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Fisher v The Warehouse Limited (Auckland) [2012] NZERA 896; [2012] NZERA Auckland 321 (12 September 2012)

Last Updated: 2 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2012] NZERA Auckland 321
5356442

BETWEEN ANNETTE FISHER Applicant

A N D THE WAREHOUSE LIMITED Respondent

Member of Authority: James Crichton

Representatives: Bill Harris, Advocate for Applicant

Penny Swarbrick, Counsel for Respondent

Investigation meeting: 27 July 2012 at Hamilton

Date of Determination: 12 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Fisher) alleges that she was unjustifiably dismissed from her employment by the respondent (The Warehouse). The Warehouse resists the application and maintains that the dismissal was a justified one.

[2] At the time of her dismissal, Ms Fisher was a Product Services Team Member employed by The Warehouse at its Hamilton store. She had been employed by The Warehouse since 1992.

[3] The events leading up to Ms Fisher's dismissal concerned the alleged abuse of
The Warehouse's employee discount system.

[4] On 30 March 2011, Ms Fisher asked David Farrell, the Assistant Store Manager, if she could apply her staff discount to a hire purchase transaction she wanted to enter into on behalf of her daughter. The Warehouse allows staff to apply their discount if they are purchasing gifts for family members.

[5] Ms Fisher's evidence is that Mr Farrell gave her permission to proceed. The Warehouse says that Mr Farrell was uncertain of the position, undertook to make inquiries, and asked Ms Fisher to check back with him later.

[6] As a matter of fact, Ms Fisher made no further inquiries with Mr Farrell and the following day she completed the hire purchase application on behalf of her daughter. Ms Fisher used her discount card to purchase the items and she paid the deposit. Later that same day, Ms Fisher's daughter executed the hire purchase agreement for the outstanding balance.

[7] The transaction came to light through The Warehouse's normal management auditing process. A disciplinary process was commenced on 2 May 2011. A first disciplinary meeting was held on 5 May at which Ms Fisher had the support of her union.

[8] During the disciplinary process, closed circuit television footage was viewed of the subject transaction. It was apparent

from that footage that Ms Fisher had served herself, a further breach of The Warehouse's policy. Given that the purchase was for a family member, the effect of the actions of Ms Fisher was in breach of The Warehouse's policies.

[9] Those facts resulted in The Warehouse adjourning its disciplinary meeting so that the fresh allegation could be put to Ms Fisher and a subsequent meeting took place on 13 May 2011 where Ms Fisher was again represented by her union.

[10] The employment was terminated without notice as a consequence of The Warehouse's process and was confirmed in writing on 16 May 2011.

Issues

[11] It will be convenient if the Authority reviews the following questions: (a) What was The Warehouse's relevant policy on the issue;

(b) Was the disciplinary investigation fair and just; and

(c) Was the decision to dismiss available to The Warehouse?

What was the relevant policy of The Warehouse?

[12] The Authority heard that The Warehouse took very clear steps with its staff to enunciate its policies, especially around issues relating to staff discounts.

[13] The Authority is satisfied that Ms Fisher was appropriately trained in the relevant policies of The Warehouse and that, as a matter of fact, Ms Fisher understood the thrust of those policies. She told the Authority that she knew it was wrong to use the staff discount for the benefit of family members unless it was a gift and that was the conclusion that The Warehouse reached as well during the disciplinary inquiry, that is, The Warehouse concluded that Ms Fisher understood the burden of The Warehouse's policy on the issue.

Was The Warehouse's procedure fair and just?

[14] The Warehouse adopted a perfectly standard disciplinary investigation process meeting with Ms Fisher and her union on two occasions to discuss the allegations against her. It is clear that on the first occasion, the meeting of 5 May 2011, the focus of The Warehouse investigation was initially on the question of whether Mr Farrell either had or had not given permission for the transaction. Although she did not indicate this at the time, Ms Fisher maintained to the Authority that she had had three conversations with Mr Farrell in relation to the subject matter. The first was around start time between 8 and 8.30am on 30 March 2011 when she says she asked the question and failed to get a straight answer, then she says she checked again around lunchtime, again without result, and finally saw Mr Farrell on the runway outside the administrative offices at around 4pm when Ms Fisher claims she got Mr Farrell's assent to her proposal.

[15] It is unhelpful that Ms Fisher remembered things differently at the time The Warehouse undertook its investigation. Two examples of this suffice. Her notes of the exchanges with Mr Farrell, made available to The Warehouse during the disciplinary investigation, refer to only two contacts with Mr Farrell not three, and her advices to The Warehouse at the first disciplinary meeting proceeded on the mistaken basis that all of the significant events happened on 30 March rather than on 30 and

31 March. At the 5 May disciplinary meeting, Ms Fisher contended that she had both received Mr Farrell's assent to her proposal and initiated the transaction on 30 March whereas the transaction was not initiated in fact, until 31 March. She corrected this

error in the second disciplinary meeting on 13 May 2011. She told the Authority that she was confused "*and flustered*" at the first meeting.

