denials given. The final step in the disciplinary process was a disciplinary action meeting.

[7] The disciplinary process set out in the general terms and conditions of employment provide if there is a decision to issue a warning then it will be formally and clearly issued and confirmed in writing. The employee is to be advised of any corrective action that is required and the consequence of further instances of misconduct or sub-standard job performance. There are three steps in the formal disciplinary process that will generally be followed. They are a written warning, a final written warning and a dismissal. It is noted in the process that where misconduct or substandard work performance is considered serious enough, a final written warning, or dismissal, may be issued without a written warning preceding.

[8] The Mill Linwood has inward and outward goods policies. It is the outward goods policy that requires consideration in this matter. Mr Faulkner said in his evidence at the Authority investigation meeting that he had not seen the outward goods policy although he accepted he was familiar with the outwards goods stamp that was placed on the tax invoice for deliveries and required signatures beside the following:

- Packed by;
- Invoiced;
- Checked by;
- Delivery signature.

[9] Mr Faulkner understood that there should be signatures in each of the boxes and the reasons for that. The *checked by* box should preferably be signed by someone other than the driver before the order is put into the van for delivery to the customer. This is a final check to make sure that the order and invoicing is correct before the goods are removed from the premises and the delivery is undertaken.

[10] On 7 December 2006 Mr Faulkner was given a letter by his then manager Kevin Glass advising of a disciplinary meeting on 13 December 2006 to discuss some areas of concern where he had failed to comply with company policy. The allegation was that Mr Faulkner had allowed stock to leave the premises before approved documentation procedures had been implemented.

[11] Mr Faulkner was advised that he could bring a support person or representative to the disciplinary meeting in December and that disciplinary action could be taken if an allegation of serious misconduct was established and his employment may be in jeopardy.

[12] The Mill Linwood was unable to identify where \$302.26 worth of stock had ended up following three deliveries which were checked off and correct on Mr Faulkner departing the store with the orders, but the third delivery was short. The minutes taken at the time of the disciplinary meeting confirm that Mr Faulkner was able to explain to the satisfaction of the Business Development Manager Southern Region, Ann Rogers, who was present at the disciplinary meeting with Mr Glass, the

outward goods procedure that The Mill Linwood had in place and the various requirements under that procedure.

[13] At the disciplinary meeting Mr Faulkner accepted that he had not undertaken the required checks when he delivered the stock and that had resulted in the shortfall in the third delivery order and presumably a delivery that had not been ordered earlier. Mr Faulkner offered to pay for the shortfall although, as I understand it, that offer was never taken up.

[14] The outcome of the disciplinary meeting was that Mr Faulkner was advised he would get a written warning for the breach which would remain on his record until June 2007. I find that the importance of following the procedures was emphasised at the disciplinary meeting and Mr Faulkner understood that continued breaches of the policy could lead to further disciplinary action being taken against him and ultimately his employment could be in jeopardy. Mr Faulkner made a comment at the end of the disciplinary meeting to the effect that he had learnt his lesson and would be unlikely to make a mistake again like that.

[15] Ms Rogers had a warning letter typed up headed *first written warning* to be given to Mr Faulkner. She sent the letter to Mr Glass for him to hand to Mr Faulkner. The Mill Linwood quite properly in my view, have accepted that Mr Glass never actually gave the written warning letter to Mr Faulkner. Mr Glass left the organisation shortly after the disciplinary meeting and Ms Rogers was unaware that the written warning letter had not been given to Mr Faulkner until after his dismissal when she was advised of this by Ms McRae.

[16] Mr Faulkner accepted in his evidence at the Authority investigation meeting that he expected a warning to be given to him at the end of the disciplinary meeting and if he had been given a warning he would not have challenged that.

[17] I have considered whether in the circumstances and in light of the disciplinary procedure which formed part of Mr Faulkner's terms and conditions of employment he was in fact given a first written warning.

[18] Whilst it is unfortunate given Ms Rogers' conscientious approach to the matter that Mr Glass did not hand Mr Faulkner the letter of written warning, I cannot find in the circumstances Mr Faulkner was in receipt of the first written warning as contemplated in his terms and conditions of employment as a disciplinary outcome. It

was however made clear to him that following procedure was very important and that there could be consequences if he did not adhere to proper procedure in the future.

[19] A written warning letter would have made it very clear to Mr Faulkner what was expected of him in the future and that he needed to take more care with following the procedures.

