Determination Number: CA 105/06
File Number: CEA 416/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Andrew Grant (Applicant)
AND	Nelson Heights Limited (Respondent)
REPRESENTATIVES	Steven Zindel, Counsel for Applicant Phil Ahern, Counsel for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	29 May 2006
DATE OF DETERMINATION	19 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Grant) alleges that he was unjustifiably dismissed by the respondent (NHL) on 24 March 2005.

[2] NHL resist that claim and say that the dismissal of Mr Grant was substantively justified and procedurally fair.

[3] Mr Grant was employed pursuant to a written individual employment agreement and he worked as a sales consultant in a store owned by NHL selling consumer electrical goods.

[4] Accordingly to NHL, Mr Grant was dismissed for three separate instances which NHL say each constituted serious misconduct.

[5] These instances of alleged serious misconduct are as follows:

(a) Mr Grant intending to sell an IPod on the website Trade Me, having bought the IPod from NHL at a staff price;

(b) Mr Grant having possession of a mobile phone which belonged to NHL and which Mr Grant had not paid for;

(c) Mr Grant not appropriately handling a personal Eftpos transaction in the store.

[6] There was the first of two disciplinary meetings on 18 March 2005. The evidence confirms that Mr Grant was properly advised about the meeting, given appropriate details about the allegations he faced and their seriousness and told to bring a representative to the meeting.

[7] At the meeting on 18 March 2005, Mr Grant admitted buying an IPod on a staff purchasing scheme and subsequently advertising it for sale on Trade Me. Mr Grant also confirmed that he knew NHL's policies and procedures in relation to the purchase of product by staff. Mr Grant acknowledged that he had breached NHL's policy.

[8] There was a second meeting between the parties on 22 March at which Mr Grant acknowledged that he had indeed purchased the IPod on a staff discounted basis with the intention of selling it.

[9] At the second meeting there was also discussion about Mr Grant's possession of a mobile phone belonging to NHL. Mr Grant confirmed that he was aware that he had to pay fully for product before arranging for its delivery and yet he had obtained possession of the mobile phone in question on 14 March 2005 and had subsequently taken no steps to complete the transaction.

[10] Thirdly, at the second meeting Mr Grant was asked about his processing of an Eftpos transaction of his own. Mr Grant acknowledged that he knew the rules which prevented staff from processing their own Eftpos transactions. Mr Grant acknowledged that he had in fact breached the rules and said that he was busy when it happened.

[11] These first two meetings were minuted and Mr Grant signed the minutes as correct.

[12] NHL then took time to consider the position and there was a further meeting on 24 March 2005 at which Mr Grant was dismissed from his employment with NHL.

Issues

[13] It is convenient to examine each of the alleged heads of misconduct separately and I deal with those three matters first.

[14] Then, I deal with the issue of the documentation of the employment agreement between the parties, about which there was significant evidence.

[15] Finally, the Authority needs to consider the question of penalty. To a greater or lesser extent, Mr Grant's evidence proceeded on the footing that while he had done what he was alleged to have done the penalty of dismissal was too harsh and that in effect, *the punishment did not fit the crime.*

The IPod transaction

[16] The first basis on which Mr Grant was dismissed by NHL was that he purchased an IPod using NHL staff purchasing privileges with the intention of reselling that item.

[17] The evidence is clear that at the first meeting between the parties, Mr Grant acknowledged that he had indeed purchased the IPod using the staff privileges and that he intended to resell the item.

[18] The factual position was that on the morning of 3 March 2005, Mr Grant purchased three IPods, only one of which was purchased using the staff discount policy. This particular machine had a five year warranty while the other two did not.

[19] NHL alleged at the first meeting between the parties that it was the machine that Mr Grant had purchased using the staff discount policy that was put up for sale on the Trade Me website that same day.

[20] After initially denying that it was indeed that machine, Mr Grant then conceded that the purchaser, if making a claim under the warranty would have had a five year warranty and not a shorter warranty. This linked the resale to the machine that was purchased on the staff price.

[21] The notes of that meeting then go on to show that Mr Grant acknowledged that he had read the relevant provisions in NHL's staff manual relating to staff purchases and that he understood that the employee purchase rights applied only to products that were purchased for the employee's own use.

[22] Mr Grant was then asked the straightforward question about whether he had breached this policy and he replied in the affirmative.

[23] At another point in the same interview, Mr Grant also made an observation to the effect that he had breached the NHL policy by buying an item at a discounted price and then on-selling it to gain a financial benefit.

[24] On the face of it, all of that would suggest absolutely conclusive evidence of a breach of NHL's policy by Mr Grant and an acknowledgement by him that that was indeed the position.

