

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 165/08
5113831

BETWEEN

Daniel Gledhill
Applicant

AND

Narau Beach Investments
Limited t/a McDonalds Mana
Respondent

Member of Authority: Denis Asher

Representatives: Rachel Burt for Mr Gledhill
Eska Hartdegen for the Company

Investigation Meeting Wellington, 2 & 3 December 2008

Submissions Received 3 December 2008

Determination: 9 December 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The company says it justifiably dismissed Mr Gledhill after it was decided that his actions *"were ... in breach of McDonald's Property and Product Policy"* (letter of dismissal 11 October 2007). The alleged breach was for giving away free food. Mr Gledhill disputes the allegation and the company's decision.

Background

- [2] The company is a McDonalds' franchisee.
- [3] Mr Gledhill was employed by the company on 18 October 2004 as a crew member. His terms and conditions of employment were set out in an individual employment agreement.
- [4] Mr Gledhill commenced, but did not complete, training as a manager. However, because of staffing shortages, he was rostered on as a manager from time to time.
- [5] On Friday 21 September 2007 Mr Gledhill encountered an abusive customer who called him "*a fucking homo*" (applicant's evidence). Friends of Mr Gledhill were also present: he says they witnessed the incident and then pressured him to provide free food. Because he felt humiliated by the encounter and did not want to be teased (my term) by his friends about it, the applicant decided – as he said himself, on the spur of the moment (document 21 in the agreed bundle; page 61) – to "*manager off*" (term common to the parties) their orders. As the till records make clear, he voided the cost of their orders. Noticing the quizzical look of a co-worker, and consistent he says with his intention from the outset and his understanding of his managerial discretion, Mr Gledhill said to her that he would pay for the orders himself, at the end of his shift.
- [6] Mr Gledhill says he was later approached by his shift manager and asked, had he given burgers away for free? Whereas the manager reported Mr Gledhill as saying he would get his friends to pay for their orders later (doc 19), the applicant (and the co-worker) maintained he said to the manager that he would pay for the orders later.
- [7] Mr Gledhill says that, at the end of his shift when he went to pay for the orders, he was once again approached by his shift manager who this time said he should not be transacting his own orders: the co-worker then stepped in and processed the applicant's payment. Mr Gledhill and the co-worker say the applicant was intending to pay full price for the orders but that the same shift manager – at her own initiative – then reduced the price of the food, with the result that Mr Gledhill paid \$4.00 of orders worth \$10. The reduced transactions were each recorded as a "*crew meal*" (doc 34).

[8] Mr Gledhill accepts he did not then tell the manager or later the respondent that the meal was not for him, but maintains his payment was in respect of the earlier orders he had voided. During the authority's investigation he accepted they should have been paid for at full price.

[9] The shift manager forwarded an incident report to the company (doc 19)

[10] In a notice dated 22 September Mr Gledhill was required to attend a disciplinary meeting (doc 20). The allegation to be put to him was:

On Friday 21 September 2007 at 9.40 pm you were witnessed "managing" off 3 meals to non McDonald's workers and when confronted by the shift manager you said "you would make them pay for it later". You also refunded one meal to another individual in the same group of people without notifying the shift manager of any issues the customer had.

(above)

[11] The company subsequently dropped the refunding allegation.

[12] The policy or rule alleged to have been broken was described as "*Property and Product*" (above).

[13] The notice warned Mr Gledhill that if proven the most serious action that could be taken in respect of the allegations was termination of his employment.

[14] The notice also advised the applicant he was entitled to bring a support person or representative, that he would be required to give a full explanation in response to the allegations and the time, date and place of the meeting.

[15] A disciplinary meeting was convened on 27 September. A minute of the meeting (doc 21, pages ^1 & 62) was signed off by the four who participated in it, including the company's representative, Aaron Leighton, Mr Gledhill and his representative – the latter being another co-worker who knew little if not nothing of his friend's disciplinary situation and who had no more experience than Mr Gledhill with which to advise the applicant, and who was encouraged by the respondent to be present.