Was the decision to dismiss Mr Faulkner on 12 March 2007 justifiable in all the circumstances?

The matters leading to dismissal

[20] In January 2007 a new store manager, Raymond Willemsen commenced at The Mill Linwood replacing Mr Glass as manager. Mr Willemsen said that prior to commencing as the manager he was aware of quite a few problems the Linwood store was experiencing with respect to the shrink percentage in terms of stock that was not accounted for. It was considered excessively high and this was of concern to The Mill Liquorsave Limited. I accept Mr Willemsen's evidence that in light of that he emphasised with staff the importance of following the inwards and outwards goods policy. Both Mr Faulkner and Mr Willemsen recall a day in or about February 2007 when Mr Willemsen accompanied Mr Faulkner as he went about his deliveries. Mr Willemsen said he was satisfied that Mr Faulkner was aware of and observed the policy during that period.

5 March 2007 delivery which led to dismissal

[21] On 5 March 2007 Mr Willemsen received a complaint from a customer who had had a case of Jim Beam (4 x 6) delivered that had not been ordered. Mr Willemsen made some inquiries and ascertained that the person responsible for the delivery was Mr Faulkner. Mr Willemsen spoke to Ms Rogers on 5 March about this and she advised him to talk to Mr Faulkner to find out how this had occurred.

[22] Mr Willemsen talked to Mr Faulkner on the same day as the delivery and showed him the relevant documentation which was related to the delivery. Mr Faulkner could not recall in his discussion with Mr Willemsen if he had checked the goods delivery. Mr Faulkner may also during that discussion with Mr Willemsen have indicated that he was not sure that he did the delivery. Either immediately after that discussion and certainly the same day Mr Faulkner was handed a letter which

advised him that there was to be a formal meeting on 8 March 2007 to discuss the concern of allowing the case of Jim Beam to leave the premises without the correct procedure being followed.

[23] Mr Faulkner was advised in the letter to have a support person or representative present but he chose not to because he did not think the issue was serious. I do not find that any responsibility for that can rest with The Mill Linwood. The letter given to Mr Faulkner did advise him that disciplinary action may be taken and that his employment could be in jeopardy if serious misconduct was established. Ms Rogers who attended the disciplinary meeting on 8 March 2007 with Mr Willemsen also advised Mr Faulkner that if he was not happy with the way the meeting was going and wanted to get a support person then an adjournment would be granted.

The disciplinary meeting of 8 March 2007

[24] Mr Faulkner was asked at the meeting on 8 March whether he did the particular delivery on 5 March 2007. The minutes taken at the meeting by Ms Rogers confirm that Mr Faulkner responded *not sure, probably*. Mr Faulkner said in his evidence at the investigation meeting that it could only have been him or one other person who did the delivery that day. He did not at any other point in the disciplinary meeting, according to the minutes taken, answer the question in the way that suggested that he was not the driver.

[25] Having heard the evidence I am satisfied that there was a reasonable basis for a conclusion by Ms Rogers and Mr Willemsen that it was Mr Faulkner who made the delivery on 5 March 2007. The customer described Mr Faulkner to another staff member and the description was a close match to Mr Faulkner. Mr Willemsen also knew the other driver was undertaking a different supply that day and that the only other two people who did deliveries were Mr Willemsen himself and another employee Adam. Mr Willemsen was obviously able to confirm that he had not undertaken the delivery and he knew Adam was on a forklift that day.

[26] I have also placed weight on the fact that on the day of the delivery Mr Willemsen raised the matter with Mr Faulkner. It would be somewhat surprising if Mr Faulkner could not recall absolutely whether or not he had actually undertaken

the delivery and if he had not, then I would have expected him to have firmly advised Mr Willemsen of that when asked.

[27] Although I have reached the conclusion that Mr Faulkner was the driver when the delivery was made, a fair and reasonable employer would have covered that off with Mr Faulkner during the meeting itself before hearing his explanation. Whether or not Mr Faulkner was the driver should have been established right at the start of the meeting, particularly given Mr Faulkner's response *not sure, probably*.

What was Mr Faulkner's explanation to the conduct?

[28] The conduct complained of was that Mr Faulkner had not had the order checked off against the invoice in accordance with the outward goods policy before he undertook the delivery and the goods were removed from the premises. Had the order been checked off then the case of Jim Beam would probably not have left the premises. On this occasion however the customer was honest that they had received an additional case and there was no loss to The Mill Linwood caused as a result.