[25] However, the position is somewhat complicated by two further relevant aspects. The first is that in the second meeting between employer and employee, Mr Grant tried to resile from his earlier statements no doubt realising that the question of his intention was highly relevant to answering the fundamental question of whether he had breached NHL's policy or not. Accordingly, what he said on this occasion when the parties met was that his intention was that the item purchased at the discounted price was for personal use (so his intention at the time of purchase was clear) but that he subsequently changed his mind through greed.

[26] The second relevant aspect in relation to the IPod is Mr Grant's attempt, particularly at the investigation meeting before the Authority, to characterise the sale transaction as in fact a *no-sale*. This was because Mr Grant said that as a matter of fact, while he had endeavoured to sell the subject IPod on Trade Me on the day that he purchased it at the staff rate, the sale had not in fact been consummated because the purchaser did not have the funds to meet his obligation. It followed that Mr Grant did not part with the IPod in the physical sense, or that is what he contended.

[27] I prefer the evidence of NHL in this regard. I am absolutely persuaded that it was appropriate for NHL to rely on the clearest of representations made by Mr Grant in the first meeting between the parties where he plainly accepted his wrongdoing in relation to the staff purchased IPod by acknowledging the purpose for which that IPod was purchased in the first place. None of Mr Grant's answers in that first interview with the employer (answers which Mr Grant has not quarrelled with) make any sense at all unless they are in fact the unvarnished truth. In my opinion, NHL is entitled to rely on those answers in reaching a view about Mr Grant's conduct in respect to the IPod.

[28] I consider that Mr Grant's subsequent responses, in the second meeting with the employer and before the Authority itself were no more than ex post facto rationalisation.

The cellular phone

[29] The evidence disclosed that Mr Grant purchased three cellular phones from the Blenheim branch and that this took place on 14 March 2005. Of the three cellular phones that formed part of this transaction, the applicant paid for two in full but only a $20 deposit was paid in respect of the third one.

[30] Subsequent to the transaction being entered into in the Blenheim branch, all three phones were delivered to Mr Grant in Nelson. There is no issue in relation to the two phones that were fully paid for. The only question relates to the third phone which was only part paid for.

[31] Mr Grant concedes that he stored the partly paid for phone at his home. In fact, because of the vicissitudes of the courier service, Mr Grant actually called at the home of the courier (who was known to him) and uplifted all three phones.

[32] I accept the submission of NHL that Mr Grant's action in uplifting all three phones adds to his difficulty in explaining this episode. He could easily have uplifted only two and required the other one to be returned to the employer.

[33] In the alternative, he could have himself returned the partly paid for cellular phone to his employer at Nelson, either on the footing that he did not wish to continue with the transaction (and therefore was presumably entitled to his deposit back) or on the basis of a quasi lay-by where the employer held the item until he was in a position to pay for it in full.

[34] He did none of those things. He took the part paid cellular phone home with the other two that were fully paid and he retained the phone and did nothing. This behaviour must be seen as extraordinary given that, even through the disciplinary process which as I have noted involved two meetings and some time in between, Mr Grant continued to take no steps. This was so even after NHL specifically raised with him at the second disciplinary meeting the question of this phone. Indeed, given NHL had given Mr Grant some notice of the matter it wished to raise with him at the meeting, it would have been available to him to forthwith make an arrangement to pay for the phone in question thus removing that issue.

[35] At the meeting with the employer on 22 March 2005, Mr Grant acknowledged that he had yet to pay the balance of the money owing on the phone in question and acknowledged that he picked up all three phones from the courier's house personally.

[36] At the investigation meeting in an answer to a question from the Authority, Mr Grant stated that he *never denied not dealing with the phone appropriately. I should either have returned it to the store or paid for it but I didn't have the funds to pay for it in full.*

[37] Mr Grant says, in his defence, that it was hardly a situation where NHL did not know where the phone was; it would have been clear from the employer's records that he had the phone and had only paid a $20 deposit. Further, the phone had been delivered to him by mistake and Mr Grant said that he simply retained the phone at home untouched and unopened until he was in a position to pay for it in full.

[38] Mr Grant also alleges that the phone issue was raised almost as an afterthought at the second meeting on 22 March 2005 and contrary to the view advanced by NHL, was not in fact properly signalled in the notification of the meeting.

[39] No doubt this particular issue, taken on its own might be regarded as a less serious breach of the trust and confidence that must infuse all employment relationships. Had this been the only breach of which Mr Grant stood accused, it is unlikely that it would have, of itself, grounded a justified dismissal.

