

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 253/10
5054501

BETWEEN SALLY-KAY NOELINE
 FRENCH
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mark Ryan for Applicant
 Penny Swarbrick and Karen Jones for Respondent

Investigation Meeting: 20 August 2009

Submissions received: 19 October 2009 from Applicant
 28 October 2009 from Respondent

Determination: 25 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms French was employed by the Warehouse in August 2005 in a customer services role. Her employment at the Downtown store lasted until October 2006 when she was dismissed for serious misconduct (allegedly breaching point of sale procedures and Company House Rules.)

[2] Ms French claims that her dismissal was unjustified. She also alleges that she has suffered disadvantage grievances as a result of :

- i. being suspended without consultation while allegations against her were investigated;

- ii. the respondent's failure to address her formal complaint that she was being bullied, and
- iii. a breach of confidentiality in that details of allegations against her were improperly disclosed to other staff members.

[3] Ms French also says her suspension amounted to a breach of contract since it was not done in compliance with the relevant procedure in her collective agreement. (Clause "A" of the employment agreement provides that the company may, after consultation with the affected team member, suspend the team member on ordinary pay while investigating or deciding an outcome of a disciplinary matter.)

Issues

[4] The respondent denies all of the allegations made by Ms French. The issues for determination are therefore: whether her suspension was fair and done in accordance with her employment agreement, whether her bullying complaint was properly addressed, whether her privacy was breached and whether the dismissal was justified.

(i) The suspension

[5] In late 2006, as part of routine procedures, a Senior Team Leader was reviewing mode of sale and price change reports when he identified that the number of price overrides was outside the norm for the branch. When this was reported to the Store Manager at the time (Rodney Jurgens) he decided to investigate further. With help from the Assistant Store Manager, Paul Young, and the Loss Prevention Manager, he subjected data from a sample week (14-21 September 2006) to more detailed scrutiny.

[6] This revealed that four staff members were involved in what the respondent calls "*irregular transactions*" amounting to potential breaches of the company house rules.

[7] One of these individuals had been involved in all the transactions at issue. This was Ms French. She appeared to have:

- i. allowed product to leave the store without scanning it (having manually entered the sales instead);
- ii. rung on sales for herself;
- iii. used another staff member's log-on;
- iv. divulged her own log-on password to another team member, and
- v. overridden prices without authorisation.

[8] Mr Jurgens told me that because of the nature and seriousness of the allegations and the fact that Ms French had access to stock and cash it was likely that the respondent would suspend her while an investigation and disciplinary process was undertaken. On 27 September (using a company template) Mr Jurgens and Mr Young prepared a letter for each of the four staff members involved. Each was personal to the intended recipient, setting out the specific allegations against the individual concerned, attaching relevant documentation and advising that they were required to attend a formal disciplinary meeting. Because some of the allegations were interconnected, letters to other staff members included references to Ms French.

[9] During the course of the day Mr Jurgens and Mr Young called three of the four individuals in turn to a short meeting at which each received a letter and, after a brief discussion, was suspended.

[10] It was planned that the meeting with Ms French be the fourth. Before she had been called in, however, her co-workers had already talked to her about the letters they had been given and the references there to Ms French. At approximately 3.00pm she approached Mr Young and Mr Jurgens on the shop floor saying that she had heard she was being suspended and asking what was going on. Mr Young did not wish to talk to her in a public place and at his request she joined him in Mr Jurgens's office.

At this point, Mr Jurgens left to attend to another commitment, leaving Mr Young to conduct the meeting alone.

[11] It is a matter of dispute whether Mr Young offered Ms French the opportunity to call in a support person. He says he did, and is sure he could not have forgotten, for two reasons. The first is the fact that the need to do so in such circumstances had been repeatedly emphasised to the respondent's managers. The other reason is that this was the fourth such meeting that day, and he was following the same procedure as with the others.

[12] Ms French emphatically denies that she was offered a support person at all. Given that the Authority investigation meeting took place over three years after the events in question, it is likely that both witnesses might have some difficulty in recall. On balance I find it more likely that Mr Young did offer Ms French the opportunity to have a support person, for the reasons recorded above.

[13] Ms French began by expressing her concern that she understood that the store's Team Leaders (of which her partner was one) had been briefed early that morning on what was about to happen to her and the other three staff members.

[14] Mr Young was taken aback by this. To "*get back on track*" as he puts it he says he showed her the letter and started taking her through it. He pointed out to her (as the letter did) that a meeting to discuss the allegations and her responses would be held at a later time. He says he had just started talking about the reasons why the company thought she should be suspended, when Ms French (who was looking through the attachments to the letter) interrupted with several concerns. She said that she did not understand the data entry input printouts attached to the letter, that docketts which were said to be attached were missing, and that the time proposed for the disciplinary meeting (the following afternoon) was not suitable as she had a doctor's appointment which would take all day.

