

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 203
5608131

BETWEEN

ROBERT HARDY
Applicant

AND

GENERAL DISTRIBUTORS
LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: John Leggett and Deeanne Taylor, Counsel for the
Applicant
Kylie Dunn and India Townsend, Counsel for the
Respondent

Investigation Meeting: 23 February 2017 at Blenheim

Submissions 21 March 2017 and 11 April 2017 for the Applicant and
4 April 2017 for the Respondent

Determination: 24 November 2017

DETERMINATION OF THE AUTHORITY

A. Mr Hardy was not unjustifiably dismissed by General Distributors Limited (GDL)

B. Costs are reserved

Employment relationship problem

[1] General Distributors Limited (GDL) dismissed Robert Hardy on 29 January 2016 from his position as Store Manager, Countdown Blenheim for serious misconduct. At the time, Mr Hardy had worked for GDL for 26 years. His employment with GDL spanned the entire operational spectrum: from collecting trollies to store manager; a position he held for 14 years.

[2] One of the many responsibilities placed on Mr Hardy as a store manager was staff training in the sale of liquor. As part of this, he was required to complete a “Sale of Liquor Mode of Sale Checklist” which is also known as the Liquor Training Folder (LTF) on a monthly basis.

[3] GDL said Mr Hardy failed to complete the LTF in October and November 2015. An employment investigation was commenced.

[4] Mr Hardy was summarily dismissed for serious misconduct by GDL on 29 January 2016. Mr Hardy, who had until that point an unblemished employment history, claimed he was unjustifiably dismissed.

Issues

[5] The following are the issues for investigation and determination:

- (i) Was Mr Hardy’s dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?
- (ii) If General Distributors Limited’s (GDL) actions were not justified, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s 123(1)(c)(i) of the Act;
- (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Hardy that contributed to the situation giving rise to the grievances? ;
- (iv) Did GDL breach it’s good faith obligations to Mr Hardy? ;
- (v) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[6] As originally lodged, Mr Hardy's statement of problem only sought reinstatement as a remedy. After discussion on a case management conference, Mr Hardy was granted leave to advance submissions why he should be granted leave to seek additional remedies. GDL was invited to provide submissions in reply. After considering the respective submissions, I granted Mr Hardy's application to lodge an amended statement of problem advancing claims for lost wages and compensation for hurt, humiliation and injury to feelings. GDL was afforded an opportunity to lodge an amended statement in reply and this was duly done. During the investigation meeting, after an adjournment to take advice, Mr Hardy withdrew his claim for reinstatement.

[7] At the meeting, I heard evidence from Mr Hardy, Mr Unsworth, Damen Blanch, a human resources manager employed by Progressive Enterprises Ltd (parent company of GDL) and Paul Radich, Progressive's alcohol responsibility manager. The parties helpfully prepared a common bundle of documents. A sequential exchange of submissions was received from counsel after the investigation meeting.

[8] This determination, reserved at the conclusion of a one day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[9] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. While I have not explicitly referred to all the submissions of the parties in this determination, I have fully considered them.

Relevant background

[10] GDL is owned by Progressive Enterprises Limited (Progressive), which operates approximately 184 supermarkets across New Zealand. These supermarkets are predominately branded as “Countdown” stores. From the evidence, it would appear that Progressive is the operator of the supermarkets and GDL employs their respective workforces.

[11] Mr Hardy’s employment was governed by an individual employment agreement, which also contained a position description for store manager. In addition, a number of policies were relevant to his role as store manager including in relation to the sale of liquor.

[12] GDL said Mr Hardy was also bound by a code of conduct. He signed the code, which contains a number of overarching statements, on 27 August 2014.

[13] On 28 September 2015, in response to several failed regulatory inspections (or “stings”) at stores throughout New Zealand a senior manager issued a memorandum to all store managers about their responsibilities around the sale of liquor. Materially the memorandum stated:

- You are responsible for the sale of liquor information folder being updated and all elements are completed accurately;
- You have a supervisor who is trained on checkouts for all hours you sell liquor this supervisor does not operate our SCO registers at the same time(sic);
- As the Store Manager you lead in service and you also should lead the store to ensure all processes at the checkout take place as per our current policy.