[40] However, it is not unreasonable for NHL to make findings in respect to this issue as part of a wider inquiry into the ability of a particular staff member to operate within the policies and procedures that have been determined for the operation of the business. I accept the submission of NHL's counsel on this point that Mr Grant's acknowledged behaviour in relation to the cellular phone was misconduct and that it did raise concerns about NHL's ability to trust him.

The Eftpos transaction

[41] Mr Grant is alleged to have processed his own Eftpos transaction on 25 February 2005. This issue was properly notified to him in the notification of the meeting with the employer on 22 March 2005 and in response to a question from the employer at that meeting on this issue, Mr Grant said this: *The policy and the procedures is pretty black and white on this, but there are certain situations where the rules need to be bent. It was particularly busy that day and time and I needed to process the transaction as the food lady was standing there waiting.*

[42] Then there is a further question from his employer: *So you did process your own transaction that day?* and the answer from Mr Grant was affirmative.

[43] Mr Grant gave evidence that this was a reasonably common breach of the rules and while he could not remember personally making a similar breach on other occasions, he certainly indicated in his evidence that other staff had.

[44] He also alleged that it was *an honest* transaction in the sense that his account was properly debited.

[45] However, by his own admission, Mr Grant knew the rules which the employer had enunciated; he is recorded in the notes of the disciplinary meeting as having referred to rules as *pretty black and white* and yet he chose to break the rules because he said *the rules need to be bent.*

[46] It is difficult to be critical of NHL for reaching a conclusion that this was another example of misconduct which NHL is entitled to take into consideration in making decisions about whether it can continue to have trust and confidence in Mr Grant.

The employment agreement

[47] NHL and Mr Grant entered into an employment agreement which comprises the following documents:

(a) covering letter dealing with certain provisions such as salary and start date;

(b) a position description;

(c) an organisational chart;

(d) a generic employment agreement;

(e) a code of conduct.

[48] For our purposes, the code of conduct and the linking clause in the employment agreement are of importance.

[49] On page 12 of the Employment Agreement the following provision appears: *Code of Conduct. The Pacific Retail Group Code of Conduct and other company policies apply to your employment. These are outlined in the Pacific Retail Group Contract Managers Policy and Procedures Manual. The company may amend such policies from time to time in which case you shall be advised accordingly, but such amendments may not be inconsistent with this agreement.*

[50] That clause would appear to link to the Employment Agreement both the Code of Conduct, which as I mentioned above is attached to the Employment Agreement and another document entitled Policy and Procedures Manual.

[51] As to the Code of Conduct attached to the Employment Agreement, that document sets out what it calls *minimum requirements* for employees to observe and then recites those minimum requirements under a number of sub-headings. There is no clear delineation between misconduct and serious misconduct in this document although there are various warnings that serious misconduct will result in summary dismissal.

[52] A relevant provision for our purposes is a provision under the heading *Property* which says: *unauthorised removal or unauthorised possession of company property … is not permitted*.

[53] There are two further documents (or more accurately parts of documents) entitled respectively *Serious Misconduct and Misconduct* and *Employee Purchasing*. Both documents are part of the Policy and Procedures Manual.

[54] The first document lists under the heading *Serious Misconduct* a schedule of bullet points which identify particular aspects the commission of which would result in the allegation of serious misconduct.

[55] The second document sets out the employee purchasing scheme and emphasises the fact that that scheme only applied to product purchased for personal use or for members of the employee's family.

[56] Mr Grant said, in his evidence, that he was not satisfied that he was fully aware of the employer's policy and procedures and in particular alleged that the version that he had seen was not as explicit about aspects of serious misconduct as the version that was put into evidence at the investigation meeting.

[57] However, Mr Grant acknowledged in relation to each of the allegations against him, when he met with his employer, that he had read and understood the relevant excerpt from the Policy and Procedures Manual so it is difficult for him to now contend that he understood the position differently.

[58] For instance, in relation to the IPod issue, the following exchange appears in the notes of the 18 March meeting between the parties, notes which Mr Grant signed as accurate after the event: *Question: Have you read and understood the Policy and Procedures Manual in regards to staff purchases? Answer: Yes I signed for that fact. Question: What does it state about staff purchases? Answer: The employee rates only apply for products purchased for the employee's personal use. Question: Do you think you have broken this policy? Answer: Yes.*

[59] In relation to the cellular phone transaction, there is a clear prohibition in the Employment Agreement against retaining or possession of company property and Mr Grant does not allege that he did not have a copy of this document or was not aware of it.

[60] In relation to the Eftpos transaction as I have already noted, Mr Grant fairly conceded at the second disciplinary meeting on 22 March 2005 that *the Policy and Procedures is pretty black and white on this, but there are certain situations where the rules need to be bent*. In the next question asked of him, Mr Grant confirms that he did in fact process his own transaction on 25 February 2005 thus breaching the very policy that he himself described as *black and white*.