[16] In any event, dealing first with the question of whether she was given permission to undertake the transaction or not, her evidence in summary is that she spoke to Mr Farrell three times on the point and, on the third occasion late in the afternoon of 30 March 2011, he gave her permission to proceed, which she did the following day.

[17] But that is not Mr Farrell's evidence. First of all, he absolutely denies talking to Ms Fisher more than once and second, he denies ever giving her consent to do what she subsequently did. Indeed, logically, if Mr Farrell's recollection of events is to be preferred, no one is suggesting that he gave permission for Ms Fisher to proceed in the first discussion, the one first thing in the morning of 30 March, which all the evidence suggests actually took place.

[18] Indeed, that first discussion between Mr Farrell and Ms Fisher had a witness of sorts, Ms Carol Whitehira. Ms Whitehira is a Checkout Supervisor for The Warehouse Hamilton Branch, and was Ms Fisher's supervisor.

[19] Ms Whitehira had overheard the discussion between Ms Fisher and Mr Farrell on the morning of 30 March 2011 and

could confirm to the Authority what both Mr Farrell and Ms Fisher said about that exchange. Ms Whitehira also offered some observations of her own. She said she was surprised that Mr Farrell had not given Ms Fisher an answer straightaway and it was clear from her evidence to the Authority that the answer that she expected Mr Farrell to give was a negative one. Ms Whitehira confirmed to the Authority that she had been spoken to by The Warehouse during the investigation so the evidence that she had of that discussion was made available to the employer at the time.

[20] Ms Whitehira is, of course, quite correct that it was somewhat surprising that Mr Farrell would want to think about what Ms Fisher was proposing. On the face of it, what she was proposing could not possibly comply with The Warehouse's policies. She herself accepted to the Authority that the transaction she was undertaking was not exclusively a gift for her daughter and thus it must have fallen outside the terms of The Warehouse's policy.

[21] In any event, the question for the Authority is not what Mr Farrell should have said, but rather what he did say. What he did say was that he never responded to Ms Fisher's request and that there was only ever one discussion and that discussion took place first thing in the morning of 30 March 2011. Furthermore, that discussion did not result, by common consent, in any definitive answer being given by Mr Farrell to Ms Fisher.

[22] On balance, the Authority prefers Mr Farrell's recollection of events to Ms Fisher's, as did The Warehouse when it conducted its investigation. The evidence that Mr Farrell gave the Authority was consistent with the evidence he had previously given The Warehouse. Although Ms Fisher staunchly maintained that she had been given permission by Mr Farrell to undertake the transaction that she sought, her evidence on other points was not consistent as between the evidence she gave to The Warehouse and the evidence that she gave to the Authority. The Authority has already highlighted two examples of that inconsistency.

[23] What is more, the ultimate conclusion reached by The Warehouse's Store Manager, Mr Te Haua Cooper, is, in the Authority's view, difficult to quarrel with. In talking about his conclusions in the matter, Mr Cooper refers to Ms Fisher using her own staff discount for her daughter and then goes on to note that when she did use it:

... she used it for the whole transaction and not for the part (\$600 worth) that she said was a gift for her daughter. I am still astounded that she did this. She cannot possibly have thought that the discount applied only to the gift component of the transaction. Nor could she reasonably have believed that the ASM [the Assistant Store Manager, Mr Farrell] would authorise a team discount on the full purchase for the benefit of another person who was not entitled to the discount.

[24] The point about this analysis is that, even if Mr Farrell had given his consent to the transaction, which of course is denied, Ms Fisher was a senior member of The Warehouse's staff who had been employed for a significant number of years and who ought to have known that she could not use a staff discount for the whole transaction when only part of it was a gift.

[25] Having found as a fact that Mr Farrell did not give the permission that Ms Fisher alleges, her whole case tends to fall away because the central building block on which the whole edifice is created is the contention that Mr Farrell did give that permission. The Authority prefers Mr Farrell's recollection of events and agrees with The Warehouse's contention that it was inherently unlikely that Mr Farrell,

himself an experienced retail manager, would have given permission for something that was, on its face, outside the terms of The Warehouse's own policy. It is also important to be clear that the Authority must judge The Warehouse's behaviour not on the evidence the Authority heard but on the evidence that The Warehouse itself heard. There are differences, particularly generated by Ms Fisher's confusing and differing explanations about when particular events are supposed to have happened.