- [16] Despite signing it off, Mr Gledhill does not accept the record as accurate. In particular, Mr Gledhill says the notes do not record his advice to Mr Leighton in the meeting that he paid for the orders on 21 September. He says he signed them off because he was asked to and because everyone else did.
- [17] Mr Gledhill accepts he did not tell the respondent of his humiliating encounter, why he voided the orders, that he advised another employee and his shift manager of his intention to pay, that another staff member again could confirm he had said he intended to pay, or that his shift manager had reduced the price of the orders.
- [18] The minute records Mr Gledhill's correction: he said he did not say "*I'll make them pay for it later*" (page 61 of the agreed bundle) but that he would pay for the orders later. Mr Leighton did not refer that disputed point back to the shift supervisor for further comment and did not investigate if any further.
- [19] Mr Leighton says the record covers the key issues discussed at the meeting; in particular he says he was not informed of Mr Gledhill's payment until after the applicant's dismissal. He also admits that, as a result of his investigation at the time, he did not link the shift manager's report (doc 19) of Mr Gledhill starting to serve himself with the applicant earlier managing off the orders.
- [20] The meeting resumed on 5 October. At its conclusion Mr Gledhill was dismissed.
- [21] On 8 October the applicant's mother met with Mr Leighton and presented a statement from the applicant's co-worker that she said confirmed her son had been pressured to provide free food, that he told the co-worker of his intention to pay for the voided orders at the end of the shift, that he reported to his shift manager what he had told the co-worker and that he paid for the voided orders at the end of the shift (doc 22).
- [22] On 10 October Ms Gledhill and the applicant met with the company's owner, Mr Trevor Campbell and Mr Leighton. Mr Campbell says he met as a courtesy but not to re-visit the issues or to review Mr Leighton's dismissal decision.

- [23] On 11 October a letter of dismissal was sent to the applicant. While bearing Mr Campbell's name, it was signed by Mr Leighton. The two men say the decision to dismiss was Mr Leighton's, and that he authored and signed off the letter of termination.
- [24] A personal grievance was filed in a letter dated 6 December 2007.

Discussion

- [25] The Company's decision to dismiss Mr Gledhill must be evaluated by the criteria set out at s. 103A of the Employment Relations Act 2000: the question of whether a dismissal is justifiable must be determined on an objective basis by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances **at the time** (emphasis added).
- [26] As is made clear above, Mr Gledhill's account to his manager of why he managed off the orders was very limited. The applicant attributes his relative silence to his belief at the time that it was all a misunderstanding which would be put right once his intention to pay was made clear and accepted. I note here that Mr Gledhill is not an articulate person and often falls silent when unable to marshal his words.
- [27] Because of the applicant's relative silence, but also because of his limited investigation and the conclusion he had quickly drawn from it, Mr Leighton had little to evaluate prior to his decision to dismiss the applicant. As it happened, during the authority's investigation, Mr Leighton did not challenge the applicant's account of being abused and humiliated but said "*managing off*" the orders was not an appropriate response.
- [28] A more adequate inquiry may well have drawn a more articulate response from Mr Gledhill.
- [29] Mr Leighton failed to directly interview the shift manager about her complaint regarding the applicant and satisfy himself as to its exact nature. Instead, he relied on her brief written statement (doc 19) and the oral report of another manager's interview of the complainant; the former was not put to Mr Gledhill at the disciplinary meetings, the latter only indirectly.

- [30] There are significant risks in relying on second-hand accounts, particularly because in this case the written complaint does not expressly raise the issue of free food. Instead, it disputes Mr Gledhill authorising “*manager meals when (the complainant) was the only manager*” (doc 19) on duty. An objective employer would need to be clear as to whether the complaint was about Mr Gledhill using manager-initiatives when he was not on duty as a manager, or whether the applicant was using manager-initiatives inappropriately.
- [31] The shift manager’s allegation of Mr Gledhill ““*managing off*” 3 meals to non McDonald’s workers and when confronted by the shift manager you said “*you would make them pay for it later*”” is repeated in the notice of disciplinary meeting (doc 20). During the authority’s investigation Mr Leighton first said Mr Gledhill was dismissed because he gave away free food. Later, when it became clear Mr Gledhill had paid for something Mr Leighton said the applicant was dismissed because he failed to ensure payment was made at the time of the transaction. The disciplinary notice fails to identify either issue other than by distant implication.
- [32] As there is evidence of payment, and consistent with the standards set out in *Honda NZ Limited v NZ Shipwrights etc Union* [1989] 3NZILR82, it is difficult to see how the company could justify a decision to dismiss the applicant for theft.
- [33] Separate from its decision to dismiss the applicant, the company does not accept the shift manager reduced the price of Mr Gledhill’s orders and alleges the applicant and/or the co-worker were responsible. It clearly reached this decision after dismissing the applicant. Its claim is advanced – the company says – because of what the complainant shift manager told it: other than asking that person and no others the company has not conducted an inquiry into the issue nor explained why it prefers one person’s account to that of another. The company’s stance reflects poorly on the respondent and its continued lack of open-mindedness.
- [34] Neither party asked the complainant shift manager to attend; it is alleged she no longer works for the company and was dismissed for assaulting another staff member. Regardless of who reduced the price of the orders, it is clear that Mr Gledhill did not tell the complainant or any other company representative what he accepted in the authority’s investigation: that the

orders did not qualify as a crew meal and therefore its price was not eligible to be reduced.