[61] It follows that it seems to be difficult for Mr Grant to seriously contend that he is somehow unaware of the employer's relevant policies in relation to the allegations against him of wrongdoing. I reject Mr Grant's evidence on that matter as lacking in credibility.

The issue of penalty

[62] In answering questions from me, Mr Grant accepted that NHL was entitled to be *grumpy* about his behaviour, acknowledged that he had made an error of judgment (arguably several) and said that he expected to lose buying privileges and maybe get a final written warning but did not expect to be dismissed.

[63] Mr Grant alleged that there was disparity of treatment and relied on Ms Cowan's evidence which he characterised through counsel as *uncertain*. I do not accept that characterisation. In my opinion, Ms Cowan who was a witness for NHL clearly and explicitly indicated that there were disciplinary consequences for staff who had committed similar indiscretions to Mr Grant.

[64] Next, Mr Grant relies on evidence in respect to a Mr Chris Asher, a former colleague. Mr Grant maintained Mr Asher had committed a similar indiscretion to his own in respect of the purchase and resale of the IPod. Mr Asher gave evidence at the Authority's investigation meeting and to put it shortly, Mr Asher's evidence simply did not confirm Mr Grant's view that there was a similarity between them.

[65] Mr Asher told me that he had spoken to the manager of NHL having purchased two IPods, one at full rate retail and one at staff rates. Whatever Mr Asher's intention when he entered into the transaction to purchase the two IPods, he was advised by the Assistant Manager of NHL that he could not resell either IPod because one was at staff rates and the other had been purchased using a staff financing scheme so although it was purchased at a commercial price the financing was on a discounted basis.

[66] In response to this intelligence, Mr Asher sought to re-credit the two IPods back to NHL and they readily allowed that to happen. It follows that there was no similarity at all between the two situations.

[67] I invited the Manager of NHL to reflect on whether his treatment of Mr Grant was too harsh or not. His response was to say that he believed *the punishment did fit the crime*. He went on to say that Mr Grant was in effect his 3IC (his third in command) and yet Mr Grant said *he can bend the rules to suit himself*. The NHL Manager went on to say *I was concerned about the angles he took and he didn't make contact and for instance tell us that he had the phone at his home nor did he withdraw the IPod from sale when he knew that we had a problem with it*.

[68] Further, NHL's Manager said he accepted that Mr Grant could have been treated more leniently if he had behaved in a similar way to Mr Asher, namely by returning the product when, as it were, the game was up.

Determination

[69] Section 103A of the Employment Relations Act 2000 sets out a statutory test for justification in cases such as this one. That statutory test has been considered in the recent decision of Judge Shaw in *Air New Zealand Limited v Hudson* 30 May 2006 SC30/06.

[70] In that decision, Her Honour identifies that the statutory test is objective in character and requires the Court to place itself in the position of a neutral observer.

[71] Judge Shaw considers that *would* means something different from *could*. The word *could* contemplates a range of potentially correct responses. While a range of options may still be possible the option chosen must be evaluated against a specific objective standard which Her Honour describes as the response to the question is this what a fair and reasonable employer would have done?

[72] The requirement is then to judge the employee's conduct by the standards of *an objective community ideal.*

[73] Judge Shaw considered that the word *would* represents a statutory curb on the range of response an employer could justifiably take.

[74] Her Honour enunciated the following test: *A particular employer having followed a proper process of investigation is justified in dismissing for misconduct if the Court or the Authority finds a fair and reasonable employer would have dismissed in those circumstancse*.

[75] In my opinion, applying the test as enunciated by the Employment Court in *Hudson* I find that the decision by NHL to dismiss Mr Grant is indeed what a fair and reasonable employer would have done in the circumstances that NHL found itself in.

[76] In my opinion, each of the three elements NHL used to support the finding of dismissal is an example of misconduct by Mr Grant which on the plain evidence before the Authority he himself acknowledged knowing was wrong. While each one taken alone might not ground a dismissal, the three taken together in my opinion represent a course of conduct which a fair and reasonable employer is justified in regarding as a fundamental breach of the duty of honesty and fair dealing which is implied into every employment relationship.

[77] I am particularly drawn to this conclusion by the very straightforward evidence that there was ample opportunity for Mr Grant to resile from his inappropriate behaviour at least in relation both to the IPod and the telephone but he chose to persevere and as it were *tough it out*.

[78] It follows that Mr Grant's claim fails in its entirety.

Costs

[79] Costs are reserved.

James Crichton
Member of Employment Relations Authority