[26] The second issue on which Ms Fisher was asked to explain herself related to the use of what is known in the retail industry as a "raincheck". The Warehouse policy is that a customer may obtain a raincheck for an item that a particular store does not have in stock and the effect of the customer being given the raincheck is to preserve the price (typically a discounted price) of that item pending that store obtaining fresh supplies of the item in question. What became apparent to The Warehouse as a consequence of its disciplinary investigation into Ms Fisher's behaviour was that, in addition to the transaction that has already been commented on by the Authority, she had used the raincheck procedure to effectively hold the price of the goods that she wanted to facilitate purchase of by her daughter notwithstanding that those items were held in the store. It follows, according to The Warehouse, aside entirely from the propriety of using the raincheck procedure for a family member, it was an illicit use of the process because the items in question were not out of stock. Ms Fisher told Mr Cooper during the disciplinary investigation that her "*intention in doing the raincheck had been to get the furniture at a reduced price*". This was because Ms Fisher believed that the discounted price might not be available after the day that she did the raincheck. In fact she was mistaken about that; the discounted price was maintained so there was no advantage to her in fact in what she did.

[27] Ms Fisher argued that the raincheck was no more than a quote and that because there was no till transaction involved, there was nothing improper in her doing what she did.

[28] Ms Fisher also alleged that other staff at The Warehouse used the raincheck system for exactly the same purposes that she had and they were not disciplined. She claims to have given evidence of that contention at the second disciplinary

meeting with The Warehouse but that claim is hotly contested by The Warehouse which says no such evidence was provided. It was provided to the Authority in the form of a schedule which appears to show a succession of raincheck transactions made by staff

ostensibly for their own benefit. For the avoidance of doubt, the Authority accepts that Ms Fisher did not provide the information to The Warehouse during the disciplinary process and the Authority's notes record Ms Fisher as appearing to concede that point under cross-examination.

[29] It is plain on the facts before the Authority that what Ms Fisher did in respect of the raincheck was also a breach of The Warehouse's policies. In effect, she was seeking to obtain a benefit (a lower price) for a family member who was not entitled to that benefit. Furthermore, the customer (in this case, the daughter) was not physically present when the raincheck was undertaken which was a further breach of the policy.

Was the decision to dismiss available to The Warehouse?

[30] It is plain on the evidence before the Authority that if the only issue The Warehouse confronted was a breach of the raincheck policy, dismissal probably would not have been contemplated. The Warehouse accepted (properly in the Authority's view) that there was more room for consideration of penalty in relation to this breach than in relation to the other and more fundamental breach, relating to the use of the staff discount for the whole of the transaction. This view of matters (relating to the raincheck issue) would have been even more apparent if Ms Fisher had provided The Warehouse with the evidence of other staff misusing the raincheck policy in the way that she did during the investigation meeting. Clearly, one of the things that she might have done during the disciplinary meeting was to argue that the raincheck breach was a commonplace amongst the staff and that if she was to be disciplined for it, then so should a number of others. In fact, the Authority is satisfied that that information was not available to The Warehouse at the time the disciplinary investigation was undertaken and so the matter has to be left there.

[31] But the short point is that The Warehouse concluded that Ms Fisher's daughter received a discount for a purchase from The Warehouse store to which she was not entitled and that discount had been obtained by Ms Fisher's daughter as a consequence of Ms Fisher's own action in applying her staff discount to the whole purchase transaction in circumstances where she knew or ought to have known that that application was outside policy and therefore wrong. As Mr Cooper noted in his evidence to the Authority, not only did Ms Fisher's daughter get a benefit to which she was not entitled, but she got that benefit as a direct consequence of Ms Fisher's

own actions, actions which had commenced with undertaking a raincheck on behalf of her daughter when the daughter was not physically present (both breaches of the rules), and then going on to enter into the transaction with the staff discount applied to it.

[32] In the Authority's opinion, The Warehouse was entitled to conclude that it had lost trust and confidence in Ms Fisher as a senior member of its staff and that the breaches, taken cumulatively, were able to be viewed as serious misconduct for which summary dismissal was the appropriate sanction.

Determination

[33] In all the circumstances, the Authority is not persuaded that Ms Fisher has any personal grievance. The Authority concludes that a fair and reasonable employer could have concluded that Ms Fisher was guilty of serious misconduct in the particular circumstances of this case, and the Authority is not persuaded that there are any grounds for Ms Fisher to complain, either in terms of the process or in terms of the substantive justification for the decision to dismiss: s 103A [Employment Relations Act, 2000](#) applied.

Costs

[34] Costs are reserved.

James Crichton

Member of the Employment Relations Authority