- [35] Mr Gledhill's individual employment agreement makes it clear that, "*Unauthorised removal ... of restaurant property ... is not permitted. ... Giving away, under charging, or the unauthorised consumption of food items is not permitted and will be viewed very seriously*" (page v, doc 6). If that was the employer's concern then it should have been put before Mr Gledhill during the former's investigation.
- [36] The company relies on other directions or policy statements as set out in the bundle of documents (some of which were produced as late as the second day of the authority's investigation). These documents are problematic. That they exist is clear: the same direction on unauthorised removal of restaurant property and giving away and under charging food was repeated in a policy reminder signed off by Mr Gledhill and dated 27 June 2003 (doc 7). Other reminders of the company's policy on theft were published by the company on 1 December 2005, 20 November 2006 and again on March 2007 (docs 10, 12 & 37). They make it plainly clear that in every instance where theft is proven the respondent's policy is to terminate employment; those instances included under charging friends.
- [37] However, none of these documents were signed off as received by the applicant and Mr Gledhill was not confident he had seen the documents even though they were incorporated into the agreed bundle.
- [38] Another document produced at the authority's investigation (on the second day; doc 38) is undated. It is headed "*McDonalds Cash Register Policy*" and stipulates amongst other things that, "*All customer purchases must be rung up on the register at the time of the order being placed*" (above). Mr Gledhill did not accept ever having seen this document or it being placed in a location such as the crew notice board where he had the opportunity to view it.
- [39] The difficulty in dismissing Mr Gledhill for serious misconduct for failing to ring up the orders on the cash register at the time of the orders being placed is that in fact he rang up the orders at the time, even though he then voided it. What the employer was really saying is that the applicant should have accepted or made a cash transaction at the same time, but failed to: that is

not a requirement expressly set out in its employment agreement or policy statements. It was not expressly stated as the focus of the applicant's disciplinary meeting, nor was it stated as the basis of Mr Gledhill's dismissal.

[40] The company says it puts its policy statements on the crew noticeboard and staff carry the burden of ensuring familiarity with them. Because of the risks with this method I do not accept the respondent's approach as fair and reasonable. But, as I am satisfied the issue is ultimately not relevant to this determination, I need take my concerns no further.

[41] What is clear is that the company did not put any of these documents, and in particular the relevant provisions in his employment agreement, to Mr Gledhill as part of its disciplinary process. That omission was unfortunate and serious: had it done so Mr Gledhill would have clearly known the nature of his alleged serious misconduct.

Findings

[42] The decision to dismiss is a weighty one and is based on either clear evidence or is reached after a reasonable inquiry: *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZILR, 584, 591.

[43] The same decision also accepted that,

... the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.

[44] I find that, while Mr Gledhill was given clear notice he faced a serious allegation and that his employment was in jeopardy, he was not given clear notice of the nature of that serious allegation, for which he was dismissed. The only reference to an allegation of theft being put to Mr Gledhill is contained in Mr Leighton's cryptic notes of the first disciplinary meeting, where he records himself saying, "You've been with us for a while now and know our policy on theft" (page 61 of the bundle, doc 21). There is no record of whether the applicant replied to that point. There is no record of the company

putting to Mr Gledhill its concern he should have paid for the transaction at the time of the orders.

- [45] Whether Mr Gledhill would have better prepared himself for the meeting with the company, or have been more expansive in his replies had he received proper notice is speculative and irrelevant: every worker is entitled to clear notice of his or her employer's concerns.
- [46] I also find that Mr Gledhill did not enjoy a reasonable enquiry. In particular, a fair and reasonable employer – in investigating the allegation – would not only have made clear the allegation or breach of work rule Mr Gledhill faced but would also have spoken directly to the shift manager about her written complaint and would have shown the same to the applicant along with a record of any discussion with the complainant: Mr Gledhill received neither.
- [47] A fair and reasonable employer would also have sought information from other staff on duty at the time, and shared that information with Mr Gledhill. Neither initiative amounts to *“a formal hearing in the nature of a trial”* (above): both are, instead, requirements of a reasonable inquiry and would have enabled the company to be confident in reaching conclusions about what was – it readily admits – an entirely out of character event as far as Mr Gledhill's work record to date was concerned.
- [48] In the alternative, did the company have clear evidence to dismiss Mr Gledhill? I do not accept it did. A reasonable investigation would have linked Mr Gledhill's payment at the end of his shift to the earlier managing off incident; it was not open to Mr Leighton to *“assume”* (oral evidence) payment was for the applicant's own meal.
- [49] This was all the more important because the parties are in dispute as to whether, at the 27 September meeting, the applicant informed the respondent of his payment: Mr Gledhill and his support person say he did, Mr Leighton and another manager say he did not. The benefit of a reasonable inquiry is that others present at the time could have provided relevant information in respect of matters that are now deeply disputed. In particular, Mr Leighton denied himself the benefit of hearing the evidence of Mr Gledhill's co-worker that was put to this authority and which it has no reason to doubt: that the applicant paid for the managed off orders at the end of his shift and his