[29] Mr Faulkner put forward by way of explanation that his job does get stressful and when he is checking off orders he sometimes misses a few products. He was asked by Mr Willemsen during the disciplinary meeting whether the job was too hard or stressful for him and he answered that it was not but that some days are really busy.

[30] Ms Rogers referred to the previous disciplinary meeting in December 2006 and the discussion about the importance of the outwards goods policy and checking off invoices. Ms Rogers checked with Mr Faulkner whether he was saying that he was not checking orders off. Mr Faulkner confirmed that he was but he said it was easy to skim over and accidentally miss something.

[31] Mr Faulkner was unable to explain why there was no signature beside the *checked by* box which should have been signed before the goods left the premises. The person who had packed the order had not signed beside *packed by*. Mr Faulkner did agree when asked by Mr Willemsen that Mr Willemsen had recently advised him to have orders checked off. Mr Faulkner accepted during the meeting that he did not have a good reason why he had not checked the order off and probably said it was *a quick drop*.

[32] The meeting was adjourned and although there was to have been a further meeting the following day Mr Faulkner was unwell. Mr Willemsen and Ms Rogers made a joint decision to dismiss Mr Faulkner taking into account the significant issues within the shop with respect to stock loss and the importance of following the policy having already been emphasised to Mr Faulkner. There was also a concern that Mr Faulkner's attitude during the meeting gave them no reassurance that he would comply with the policy in the future. His attitude was described as *blasé* and it was felt that he had not shown a lack of remorse. This may, objectively assessed, have been because there was no real consequence to Mr Faulkner following the earlier disciplinary meeting. Ms Rogers' contrasted Mr Faulkner's attitude with that shown at the December meeting where it was felt that he showed remorse at the situation that had occurred. Alternatives to dismissal were considered by Ms Rogers and Mr Willemsen but it was felt Mr Faulkner could not be trusted in the future to undertake his position properly and that they had already invested a lot of time in emphasising the importance of the policy. They did not consider that it would be possible to have a buddy type situation whereby Mr Faulkner was observed in his day to day work.

[33] Mr Faulkner was invited to a meeting on 12 March 2007 and his employment was terminated from that time and took effect immediately.

Reason for dismissal

[34] The reason for the decision to dismiss Mr Faulkner was contained in a letter dated 13 March 2007. One of the reasons for the dismissal was that reliance was placed on the written warning that Mr Faulkner was said to have received following the disciplinary meeting on 13 December 2006. The other reasons for dismissal were breaches of the company rules, specifically a lack of application to an assigned task and allowing stock to leave the premises without the correct documentation procedures being followed.

Conclusion with respect to justification for the dismissal

[35] Section 103A of the Employment Relations Act 2000 sets out the test for justification which the Authority is required to consider objectively. Objective may be likened to *dispassionate* or *disinterested* as opposed to how the affected employee or employer may have considered justification. It is the employer's conduct that is the

focus of the objective inquiry. It is necessary to consider the actions of the employer in terms of the substantive dismissal and how the employer acted in the process leading to that outcome. *X v. Auckland District Health Board* [2007] 1 ERNZ 66.

[36] The Authority must be satisfied that what the employer did and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[37] I considered whether a fair and reasonable employer would have concluded that Mr Faulkner's omission in this case to have the goods checked off against the invoice amounted to serious misconduct. Allowing any stock to leave the premises before the approved documentation procedures have been implemented is certainly classified as serious misconduct but the conduct itself has to be considered.

[38] Considered objectively it could not be concluded that Mr Faulkner had deliberately with questionable motive removed goods from the premises before completing the approved documentation. Rather he had been careless and his performance was below the standard required. The Mill Linwood was able due to the honesty of the customer to identify where the case of Jim Beam was and there was no loss of stock therefore or financial implication as a result of Mr Faulkner's poor performance.

[39] In reaching the decision to dismiss and considering the seriousness of the conduct The Mill Linwood relied on Mr Faulkner having received a written warning following the disciplinary meeting held on 13 December 2006 and the dissatisfaction expressed at Mr Faulkner's conduct during that meeting. Mr Faulkner did not receive a written warning following the disciplinary meeting although Ms Rogers and Mr Willemsen I accept did not know that until after the dismissal had taken place. I find that it would have been part of a fair process and certainly good practice to have provided Mr Faulkner during the 8 March meeting with a copy of the first written warning and to have talked through that with him. Had that been done then Mr Faulkner would have had an opportunity to say that he had not been given the written warning.