[15] There was a brief discussion about how long the doctor's appointment would take and about what other times might be appropriate for a meeting. In response to a suggestion from Mr Young that the meeting be deferred until 29 September, Ms French declined, saying she "*wanted to get it all over and done with*" (to use her

words.) Mr Young therefore set the meeting for 8.00 am the following day (before her doctor's appointment at 10.00.)

[16] Mr Young then went to get copies of the missing dockets. On his return Ms French asked him whether she had to leave the store immediately. He responded that it would probably be best, but if she wanted to wait for her partner she could. The meeting then ended.

[17] The disciplinary meeting set by Mr Young for 8.00am on 28 September did not go ahead at that time. Upon hearing what had been arranged, Mr Jurgens rescheduled it to 9.00 am on 29 September. This was further postponed (to 3 October) when on the afternoon of 28 September the applicant's partner called to ask that it be rescheduled. In submissions for the respondent it was noted that "*the applicant was not disadvantaged in her employment due to the suspension. The suspension was initially for less than 1 hour and was subsequently extended by agreement.*"

[18] Ms French maintains that she was not given any opportunity to comment on the proposed suspension and refers to the final paragraph of the letter (which notified her that she was suspended) as support for this contention.

Determination

[19] I accept Mr Young's evidence that Ms French interrupted him when he was putting to her the company's reasons for wanting to suspend her. I acknowledge that he was trying to conduct the meeting fairly. However it is unsurprising that by the time it was Ms French's turn to meet with him she had become anxious and upset. Having briefed the store's team leaders at the start of the day, it then took until mid afternoon for Mr Jurgens and Mr Young to meet with three of the four staff concerned. Ms French had by then heard what was going on and formed a belief that she was to be suspended, like her co-workers. The fact that her meeting began with the presentation of a letter which said that she had been suspended served only to confirm her preconceptions of what was happening.

[20] Neither Mr Young nor Mr Jurgens offered any explanation for the delay that day. I accept that that the overall process for the day was less than adequate and that

the respondent must take responsibility for this. I also accept that since Mr Young began by reading out the letter (which contained an unequivocal statement that Ms French was suspended) she was indeed suspended without proper consultation.

[21] However the allegations were sufficiently serious that suspension was entirely appropriate. As well, the body of material presented to back up those allegations was such that it was reasonable for the applicant to be relieved of her duties while she considered it. Any disadvantage to Ms French was therefore minor.

(ii) Bullying complaint.

[22] On 28 September Ms French wrote to her employer raising several concerns. These included issues relating to her suspension and to the alleged breaches of confidentiality. She also asserted that she and the other workers who had been suspended had been bullied by members of the store's management team.

[23] The first bullying allegation related to the meeting of 27 September. Ms French stated that she felt pressured to explain why she needed a full day off to see her doctor, and in the process divulged medical information that she would have preferred to keep private. Mr Young says that Ms French volunteered this information without being asked. He says he had no wish to know anything other than how long the doctor's appointment could be expected to take and whether it might be better to schedule the meeting for the Friday. In her evidence to the Authority Ms French agreed that she was not directly asked about the purpose of her visit to the doctor. I accept that stress and a sense of pressure may have caused her to blurt out the information but not that Mr Young expressly requested this information.

[24] The second allegation was that a named female member of the management team had on one occasion taken food belonging to Ms French from the lunch room and at other times verbally abused her. However Ms French did not say what form the abuse took or when it occurred.

[25] Finally, the letter alleged that the Senior Team Leader (a male staff member) had once "*physically shoved her aside.*" Again no details were provided as to when or where this occurred. This Senior Team Leader was the person who had first identified

the conduct which had led to the disciplinary proceedings. Ms French alleged that he had admitted to her that he had it in for some of the staff, and stated her belief that he had instigated the disciplinary proceedings because he was prejudiced towards them.

[26] Mr Young replied to these concerns in a letter dated 6 October saying that her allegations would be investigated by the company but (because they appeared to be unrelated) in a process separate from the allegations against her. The respondent now asserts that Mr Young's response was reasonable. It says she was not at risk of being subjected to adverse behaviour while she was away and (in any event) it was not possible to address the grievance until she was back at work. As things turned out, she was dismissed, and no investigation was conducted.

[27] The respondent also notes that Ms French has never provided evidence of what disadvantage she suffered as a result of the way the respondent handled her complaints.