manager reduced the price of the orders. I have no reason to doubt that evidence, given as it was by a current employee of the respondent, with no apparent axe to grind and one who – while visibly shocked – firmly denied counsel for McDonald’s forcefully put allegation she was “lying”.

- [50] Other staff were on duty who also could quickly have given useful evidence to Mr Leighton: there is no excuse for his failure to talk to relevant staff.
- [51] For the reasons set out above I am satisfied the company cannot say it held clear evidence such that a reasonable employer could rely on to dismiss the applicant.
- [52] It is clear that, in coming to his decision to dismiss the applicant, Mr Leighton relied on a view that whenever someone was caught giving away food “99% of them always said they intended to pay for it later” (par 12, his statement), i.e. Mr Gledhill was lying. He clearly saw Mr Gledhill in the same light and made no further active inquiry. During the authority’s investigation he suggested Mr Gledhill was intending to deceive the company from the moment of voiding the orders, even before his actions were queried by a co-worker and advised her of his intention to pay at the end of the shift: Mr Leighton has, and more importantly had, no evidence to support any conclusion of intention to steal other than his belief that as it was true for others so also must it be true in respect of the applicant.
- [53] In fact the evidence before Mr Leighton was of an employee of very good service over several years; one who responded to requests for help when the restaurant was short staffed, and one who had no issues of dishonesty. Mr Leighton would also have known the applicant’s sisters had worked for the company while pursuing tertiary qualifications and that Mr Gledhill may well have harboured similar ambitions.
- [54] I find Mr Leighton’s view to be evidence of a closed-mind approach and reflects a failure by the respondent to fairly assess Mr Gledhill’s actions and the answers he gave to his employer’s inquiry. Instead, Mr Leighton relied on a simplistic analysis and decided that Mr Gledhill was guilty as charged because others had been in similar circumstances.

- [55] Section 103A of the Act requires an assessment of what a fair and reasonable employer would have done in all the circumstances at the time. At the core of the employer's responsibility is the obligation to reasonably assess an employee's conduct and not judge that person simply on the basis of what other workers have said or done in similar circumstances.
- [56] As a result of these shortcomings it follows that the company's decision to dismiss would not have been what a fair and reasonable employer would have reached, objectively measured, in all the circumstances at the time.
- [57] It follows that Mr Gledhill was unjustifiably dismissed.

Contributory Fault

- [58] The poorly-judged initiative by Mr Gledhill on 21 September – of appearing to give away free food – was significantly blameworthy as it placed himself and his employer in a disreputable light. It would properly be assessed as 50% contributory fault.

Equity and Good Conscience

- [59] Ironically, and consistent with what the above should make clear, had Mr Leighton carried out a reasonable inquiry he would have properly satisfied himself that – amongst other things, and regardless of who authorised it – Mr Gledhill benefitted by the reduced pricing of the orders he voided and his actions at the end of the shift therefore amounted to a serious breach of the parties' code of conduct as set out in their employment agreement, i.e. "*under charging ... of food*" (page 30 in the bundle; doc 6). As he intended to, and did, pay for his friends, Mr Gledhill was obliged to ensure full payment and not to benefit by a mistaken crew meal reduction. Despite his shift manager's personality, Mr Gledhill was under an obligation to correct her error and ensure his employer received full payment, or to advise another manager of the same.
- [60] What commenced as orders worth \$10.00 or \$11.70 has blown out into an employment relationship problem involving a stain on the employment record of an intelligent and capable young man and each side shouldering costs of

many thousands of dollars: this is a matter that should have been settled by the parties on their own terms, particularly as the evidence strongly points to misjudgement rather than deliberate deceit.

[61] Consistent with the authority's equity and good conscience jurisdiction, and after having regard to the above, I am satisfied that no remedies should be awarded Mr Gledhill.

Determination

[62] Mr Gledhill was unjustifiably dismissed by the company.

[63] As agreed by the parties, costs are reserved. Subject to any submission, my preliminary view is that – consistent with the findings of this determination – costs should lie where they fall.

Denis Asher

Member of the Employment Relations Authority