[14] The memorandum also stated that failure to comply with policy and the law was a serious issue and could result in disciplinary action. Mr Hardy signed the memorandum to acknowledge he had read it and would abide by its conditions.

[15] The sale of liquor at Countdown Blenheim is overseen by the Marlborough District Licencing Committee (MDLC).

[16] In September 2015, Countdown Blenheim failed its second “sting” in two months and became a “strike 2 store”. The MDLC suspended store’s liquor licence for 42 days. GDL claimed this cost Progressive an estimated \$349,000 in lost sales. GDL said a failed third sting would result in the mandatory cancellation of the store’s liquor licence for 5 years, with no guarantee of renewal.

[17] Mr Hardy said he was not responsible for the incidents giving rise to Countdown Blenheim being a strike 2 store. In his evidence, Mr Hardy expressed it this way: “I cannot personally prevent employees from making blatant errors despite all the training that I provide and despite staff being aware of the seriousness of not complying with the sale of liquor process ...”.

[18] In November 2015, the liquor sale process changed. The changes were detailed in a new liquor policy document which was supplied to all Store Managers. Store managers were trained in the new policy.

[19] The essential change was store managers of strike 1 and 2 stores were required to complete the LTF on a weekly rather than monthly basis and area managers were required to verify quarterly this had been done.

[20] The new process came into effect as soon as store managers were trained in it. In the Nelson/Marlborough Region, Craig Unsworth, area manager, trained store managers in the process as part of a broader meeting held in early November 2015.

[21] On 18 December 2016, as part of an inspection of the Countdown Blenheim store, Mr Unsworth noted gaps in the LTF. Nothing was said to Mr Hardy at this time.

[22] On 24 December 2015, Mr Unsworth again attended the store. After a further inspection, he asked to meet with Mr Hardy in his office. During the meeting, Mr Unsworth informed Mr Hardy of the issue with the LTF he had discovered on 18 December 2015.

Employment investigation

Suspension of Mr Hardy

[23] On 28 December 2015, Mr Unsworth again attended the store. Mr Hardy was taken to his office and suspended by Mr Unsworth. GDL relied on clause 19 of Mr Hardy's employment agreement, which allowed for suspension in the event of an alleged act of serious misconduct warranting further investigation. GDL said Mr Hardy agreed to the suspension on full-pay.

Mr Hardy invited by Mr Unsworth to investigation meeting

[24] On 29 December 2015, Mr Unsworth sent Mr Hardy a letter inviting him to an investigation meeting. The letter, which alleged a breach of company policy and procedures, and referenced the code of conduct, particularised GDL's allegation as:

The liquor mode of sale checklist has not been completed for all checkout operators, supervisors and senior team for the months of October and November as per the new policy

[25] In essence, GDL said Mr Hardy had failed to follow the sale of liquor process by not completing the LTF for October and November 2015.

[26] Also in the letter, Mr Hardy was advised of his right to obtain advice and bring an "advisor, support person or other representative of [his] choice" to the meeting.

First disciplinary meeting

[27] At the commencement of the meeting, which was notarised by Mr Blanch, Mr Unsworth asked Mr Hardy if he understood the contents of his letter of 29 December 2016. Mr Hardy acknowledged that he did.

[28] Mr Unsworth also asked Mr Hardy if he wished to have a representative at the meeting. Mr Hardy said he did not.

[29] During the meeting Mr Unsworth asked Mr Hardy for his response to the allegation. A review of the transcript discloses that Mr Hardy accepted he was responsible for completing the LTF. Mr Hardy said Countdown Blenheim was under-resourced. This issue is discussed further below.

[30] Mr Hardy would also subsequently allege a disparity of treatment by GDL. This is also discussed below.

[31] A further meeting was scheduled for 5 January 2016. That meeting was subsequently postponed by Mr Unsworth following a request for time to engage a legal representative.

[32] The meeting then adjourned for Mr Unsworth and Mr Blanch to consider and investigate Mr Hardy's responses.

Second disciplinary meeting

[33] The meeting was convened by Mr Unsworth on 27 January 2016. In attendance were Mr Blanch, who again took notes, Mr Hardy and his legal representative, John Leggett.