Determination

[28] An employee complaint should be investigated whether or not the employment is to continue and a failure to follow up on a complaint can amount to an unjustified action. However, the letter of 28 September (the sum total of the evidence about the applicant's concerns) contains very few specifics about the conduct of the two team leaders concerned. Without knowing more, it is impossible to determine whether the conduct alleged was capable of amounting to bullying. It cannot be said that there was substance to the complaint or disadvantage to Ms French. Ms French has not therefore established a personal grievance in relation to either the conduct of her supervisors or the fact that her complaint was not followed up.

[29] Ms French drew a connection between the Senior Team Leader's attitude towards her and the instigation of the disciplinary proceedings. In these circumstances there could be potential for unfairness in the decision to delay the investigation of her complaint until after a conclusion had been reached about her conduct. Bias on the part of a manager who is involved in an inquiry could of course undermine the legitimacy of the whole process, and an allegation to this effect would need to be

investigated as part of the inquiry into the alleged misconduct by the worker concerned.

[30] That is not the situation here. The Senior Team Leader's involvement in the initiation of the investigation was minor. He had noticed an unusual number of price overrides. Once he had alerted the store manager about this the inquiry was taken out of his hands and it was only subsequently that Ms French's involvement was identified. I accept that the concerns Ms French had raised about the Senior Team Leader and about one of the female staff members were not such as to have any bearing on the fairness of the inquiry into her conduct.

(iii) Alleged breaches of confidentiality

[31] Also in the letter of 28 September Ms French raised allegations that her privacy had been breached, asserting that the other staff who were suspended were told of the allegations against her before she was, as were the Team Leaders (as set out above.) After the suspension, she said, it became apparent to her that "*the whole store is aware of why we are no longer there*" and speaking of the suspended workers as "*thieves.*"

[32] The respondent says that the Team Leaders were told the minimum information needed for them to manage any disruption arising from the proposed meetings and possible suspensions. The manager's meeting was confidential and the sensitive nature of the information imparted to them was emphasised at the meeting. The Respondent notes that the principal source of information about the situation was the applicant's partner, who was at the Team Leaders' meeting. It was noted in submissions for the respondent that:

"the Applicant's partner divulged (and in fact misrepresented) confidential information to the Applicant. He was subsequently disciplined for this disclosure. The Applicant has been unable to point to any other alleged breach of confidentiality by the Respondent."

[33] The respondent also argues that there is no evidence of harm suffered as a result of the alleged breach of confidentiality.

Determination

[34] I am satisfied that the disclosure of information to the Team Leaders was justified given the operational issues related to the possible suspension of four staff. I am also satisfied that it was unavoidable that (where the allegations against them were interconnected) each of the four would be provided with information which related to allegations against the others.

[35] As we have seen, the respondent has taken action against the applicant's partner in relation to disclosure of information conveyed to him at the team leaders' meeting. His conduct does amount to a breach of confidentiality but given his relationship to her, and in the absence of any evidence to show that she was disadvantaged by his conduct, I cannot accept that a disadvantage grievance has been made out in relation to it. For the same reason I decline to make any award of damages for breach.

[36] As for the other three staff who were the subject of allegations, the fact that they talked amongst themselves or with other staff about what was happening is most unfortunate however I am not satisfied that the respondent could reasonably have been expected to have controlled this activity. I am not able to say that there was an unjustified action in relation to their conduct.

(iv) Unjustified dismissal

[37] On 29 September, along with the applicant's letter of complaint, the respondent received a written response from Ms French to the allegations against her. Ms French admitted scanning goods for herself under her own logon (saying that it was done mistakenly) as well as scanning goods under another team member's logon (for this she maintained that she was given permission by a supervisor.)

[38] Mr Jurgens followed up on the latter assertion by questioning the supervisor concerned who denied giving permission. He later told the Authority that this supervisor had not figured in any of the reports or video footage that he scrutinised and was a trusted senior staff member of long standing. He preferred her word over

that of Ms French. (I note that this person was not one of the individuals who had been the subject of Ms French's complaint.)

[39] Also in her written response Ms French denied telling a co-worker to mark down a purchase that Ms French was making, giving a co-worker her password, and overriding prices (except where a new price was marked on the item.) By way of explanation for having manually entered a long list of items, she said:

"As it was busy throughout the day, I scanned the items earlier and put them on a quote docket to make the final transaction faster."

[40] Ms French did not then, and has not subsequently, explained to either the respondent or the Authority how her actions in manually entering data for a sale could be faster than scanning the items and processing the sale in the normal way.

[41] As it turned out the meeting planned for 3 October was also cancelled at Ms French's initiative. On 5 October she provided a medical certificate dated 3 October which advised that she was unwell and would deal with the company in writing only. From that point on the disciplinary process was conducted through an exchange of written communication between Mr Jurgens and Ms French.