[40] I accept that The Mill Linwood had grave concerns about loss of stock and that they needed reassurance that orders would be checked off before they left the store in future. I do not find however evaluated against an objective standard that a

fair and reasonable employer would have concluded that there was serious misconduct on the part of Mr Faulkner on 5 March 2007.

The decision to dismiss

[41] I have found that assessed on an objective basis a fair and reasonable employer would not have concluded that there was serious misconduct on the part of Mr Faulkner and therefore the decision to dismiss him was not justified. A fair and reasonable employer would not have dismissed Mr Faulkner in all the circumstances but would have given him a written warning which would have sent a clear signal to Mr Faulkner about the seriousness of the matter, the standard of performance required and the consequences if policies and procedures were not followed in the future.

[42] I find that Mr Faulkner has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies. I do not intend to make any separate award in terms of the claim for unjustified action causing disadvantage as I consider that is a matter that falls properly to be considered as part of the justification for the dismissal.

Remedies

Contributory conduct

[43] The Authority is required to consider under s.124 of the Employment Relations Act 2000 the extent if any to which Mr Faulkner contributed to the situation that gave rise to his personal grievance. If it is found that Mr Faulkner did contribute to that situation then the remedies which otherwise would have been awarded should be reduced.

[44] I find that Mr Faulkner did not act with appropriate care on 5 March 2007 and check the order off before it was delivered. Whilst accepting that the person packing the order had also not signed, the final check is the check at which any earlier mistakes could be picked up. As to whether he knew what to do I find that Mr Faulkner was well aware that following procedures was important to The Mill Linwood and that he had been advised several times about this. Mr Glass had advised Mr Faulkner in his performance assessment on 16 October 2006 that checking procedures must be adhered to as it is company policy and failure to follow may result in disciplinary procedures.

[45] In November 2006 whilst investigating another matter, Bevan Seddon, who is employed by The Mill Liquorsave Limited and holds the position of National Human Resources/Operations Director, was advised by Mr Faulkner that Mr Faulkner understood what to do in terms of company policy and procedures and that the process had been explained to him by Mr Glass. The importance of the procedures was again emphasised at the disciplinary meeting in December 2006.

[46] I find that Mr Faulkner did contribute to the situation that gave rise to his personal grievance when considering his knowledge of the policy and the fact that the importance of complying with it had been brought to his attention on earlier occasions. I am of the view that there should be a reduction to any remedies that I should go on to award of 30%.

Lost wages

[47] The applicant was without employment for a period of ten weeks from 10 March 2007 and as I understand the evidence was not paid for at least one, and possibly two days before his employment was terminated. I accept that Mr Faulkner tried to mitigate his lost wages and he gave evidence of applying for between 20-25 jobs during the period he was unemployed. Ms McRae has assessed in her submissions ten weeks lost wages at \$4,896.00 but submits that this will need to be verified.

[48] In those circumstances I shall leave this for the parties to calculate and in doing so they should of course take into account the contribution assessed at 30%.

[49] I reserve leave for either party to return to the Authority if that is required.

[50] Mr Faulkner is also required to receive payment for any days prior to termination of his employment that he has not been paid for. I am not satisfied reflecting on the day of sickness and the reasons for the failure to pay on that day that it would have been reasonable for proof to have been required from Mr Faulkner for this in terms of the general terms and conditions of employment.

Compensation

[51] Mr Faulkner claims the sum of \$15,000 for hurt and humiliation and loss of dignity. I heard from Mr Faulkner's mother, Jill Faulkner, about the humiliation and

hurt that Mr Faulkner suffered as a result of his employment being terminated and about the financial difficulties that that termination caused. I also heard from Mr Faulkner in terms of the difficulties that the termination caused. I am not satisfied from the evidence that an award of the sum claimed is justified. I am of the view that a suitable award in all the circumstances is \$5,000.

[52] Applying the assessment I have made for contribution, I order The Mill Liquorsave Limited to pay to Nick Faulkner the sum of \$3500 without deduction, being compensation for hurt and humiliation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Penalty

[53] For completeness as Ms McRae's submission refer to a penalty claim I am not of the view that a penalty should be awarded.

Costs

[54] I reserve the issue of costs. I would encourage the parties to reach agreement with respect to costs. In the event that agreement is not reached the applicant has until 30 January 2009 to lodge and serve submissions as to costs and the respondent has until 13 February 2009 to lodge and serve submissions as to costs in reply.

Helen Doyle
Member of the Employment Relations Authority