[34] At the commencement of the meeting, Mr Unsworth said Mr Hardy initialled the notes of the 31 December 2016 and confirmed they were correct.

[35] During the meeting, Mr Unsworth asked Mr Hardy a series of further questions.

[36] As recorded in Mr Blanch's notes, Mr Hardy acknowledged a number of important matters. These included:

- (i) the consequences for a Strike 2 store if there was another non-compliant liquor sale;
- (ii) he did not prioritise the sale of liquor process;
- (iii) he did not make anyone aware of any difficulties he was facing with the sale of liquor process or ask for assistance;

- (iv) he knew he was required to complete the LTF and had failed to do so;
- (v) he knew completing the LTF was important because it would mitigate risk and identify supervisors who were not potentially carrying out their functions properly; and
- (vi) he was not short staffed for the entire period in question (October and November 2015).

[37] Mr Hardy did not dispute Mr Blanch's notes of the meeting either at the time or during the Authority's investigation meeting.

[38] Mr Unsworth then adjourned the meeting to consider Mr Hardy's responses from the meeting and the earlier meeting held on 31 December 2015. In reconvening the meeting Mr Unsworth summarised Mr Hardy's responses. The notes record, Mr Hardy agreed with the summary.

[39] Mr Unsworth then advised Mr Hardy that he considered his conduct in not completing the LTF as a very serious breach of company policy and procedures and serious misconduct. Mr Unsworth then advised Mr Hardy that GDL was tentatively considering dismissal as the disciplinary sanction.

[40] Ms Unsworth said Mr Hardy would be given an opportunity to provide feedback on the proposed outcome. A further meeting was agreed to consider this.

Third disciplinary meeting

[41] The meeting was convened by Mr Unsworth on 28 January 2016. In attendance were Mr Blanch, who again took notes, Mr Hardy and Mr Leggett.

[42] At the commencement of the meeting, Mr Unsworth asked Mr Hardy to confirm if the notes taken at the meeting on 27 January 2016 were correct. He confirmed he believed they were.

[43] Mr Unsworth asked Mr Hardy if he wished to provide any feedback on the proposed sanction of dismissal. Mr Hardy said “I’ve put my position and I don’t want to add anything further”.

[44] Mr Unsworth then proposed an adjournment to consider Mr Hardy’s response. The notes record that Mr Leggett said GDL was “clearly in breach” and that an adjournment would not change the outcome.

Decision to dismiss

[45] After the adjournment, Mr Unsworth reiterated his findings and said Mr Hardy’s conduct had deeply impaired the relationship of trust and confidence between himself and GDL. He then confirmed his tentative decision to dismiss Mr Hardy for serious misconduct and did so with immediate effect.

[46] The decision to summarily dismiss Mr Hardy, and the reasons for this, was confirmed in a letter dated 28 January 2016. The letter stated the reasons termination were because Mr Hardy:

- (i) understood the code of conduct;
- (ii) signed the memorandum from the general manager relating to store manager responsibilities for the sale of liquor;
- (iii) understood his obligations as store manager in relation to the sale of liquor;
- (iv) failed to complete the LTF;
- (v) understood the potential risk to GDL of Countdown Blenheim being a strike 2 store and understood the process outlined in the memorandum referred to at (ii) above was put in place to mitigate the risk;
- (vi) put GDL at risk by not ensuring appropriate training in the sale of liquor was carried out;
- (vii) Did not prioritise the sale of liquor despite recognising the significant risk to GDL and team members from not doing so; and
- (viii) Did not seek assistance in completing the LTF.

Other relevant matters raised by Mr Hardy

Staffing issues

[47] Mr Hardy said for a good period of October and November 2015, the store was without an administration manager and a long life manager. He said these positions were critical to the effective running of a store the size of Countdown Blenheim and along with the store manager formed the senior management team.

[48] Mr Hardy said during this period the store was also short six team leaders, who operationally managed their own departments. Mr Hardy said he was working hard with the recruitment department to have these vacancies filled. He provided evidence to the Authority of his efforts in this regard.

[49] Mr Unsworth said extra assistance was provided “over and above” that provided to other stores in the same working conditions at the time. GDL also said a new second tier manager had been appointed to the store in November 2015 and Mr Hardy had acknowledged in an email on 9 December 2015 in relation to recruitment: “I think we are pretty close to where we need to be”. In his evidence to the Authority, Mr Hardy said at the time GDL alleged he had failed to maintain the LTF in December 2015, he had a “fully staffed store”.

[50] During the second disciplinary meeting Mr Unsworth acknowledged Mr Hardy’s explanation about the effect of short staffing at Countdown Blenheim but said he did not accept this explained why such an important task for a strike 2 store had not been completed.

Disparity of treatment

[51] Mr Hardy alleged there had been a disparity of treatment by GDL between himself and the store manager of Countdown Springlands (another Blenheim store).

[52] Mr Hardy said that manager, who received the same training as he, was conducting monthly, rather than weekly, checks. Mr Hardy said the store manager was given an opportunity to rectify the mistake, whereas he was dismissed for serious misconduct.

[53] GDL said there was no disparity. It said Mr Hardy was not complying with either the new or old policy. GDL further said the circumstances at the store were different because, Countdown Blenheim was a strike two store and Countdown Springlands was a strike one store. Mr Hardy said that was irrelevant because strike two and strike one stores were subject to the same policy requiring weekly checks.

Evaluation

[54] GDL said the decision to dismiss Mr Hardy was carried out in a procedurally fair manner. It further said that, even if there were defects of process, they were minor and did not result in unfairness to Mr Hardy.¹

[55] Mr Hardy said the failure to complete the LTF was not serious misconduct warranting summary dismissal. Alternatively, even if the failure to complete the LTF was serious misconduct, summary dismissal was not open to a fair and reasonable employer having regard to all the circumstances at the time including store resources and disparity issues.

Was Mr Hardy's dismissal carried out in a procedural fair way?

[56] GDL submitted that it complied with its obligations under s 103(A) of the Act. Specifically, GDL:

- a. wrote to Mr Hardy, invited him to a meeting, advised him the matter was serious and could result in his dismissal.
- b. specified the allegations, put them to Mr Hardy for comment and investigated his responses.
- c. delayed the investigation at Mr Hardy's request and allowed him to instruct legal representation of his choosing;

¹ Employment Relations Act, s103(A)(5)

- d. gave Mr Hardy a full opportunity to respond to the allegations;
- e. held three disciplinary meetings with him
- f. considered his response before making the decision to dismiss him

[57] Mr Hardy submitted that he had not been properly put on notice of the allegations made against him. He suggested GDL conflated the old and new policy during the investigation.

[58] In response to this submission, GDL said Mr Hardy never raised this concern during the employment investigation and, in any event, it made no material difference because while there was an overlap in October and November 2015 between the old and new policy, Mr Hardy was not complying with either policy. I accept this submission.

[59] Further, a review of the material provided to the Authority discloses that during the first disciplinary meeting Mr Hardy was asked if he understood the contents of the letter of 29 December 2016. Mr Hardy acknowledged that he did. He would then confirm the contents of the notes of this meeting, which contained the acknowledgement, at the commencement of the second disciplinary meeting.

[60] I find Mr Hardy's acknowledgments speak for themselves and he was properly put on notice of the allegations made against him by GDL.

[61] Mr Hardy also submitted that there were defects associated with his suspension and generalised failings by GDL to properly consider and investigate whether Mr Hardy had been properly trained.

[62] Mr Hardy did not raise a grievance in relation to his suspension. GDL's power to suspend Mr Hardy was afforded to it in very broad terms under his employment agreement in the event of allegations of serious misconduct being made against him. Mr Unsworth said in his evidence, Mr Hardy accepted his suspension on full-pay.

[63] Even if there were defects associated with Mr Hardy's suspension, the Court has found a procedurally unfair suspension on full-pay of short duration may not prevent an employer from justifying a dismissal.²

[64] The issue of the adequacy of the training given to Mr Hardy in the new liquor policy must be considered in the circumstances that he was not complying with either policy. Further, Mr Unsworth was well aware of the training given to Mr Hardy because he had delivered it. In any event, the changes between the old and new policy were fairly straightforward and, in reality, largely required Mr Hardy to carry out the same activities on a more regular basis: weekly rather than monthly.

[65] I find GDL's investigation into the allegations against Mr Hardy was procedurally fair.

Was Mr Hardy's dismissal substantively justified?

[66] GDL said the finding of serious misconduct against Mr Hardy was open to it and his dismissal was substantively justified.

[67] In his responses to GDL during the employment investigation and his evidence before the Authority, Mr Hardy accepted that he had not completed the LTF and that he was aware of his obligations as store manager in respect of the sale of liquor.

[68] In his evidence to the Authority, Mr Hardy stated: "I concede that I did sign the Code of Conduct document for all employees and the Memorandum from the Acting General Manager Andrew Halerthay dated 28 September 2015. I was also aware of my responsibilities in relation to the sale of liquor including the responsibilities as outlined in the position description in the First Schedule of my Individual Employment Agreement with [GDL]". However, he would also say his working conditions were such that even with his level of experience, he had difficulty complying with all the responsibilities expected of him as a store manager.

² *Kereopa v Go Bus Transport Limited* [2009] NZEmpC 74 at [29]

[69] The memorandum stated a failure to comply with policy and the law was a serious issue and could result in disciplinary action. Mr Hardy signed the memorandum to acknowledge he had read it and would abide by its conditions. I find this was a “fair and unequivocal warning” by GDL to its store managers, including Mr Hardy.³

[70] I further find a fair and reasonable employer having given such a warning could, on the facts, even though Mr Hardy’s failure to complete the LTF did not result in Countdown Blenheim receiving a third strike and thereby losing its liquor licence, make a finding of serious misconduct against Mr Hardy. On his own evidence, Mr Hardy was knowingly aware of his responsibilities in relation to the sale of liquor and the consequences to his store and GDL of further incidences of non-compliance.

Staffing issues

[71] As outlined above, Mr Hardy raised generalised staffing issues as a reason for not completing the LTF. However, he did not appear to draw a direct link between such staffing issues and the failure by him to complete the LTF.

[72] I accept the position of GDL that staffing issues said to exist at or about the time of his inactions in respect of the LTF cannot explain Mr Hardy’s failure to prioritise sale of liquor compliance within the context of Countdown Blenheim being a strike 2 store, and in the event he was unable to do this, request assistance from his employer.

Disparity of treatment?

[73] The Court of Appeal considered the issue of disparity of treatment in dismissal situations in *Chief Executive of Inland Revenue v Buchanan*.⁴ In that case, the Court approved a three stage test for the assessment of disparity of treatment as follows: (i) was there a disparity of treatment; (ii) if so, was there an explanation by the employer

³ *Butcher v OCS Limited* [2008] ERNZ 367 at [57]

⁴ [2005] 1 ERNZ 767

for the disparity; and (iii), if not, was the dismissal justified even though a disparity was found to exist?

[74] I find there was no disparity of treatment between Mr Hardy and the store manager of Countdown Springlands. For reasons given above, I accept GDL's position that Mr Hardy was not complying with either the new or old policy. I also accept GDL's position that the circumstances between the two stores were different because Countdown Blenheim was a strike two store and Countdown Springlands was a strike one store.

[75] Having found there was no disparity of treatment, it is not necessary to consider the rest of the test.

Conclusion about Mr Hardy's personal grievance

[76] The finding of serious misconduct against Mr Hardy by GDL was available to it on the facts as established by a procedurally fair investigation carried out in compliance with s 103A of the Act. The subsequent disciplinary action taken against Mr Hardy, which saw him dismissed from his employment as Store Manager of Countdown Blenheim, was within the range of reasonable responses available to GDL.

[77] Having found Mr Hardy was not unjustifiably dismissed by GDL, it is not necessary to consider the issue of remedies.

[78] For completeness, to the extent it was advanced as a separate cause of action by Mr Hardy, for the reasons given above, I find that GDL did not breach its good faith obligations to Mr Hardy in carrying out its employment investigation.

Costs

[79] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of

a daily tariff of \$4500 for one day investigation meeting adjusted upwards or downwards for relevant factors.⁵

A handwritten signature in black ink, appearing to read 'Andrew Dallas', written over a light blue horizontal line.

Andrew Dallas
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].