[42] As we have already seen, Mr Jurgens wrote to Ms French on 6 October. With that letter he enclosed (for her comment) a copy of video footage showing the transactions to which the allegations related. At the Authority investigation meeting, for the first time, Ms French told Mr Jurgens that when she tried to view the disc he had sent her, it appeared to be blank. She had not (at any point up to then) had a chance to look at it. (Both Mr Ryan and the Authority have now been provided with an opportunity to review the footage.)

[43] Ms French did respond to the letter of 6 October in a letter dated 12 October and headed "*disciplinary bullshit part 2.*" This document did not add anything material what Ms French had so far said about the substantive allegations against her. Instead she revisited her complaints of 29 September and what she felt was the Respondent's unfairness in proceeding with the disciplinary process.

[44] On 14 October Mr Jurgens wrote back, detailing the information the respondent had obtained in relation to each allegation, including the key elements of what could be seen on the video, and what he had been told by the other three staff members involved as well as the supervisor's denial of having sanctioned certain practices. He asked Ms French to respond by 20 October.

[45] On 18 October Ms French sent off her response however due to insufficient postage it was returned to sender. On 25 October, having heard nothing from Ms French, Mr Jurgens wrote to her again, extending the timeframe for response to 27 October. That letter also advised that if there was no communication from her by then a decision would be made on the basis of the information available.

[46] On 31 October, Ms French was dismissed. The letter of termination recorded the reasons for dismissal as relating to:

- *“unauthorised transaction at POS*
- *unauthorised price over-rides at POS*
- *using another team member's password at POS*
- *divulging personal employee password to another team member.”*

[47] On 1 November Ms French's letter of 18 October and a further letter from her in response to the letter of 25 October were hand delivered to Mr Jurgens by a staff member. These documents reiterate Ms French's concerns about the suspension, the respondent's decision to defer investigation of the complaints she had raised on 28 September, the fact that the respondent was proceeding with the disciplinary process in relation to the allegations against her, and her concerns that the timeframes given for her to respond to each of Mr Jurgens's letters had been too tight. They do not provide any further information in relation to the substantive allegations against her.

[48] Receiving these letters did not cause Mr Jurgens to revisit his decision to dismiss.

Determination

[49] The Authority was provided with all the material taken into consideration by the Authority including dockets and records of price overrides. These confirmed that Ms French had marked down prices on significant numbers of items for herself. These were unauthorised transactions. So were those where code for items had been entered manually and the pre packed goods had left the store without being checked.

[50] The allegations against Ms French were serious and amounted to breaches of standard procedures which were known to her. Mr Ryan does not, in his submissions, suggest otherwise. He does argue on her behalf that upon receiving Ms French's letters of 18 and 31 October the respondent should have reviewed its decision to dismiss and taken the contents of those letters into consideration. This, he argues, would have been the action of a fair and reasonable employer.

[51] As already noted, those letters did not contain any new information about the substantive allegations against Ms French. The points of relevance they contained related to the process that had been followed. I am not satisfied that the process was unfair or capable of undermining the justification for the dismissal. Ms French was given full details of the allegations against her, had sufficient opportunity to respond, and did so. She was not prejudiced by any difficulties she may have had in viewing the video footage (since nothing on it contradicts what is shown in the documentary record) but in any event, she failed to alert the respondent to the fact that it appeared to be blank.

[52] Very little of what Ms French did say by way of explanation was credible. I have noted the example of her assertion that it saved time to scan goods for purchase by a colleague and then, later in the day, enter the codes manually. On one occasion, this type of manual entry took close to half an hour. As well, her assertion that some practices she had engaged in had been approved by a supervisor was firmly rejected by the supervisor concerned. I have heard nothing to indicate that it was unreasonable for Mr Jurgens to prefer that individual's word over that of Ms French.

[53] Mr Ryan also says that sanctions less than dismissal should have been considered given that Ms French had a good work record prior to these incidents.

However, the allegations were serious and I accept that once substantiated they amounted to justification for dismissal.

[54] Finally Mr Ryan says that several other staff members were involved in similar conduct. In submissions he noted that it was the applicant's understanding that only she and her partner were dismissed as a result of the inquiry. This submission is not consistent with the evidence given to the Authority which was that two of the other three workers who were investigated were also dismissed. Only one was not. I was told that it had been established that this person had used Ms French's log on. I was not told anything more about the conclusions reached in relation to her conduct. However, I note that several additional allegations against Ms French were made out and I am unable to conclude that the circumstances were such that different treatment of the two women was unfair.

[55] In short, I accept that the termination of Ms French's employment was procedurally fair and substantively justified.

Remedies

[56] The only aspect of the employment relationship problem that has been found to be of substance is the matter of Ms French being suspended without consultation. However I am not satisfied that there has been any material disadvantage to Ms French as a result of this and decline therefore to award remedies.

Costs

[57] Costs are reserved. Any application for costs should be made no later than 28 days from the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority