

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 7
5419080**

BETWEEN

MARGARET HARRIS
Applicant

AND

THE WAREHOUSE LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Peter Cranney, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 19 & 20 November 2013 at Paihia

Submissions received: 20 November 2013 from Applicant and from Respondent

Determination: 10 January 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Margaret Maria Harris, claims that she was unjustifiably dismissed by the Respondent, The Warehouse Limited (The Warehouse), on 8 March 2013.

[2] The Warehouse denies that Ms Harris was unjustifiably dismissed and claims that she was justifiably dismissed for serious misconduct.

Issues

[3] The issue for determination is whether or not Ms Harris was unjustifiably dismissed by The Warehouse, in particular:

- Was The Warehouse entitled to reach the view that Ms Harris had engaged in serious misconduct?
- Did The Warehouse carry out a proper procedure?
- Was the termination of Ms Harris's employment the appropriate outcome?

Background Facts

[4] Ms Harris commenced employment with The Warehouse in October 2011 as a Loss Prevention Officer (LPO) at The Warehouse store in Kaikohe (the Store). Ms Harris had been provided with a job description setting out her duties, and which stated as the reason why the position existed as:

To take a leading role in In-Store Loss Prevention initiatives and assist the store in achieving a stock loss result within the set targets of each six monthly period. To ensure all customers are treated appropriately.

[5] As a union member Ms Harris had been issued with a copy of the collective employment agreement between First Union and The Warehouse (the CEA) and a copy of The Warehouse House Rules.

[6] Clause 16.1 of the CEA entitled 'Serious Misconduct' stated:

Serious misconduct constitutes grounds for dismissal without notice. Any team member who violates the Company House Rules, or is guilty of other serious misconduct, may be summarily dismissed (i.e, without notice). A single instance of serious misconduct may result in dismissal, regardless of whether or not any previous warnings have been issued.

[7] The Warehouse House Rules set out a number of actions which could constitute serious misconduct including:

16. Threatening, intimidating, or interfering with another Team member or anyone on Company premises.

17. Sexual or racial harassment or unlawful discrimination.

[8] The Warehouse House Rules also set out a number of actions which could constitute misconduct including

1. Offensive language or rudeness to customers, suppliers or Team Members.

Events on 15 February 2013

[9] Ms Harris said that on 15 February 2013 she had been sitting at the security podium near the front door of the Store which was adjacent to the foyer of the Store when she noticed a customer with a dog standing near the checkout.

[10] Ms Harris said she had politely approached the customer and explained that dogs were not allowed in the Store with the exception of blind dogs, and had explained the health and safety issues involved before returning to the security podium.

[11] Because the customer had not left the Store, Ms Harris said she had approached her a second time and again politely requested that she left the Store, however the customer had kept her back turned to her.

[12] As Ms Harris returned to the security podium the customer had left the Store and entered the foyer. Ms Harris said that she had followed the customer into the foyer to talk to her and explain the Store policy and the reason why she had to leave the foyer and go outside the Store with the dog.

[13] Whilst Ms Harris was in the process of talking to the customer, she said a Maori Warden, Ms Lovey Rakete, had intervened and spoken to the customer. During the Investigation Meeting Ms Harris stated that Ms Rakete had exacerbated the situation, and agreed that she herself had done nothing to defuse that situation.

[14] Ms Harris then re-entered the Store and commented to another employee, Ms Jasmine Maunsell, that the customer was arrogant.

[15] Ms Harris confirmed that throughout her exchanges with the customer with the dog, the customer had neither spoken nor replied to her.

Letter of complaint

[16] Mr Richard Bunce, Store Manager, said he had become aware of a complaint against Ms Harris on 18 February 2013 when The Warehouse Customer Service Team had forwarded to him an email complaint from Mr Jeff Pattinson, the husband of the customer with the dog who had been asked by Ms Harris to leave the Store on 15 February 2013.

[17] The email forwarded to him included the customer complaint which had been made on the day of the incident. The complaint had been written by Mr Pattinson and addressed the manner in which Mrs Pattinson had been spoken to by Ms Harris whilst they had been in the

Store. In the letter of complaint, after explaining that the initial interchanges with a Store employee had not been polite, Mr Pattinson stated that when his wife was leaving the Store:

... I heard the original woman state loudly, "how arrogant!" and then she continued to discuss it loudly with her co-workers, saying something like, "if they were Maori they wouldn't be like that ... and she said something else about white people .." and they agreed with her.

Then the original employee went out to the entry area and demanded my wife leave from there as well, calling her arrogant again.

My wife then pointed out that she was no longer in the shop, but this was not satisfying to your employee.

Then this woman threatened to call the Police and to have my wife served with a trespass notice.

[18] The letter of complaint continued with further details concerning the incident and made comments of an extremely offensive manner concerning the Store and its employees.

[19] Mr Bunce said he had read the letter of complaint carefully and having set to one side the emotive and obnoxious comments made in the letter, had isolated the key elements of the complaint. He had concluded that there may have been an incident of poor customer service, and possible rudeness, threatening or intimidating behaviour, or even racial taunts. In addition he noted some operational issues concerning the Store signage in regards to dogs.

[20] Mr Bunce said that despite its unpleasant tone he could not ignore the letter of complaint and he had decided to view the Store CCTV footage from the times provided by Mr Pattinson, and to have a discussion with Mr and Mrs Pattinson before proceeding further.

[21] Mr Bunce explained said he had involved Ms Val McCoid, Assistant Store Manager, in the process and they had both viewed the CCTV footage of the incidents. Ms McCoid said she had been concerned by what the CCTV footage showed of Ms Harris's actions, particularly her body language with her arms and hands raised, and the fact that she appeared to be quite animated whilst talking to Mrs Pattinson.

[22] Mr Bunce said that he had found the CCTV footage did not contradict what Mr Pattinson had said in the letter of complaint, and in fact tended to support some, if not all, of what he had stated.

[23] In particular Mr Bunce explained that the CCTV footage showed three exchanges between Ms Harris and Mrs Pattinson and that:

- In relation to the first exchange, asking a customer to leave the Store was a serious matter and had to be handled delicately. The customer needed to be approached in a friendly manner with a polite explanation of what the policy was and why it was in place. In his view this would take at least 30 seconds; however the CCTV footage recorded the first exchange between the customer with the dog and Ms Harris as taking 3 seconds.
- In relation to the second exchange, Ms Harris, who had returned to her podium, had returned partway towards the customers and had been shown gesticulating at them, communicating from a distance. In his view, if the request was to be polite, it should take place in close proximity.
- In relation to the third exchange, the customer had left the main part of the Store and gone into the foyer followed by Ms Harris, whose body language appeared to him to be aggressive rather than conciliatory.

[24] Mr Bunce said that he had been sufficiently concerned by what he had seen that he had felt he should talk to the customer. After contacting Mr Pattinson, a meeting had been arranged with him and Mrs Pattinson for 26 February 2013 when they would be available.

[25] Mr Bunce and Ms McCoid had met Mr and Mrs Pattinson on 26 February 2013. Mr Bunce said they were both still angry, and alleged that they had been treated poorly whilst in the Store. They said that the Store employee's manner had been intimidating, she had used racial language referring to them as "white", had referred to them as 'arrogant', and had spoken to them loudly in front of other customers.

[26] Mr Bunce said he had shown Mr and Mrs Pattinson a copy of the CCTV footage and from it they had confirmed that Ms Harris was the woman about whom they had been speaking.

[27] Following the meeting with Mr and Mrs Pattinson, Mr Bunce decided that, despite the obnoxious comments made by Mr Pattinson in the letter of complaint, there did appear to have been a situation created by Ms Harris which had left customers feeling upset and intimidated. On this basis he decided that it was appropriate to commence a disciplinary process with Ms Harris in relation to the incident on 15 February 2013.

Disciplinary Process

[28] On 27 February 2013 Ms Harris said she had been asked to meet with Mr Bunce and Ms McCoid and had been presented with a 'Step One', The Warehouse disciplinary meeting advice letter. The Step One advised Ms Harris that she was required to attend a disciplinary meeting to respond to three allegations in connection with an incident on 15 February 2013, and that she was entitled to have a support person present at that meeting.

[29] The three allegations were set out as being:

- 1) *Asking the customer to leave the premises by using intimidating behaviour;*
- 2) *Threatening, intimidating or interfering with another team member or anyone on company premises; and*
- 3) *Sexual and racist harassment or unlawful discrimination.*

[30] At the 27 February 2013 meeting, Ms Harris had also been consulted about, and had agreed to, suspension on full pay pending the outcome of the disciplinary investigation.

[31] Mr Bunce said that following the meeting he had completed the Step One and provided a copy to Ms Harris together with a copy of the letter of complaint. He had also prepared a suspension letter from The Warehouse template and sent it to Ms Harris's home.

[32] Ms Harris said she had been shocked by the tone and content of the letter of complaint as she found it to be untrue, very offensive, derogatory and upsetting.

Investigation 27 February 2013

[33] Mr Bunce said he had carried out further investigation later that day, meeting with Store employees, Ms September Erueti, and Ms Jasmine Maunsell, and also with the two Maori Wardens who had been present in the Store on 15 February 2013. Ms McCoid had been present at all the interviews and had recorded the interviews and meetings immediately after each meeting when she and Mr Bunce sat down to write out in full what they had each jotted down during the meetings.

(i) Interview with Ms Erueti

[34] Mr Bunce said he and Ms McCoid had first interviewed Ms Erueti who is a Supervisor/Checkout Operator and who had been present at the customer services counter from time to time during the time the incident occurred.

[35] Ms Erueti had been shown the CCTV footage and then asked if she could recall any of the conversation between Ms Harris, Mrs Pattinson and the two Maori Wardens.

[36] Ms Erueti said she had recognised Mr and Mrs Pattinson but she had not heard any of the conversation between Ms Harris, Mrs Pattinson and the two Maori Wardens, although she recalled that Ms Harris had told her and Ms Maunsell that she had asked Mrs Pattinson to leave the Store.

[37] At the end of the meeting Mr Bunce said he had asked Ms Erueti to confirm that she definitely did not hear any conversation between Ms Harris, Mrs Pattinson and the two Maori Wardens, and she had done so.

(ii) Interview with the Maori Wardens

[38] Mr Bunce said that the two Maori Wardens, Ms Lovey Rakete and Mr Te Matiukapa Rakete, had been present during the incident and involved in the exchanges with Mr and Mrs Pattinson, although they had not been on duty at the time and had not been in uniform.

[39] As Mr and Ms Rakete had been present in the Store on 27 February 2013 Mr Bunce said he had asked them to meet with him, and they had agreed.

[40] Mr Bunce explained that whilst he knew Ms and Mr Rakete were persons of status within the Maori community, he did not know them personally. Having confirmed that they remembered the incident on 15 February 2013, Ms and Mr Rakete said that Ms Harris had asked the customer in a nice manner to leave the Store with the dog. The customer had ignored Ms Harris, so she had asked her a second time to leave, saying that it was a health and safety issue.

[41] Mr Bunce said he had explained that the customer alleged that she had felt intimidated by Ms Harris's actions, however Ms and Mr Rakete stated that there had been no intimidation on Ms Harris's part. They had also denied that there had been any racial content during the discussions with the customer.

[42] Mr Bunce said he had then asked them about the CCTV footage which showed them interacting with the customer, and they said they had been pointing out to the customer that she should not be in the Store with a dog due to health and safety reasons.

[43] Ms McCoid said she had asked Ms Rakete what the customer had responded when she, Ms Harris, and the customer had been in the foyer and she had been asking the customer to leave, and Ms Rakete had stated that the customer had said nothing.

[44] Mr Bunce said he had not believed that what the Maori Wardens were telling him was truthful because he had sensed they were embarrassed about what had occurred on 15 February 2013. Although they had told him that Ms Harris had been polite in her interactions with the customers, he considered that this did not accord with what was shown on the CCTV footage.

[45] Ms McCoid said she concurred with Mr Bunce's view as she also had considered that Ms and Mr Rakete were evasive and had the impression that they were trying to protect Ms Harris.

[46] Mr Bunce also said that although the Maori Wardens had told him that Ms Harris had not threatened Mrs Pattinson with the police or a trespass notice, he had reached the conclusion that she had done so, based on his belief that a 'trespass order' was an order solely utilised by The Warehouse. Additionally, although he had considered whether or not Mr or Ms Rakete may have used the expression, he concluded that it was unlikely they had done so, based on their lack of jurisdiction in respect of The Warehouse's premises.

(iii) Interview with Ms Maunsell

[47] Mr Bunce and Ms McCoid had then interviewed Ms Maunsell who had been working on the Service Desk at the time of the incident on 15 February 2013 and who had instantly recalled the incident and the customer with the dog.

[48] Ms Maunsell had told Mr Bunce and Ms McCoid that she remembered Ms Harris going to the customer and asking her to leave; however the customer had not done so and Ms Maunsell said she had felt the customer's husband was being quite arrogant. She also recalled Ms Harris asking the couple for a second time to leave and that at this point the customer with the dog did walk into the foyer.

[49] Mr Bunce said he had also asked Ms Maunsell if she could recall two Maori Wardens in plain clothes becoming involved in the incident and she confirmed that she did, and that she had heard Ms Rakete say: "*if it was a Maori walking into your store then it would be a different story*". However Ms Maunsell said she had not witnessed or heard Ms Harris saying anything racist.

[50] Mr Bunce said he had asked Ms Maunsell if Ms Harris had been intimidating to the customer and Ms Maunsell had said that she did not think she had been. He had mentioned to Ms Maunsell that from the CCTV footage it looked as if Ms Harris had been shouting across the Store floor from where the baskets were situated, and Ms Maunsell said that Ms Harris had yelled at the customer from the baskets and told her to remove her dog.

[51] Mr Bruce had then asked Ms Maunsell if she had heard Ms Harris making any derogatory comments as she walked away from the customer as this was part of the complaint. Ms Maunsell had replied that Ms Harris had said “*arrogant prick*”, confirmed that the customer was quite close by and would have been able to hear it, and that the customers had looked at each other when they heard it.

[52] Mr Bunce and Ms McCoid said that Ms Maunsell had been very clear and concise in her recollections. She had had a direct line of sight from where she had been standing at the service desk and had been well placed to witness the incident.

[53] At the Investigation Meeting Ms Maunsell said that she had been confused by Mr Bunce’s questioning, and that she had not been shown the CCTV footage. However when questioned Ms Maunsell confirmed that she had told Mr Bunce and Ms McCoid that Ms Harris had ‘*yelled*’ at the customer from the baskets, and that she had told them that Ms Harris had called the customer an ‘*arrogant prick*’ although she had only heard Ms Harris say ‘*arrogant*’.

The Disciplinary Meeting on 6 March 2013

[54] The disciplinary meeting held on 6 March 2013 had been attended by Mr Bunce, Ms McCoid, and Ms Harris who had been accompanied by Mr Gary Hetherington, First Union Officer, and Ms Anne-Marie Tango, as her support persons. Prior to the meeting Mr Bunce had provided Mr Hetherington with all of the notes of the interviews which had been held and the CCTV footage. Ms McCoid took notes during the meeting.

[55] Ms Harris said that at the meeting she had told Mr Bunce and Ms McCoid what had happened on 15 February 2013, and that when Mr Hetherington had said that there had been no racist or rude comments made by her she had said: “*I am not a racist.*”

[56] Mr Bunce said he had tried to keep the focus of the meeting on how the customers had been treated, and explained that he had asked the customers to come into the Store and explain what their concern had been. He had asked Ms Harris to explain what had occurred.

[57] Ms Harris had explained that she had been at the checkouts and had seen the customer with the dog when she had returned back to the checkouts. Ms Rakete had come

across to her and complained that the customer had a dog; so she had gone over to the customer and told the customer that dogs were not allowed, explaining that this was due to health and safety considerations.

[58] The customer had turned her back on her and she had said: “*excuse me Mam. We don’t have dogs in the store, can you remove the dog from the store*”. Ms Harris confirmed that she had been close to the customer when she had made the comments, so Mr Bunce said he had questioned whether she had the time to make the comments given what was shown on the CCTV footage.

[59] Ms Harris said she had only been shown the CCTV footage taken from the camera at the entry of the store and from the camera behind the service desk, but the footage from the checkout area and later footage of her discussion with Ms Maunsell on the service desk had not been provided.

[60] Mr Bunce said that as Ms Harris had been upset during the meeting there had been a number of adjournments. Although she said repeatedly that she had been polite to the customer, Mr Bunce said that Ms Harris had stated that the situation “*blows up*” after she returned to the security podium.

[61] Mr Bunce said that after informing Ms Harris that an employee had said she had yelled at the customer he had asked her how she thought the customer would feel in that situation, and Ms Harris had agreed that the customer would feel uncomfortable and that she had used an inappropriate manner.

[62] Mr Bunce told Ms Harris that Ms Maunsell had alleged that she had said the customer was an ‘*arrogant prick*’ and that the customers’ letter of complaint had used the word ‘*arrogant*’ but Ms Harris denied she had said ‘*arrogant prick*’ or that she had made derogatory remarks.

[63] Mr Bunce asked Ms Harris if she had threatened the customer with the police or a trespass notice, but Ms Harris denied she had done so.

[64] The disciplinary meeting had concluded with an agreement to reconvene on 8 March 2013.

Further investigation

(i) Interview of Ms Maunsell

[65] Given Ms Harris’s denials of the customer complaint and Ms Maunsell’s statement about the ‘*arrogant prick*’ remark, Mr Bunce had decided to re-interview Ms Maunsell which

he and Ms McCoid had done on 6 March 2013. At the meeting Ms Maunsell had confirmed that Ms Harris had ‘yelled’ at the customer.

[66] Ms McCoid said she had asked Ms Maunsell to define what she meant by yelling and Ms Maunsell had demonstrated raising her voice. Ms Maunsell also confirmed that Ms Harris had made the ‘*arrogant prick*’ comment and that it had been loud enough for the customer to have heard it.

(ii) *Interview of Ms Cheryl Coster*

[67] Mr Bunce said he had initially discounted Ms Cheryl Coster who had been working on the checkout on 15 February 2013 as a witness, as on the CCTV footage she appeared to be fully engrossed and immersed in customer service at the time of the incident on 15 February 2013.

[68] Following the disciplinary meeting with Ms Harris on 6 March 2013 he had decided to interview her; however she had been unable to assist.

[69] Ms Coster said she had told Mr Bunce and Ms McCoid that she had noticed the customers with the dog on 15 February 2013, however she had not heard yelling which she would have done if it had occurred, despite her being busy.

Disciplinary Meeting on 8 March 2013

[70] The disciplinary meeting reconvened on 8 March 2013 and was attended by Mr Bunce, Ms McCoid, Ms Harris and Mr Hetherington. It had opened with Mr Bunce recapping on what had happened since the previous meeting on 6 March 2013, and stating that he saw the contentious issue as whether or not Ms Harris had raised her voice and made the ‘*arrogant prick*’ comment.

[71] Mr Bunce explained that he had spoken to Ms Maunsell again and read out her statement confirming her previous statement that Ms Harris had yelled and made the ‘*arrogant prick*’ comment within the customer’s hearing, also noting that the customer had said in the letter of complaint that the comment had been; “*how arrogant*”.

[72] Ms Harris agreed that she had said to Ms Maunsell that the customer was being arrogant.

[73] Mr Hetherington had made submissions on Ms Harris’s behalf, stating that Ms Harris had not made any racist comment, the Maori Wardens had added to the situation, Ms Harris

had not intended the customer to hear the ‘*arrogant*’ comment, and that she would write a letter of apology to the customer.

[74] After this Mr Bunce had adjourned the meeting to telephone The Warehouse’s HR Advisor, Ms Julie Whale, to update her on the situation, and to tell her that after consultation with Ms McCoid, his view was that there had been serious misconduct and that dismissal was the appropriate outcome. Ms Whale had agreed with his view so he had written out his preliminary decision in order to read from it when the meeting resumed.

[75] Ms Harris said when the meeting resumed Mr Bunce had informed her of his findings which were that:

- The complaint was the worst customer complaint he had received in 30 years of retail management;
- He did not believe she had made any racist remarks;
- He did not believe the customers were asked politely to leave;
- He believed she had called across the Store to the customers;
- He believed she had walked away from the customers and made a derogatory remark ‘*arrogant prick*’ which had been heard by the customer and other people;
- Her actions after the customer had left the Store had been an attack and totally excessive;
- She had threatened the customer with the police and a trespass notice.

[76] Mr Bunce said that he had viewed the matter as serious misconduct, taking into account the fact that two customers had come into the Store to shop, and had left feeling embarrassed, threatened and humiliated. As a result he did not feel he could trust Ms Harris to act appropriately with customers in the future, such that his preliminary decision was that dismissal was the appropriate outcome.

[77] In reaching this decision, Mr Bunce said he had considered whether dismissal was the appropriate outcome rather than some lesser sanction, however he had considered that there had been four separate points of interaction between Ms Harris and the customers where she could have behaved appropriately, but had not done so, these being when :

- i. she had approached them and asked them to leave;

- ii. she had yelled at them across the Store floor;
- iii. she had made the ‘*arrogant prick*’ remark sufficiently loudly to be heard by others;
- iv. she had followed Mrs Pattinson out of the Store and continued to escalate the situation,

[78] In addition Mr Bunce considered that Ms Harris had done nothing to try to calm the situation down when the Maori Wardens had taken it upon themselves to interfere, and had at no time, until the end of the meeting on 8 March 2013 when she had offered through Mr Hetherington to apologise, acknowledged to the customers or to him that she had behaved inappropriately.

[79] Instead there had been a series of incidents, escalating in severity, where she had embarrassed and/or intimidated the customers.

[80] After Mr Bunce had read out his preliminary decision there had been a further adjournment so that Ms Harris could consider it and provide further comments. When the meeting reconvened Ms Harris advised via Mr Hetherington that she had nothing further to add.

[81] Mr Bunce had confirmed his preliminary decision in writing by letter dated 8 March 2013 and advised that Ms Harris’s employment was terminated summarily with effect from that date.

[82] Ms Harris’s employment was terminated on 8 March 2013. On 10 May 2013 Ms Harris filed a Statement of Problem with the Authority. The parties attended mediation but this did not resolve the issues.

Determination

Was Ms Harris unjustifiably dismissed by The Warehouse?

[83] Ms Harris had been dismissed by The Warehouse on 8 March 2013. The Test of Justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

- ii. *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[84] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. The Warehouse must therefore establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Was The Warehouse entitled to reach the view that Ms Harris had engaged in serious misconduct?

[85] The Warehouse as a retail organisation set high expectations of its employees in terms of customer service, customer service and satisfaction being of critical importance to its business. Mr Bunce stated, and I accept, that The Warehouse's expectations regarding customer service were repeatedly emphasised to all the employees at the Store. I also accept that all employees at the Store, including Ms Harris, are and were provided with formal and on the job customer service training.

[86] Ms Harris was dismissed as a result of the incident involving Mr and Mrs Pattinson on 15 February 2013. In reaching the decision to dismiss, Mr Bunce had taken into consideration information derived from Mr and Mrs Pattinson, Ms Erueti, the Maori Wardens, Ms Maunsell, Ms Harris and the CCTV footage.

[87] Although the letter of complaint written by Mr Pattinson was extremely racist in nature and contained extremely offensive and obnoxious comments, these had been allegedly set to one side by Mr Bunce who had proceeded to examine the customer service complaints, viewed the CCTV footage, and interviewed Mr and Mrs Pattinson before proceeding further and issuing the Step One procedure to Ms Harris.

[88] I also observe that although the letter of complaint written by Mr Pattinson was written in emotional, racist and offensive language, during the incident on 15 February 2013 Mrs Pattinson had not spoken to or made any comment whatsoever to Ms Harris which would have contributed to the situation which subsequently arose.

[89] At the initial stage of his investigation Mr Bunce identified that there appeared to him to have been actions taken by Ms Harris on 15 February 2013 capable of constituting serious misconduct as set out in The Warehouse House Rules.

[90] Although the evidence from the Maori Wardens upheld the version of events given by Ms Harris, and the evidence provided by Ms Erueti and Ms Coster did not support the allegations, the evidence of Ms Maunsell was that Ms Harris had ‘yelled’ at the customer and referred to her as an ‘*arrogant prick*’ which comment had been overheard by the customer.

[91] In *Ministry of Maori Development v Travers-Jones*¹ the Employment Court observed:

A personal grievance is not an appeal to the Employment Relations Authority from the employer’s findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.

[92] Although the employer is entitled to accept one account rather than another, his or her beliefs must be based on reasonable grounds.

[93] During the Investigation Meeting Ms Maunsell gave evidence to the effect that she had been confused during the interviews she had with Mr Bunce and Ms McCoid and had consequently provided them with false information about the incident on 15 February 2013.

[94] I note that Ms Erueti said at the Investigation Meeting that she could confide in Mr Bunce as she trusted him, and Ms Maunsell said she considered she could go, and had in fact had gone, to Mr Bunce with any problems. On this basis I do not find that Ms Maunsell had felt pressurised by Mr Bunce into providing false information during the interviews.

[95] I find that Mr Bunce was entitled to rely upon the evidence which Ms Maunsell had provided on 27 February 2013, and which she reconfirmed on 6 March 2013, and which supported the allegations made in the letter of complaint.

[96] I have considered Mr Bunce’s view of the evidence given by the Maori Wardens which upheld Ms Harris’s evidence. Despite Mr Bunce accepting that the Maori Wardens were of high standing and respected members of the Community, he had not accepted their

¹ [2003] 1 ERNZ 174

evidence as portraying what actually occurred based on his impression that they had been embarrassed by what had occurred on 15 February 2013, and his erroneous view that a ‘trespass order’ was an order only used by The Warehouse.

[97] However I find that Mr Bunce balanced the evidence given by the Maori Wardens in light of that provided by the CCTV footage, albeit that this did not provide any sound dialogue, which indicated the involvement of the Maori Wardens whilst Mrs Pattinson was still in the Store and Ms Rakete being present during the incident in the foyer, and the fact that the Maori Wardens had no jurisdiction within the Store premises to issue a trespass order, whereas Ms Harris, as the Store LPO, did have.

[98] Mr Bunce had discounted Ms Coster’s version of the events as provided to him when interviewed which was that she would have heard yelling, despite being busy. Mr Bunce had not given this negative evidence any weight based on his own Store experience, which I find was a view open to him when this evidence was balanced in the totality of the evidence he had gathered. I also note that Ms McCoid supported Mr Bunce’s view, again based on her own Store experience.

[99] Taking into consideration:

- (i) the evidence of the Maori Wardens, Ms Ereuti and Ms Coster with Ms Maunsell’s evidence, which had been reconfirmed, and Ms Harris’s own admission during the disciplinary meeting held on 6 March 2013 that the situation: “*blows up*”, and had been exacerbated by Ms Rakete, without her as the Store LPO taking any action to alleviate the situation; and
- (ii) the further admission during the disciplinary meeting held on 8 March 2013 in which Ms Harris admitted that she had made the ‘*arrogant*’ comment, and offered to write an apology

I find that The Warehouse was entitled to regard Ms Harris’s behaviour as amounting to serious misconduct as defined in the House Rules.

[100] I have considered whether serious misconduct applies to a situation in which an employee, like Ms Harris, considers that the actions they have taken are in accordance with their duties such that the issue is about performance rather than misconduct.

[101] Although there were no signs advising customers that dogs were not allowed in the Store, this is the normal policy in retail shops, especially in shops, which like the Store, stock

food items. It is a health and safety issue and I accept that Ms Harris acted properly by deciding to ask the customer to leave the Store with the dog.

[102] However Ms Harris's conduct from that initial point onwards was inappropriate and crossed the dividing line between rudeness to a customer constituting a misconduct issue in accordance with the House Rules, to that of making the customer feel threatened and intimidated constituting serious misconduct in accordance with the House Rules

[103] In summary, I find that what raises this issue from a performance issue to that of serious misconduct is the escalating nature of the interactions in which Ms Harris failed to act appropriately in the situation which had arisen, particularly in light of the Maori Warden involvement where she had failed, as The Warehouse representative, to take control and defuse the situation.

Did The Warehouse carry out a proper procedure?

[104] In accordance with s 103A (3) of the Act the Authority must also consider whether:

(a) ... the employer sufficiently investigated the allegations against the employee ...

(b) ... the employer raised the concerns that the employer had with the employee ...

(c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...

(d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[105] I find that The Warehouse did carry out a proper investigation in accordance with s103A of the Act in that I find that Ms Harris had been advised of the allegations against her, provided with the opportunity to offer an explanation, and that Mr Bunce did give full consideration to her explanation.

Was termination of Ms Harris's employment the appropriate outcome?

[106] The Test of Justification requires that I determine whether Mr Bunce's action in dismissing Ms Harris was one that a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred.

[107] In *Angus v Ports of Auckland Limited*² the Employment Court observed:³

... The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established ... The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer's response to those conducts.

[108] Mr Bunce said he no longer had trust and confidence in Ms Harris to deal appropriately with customers in the future, and that the incident on 15 February 2013 was of sufficiently serious misconduct to merit dismissal rather than a lesser sanction.

[109] Whilst Ms Harris had acted inappropriately in her interactions with the customers on 15 February 2013, I note that she had not been subjected to any disciplinary procedures prior to that triggered by the incident on 15 February 2013. Further that Mr Bunce confirmed that prior to the incident he had had no concerns about Ms Harris's performance.

[110] I also observe that at the outset of the incident on 15 February 2013 Ms Harris had believed herself to have been acting in the course of her duties by asking a customer to remove a dog from the Store. As previously observed, this is normal policy based on health and safety considerations in a situation in which, as in this case, a retail store stocks food items.

[111] I consider that the fair and reasonable employer would have taken these factors into consideration when considering the appropriate outcome, and would not have made a decision to dismiss Ms Harris.

[112] I determine that Ms Harris was unjustifiably dismissed by The Warehouse.

Remedies

[113] When considering the issue of remedies, I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

² [2011] NZEmpC 160

³ Ibid at para [24]

[114] As set out above, I have found that Ms Harris from the initial point of contact had proceeded to act inappropriately in further interactions with the customer, and that this, together with the interventions of the Maori Wardens had resulted in the initial situation 'blowing up'. A situation which Ms Harris had taken no steps to defuse.

[115] Mr Bunce took the view that Ms Harris's conduct towards the customer was such a serious breach of her principle responsibility to ensure: "*that all customers are treated appropriately*" that his trust and confidence in her was destroyed.

[116] That view had not been alleviated by the fact that Ms Harris, although clearly upset at the first disciplinary meeting, had not accepted any responsibility at that point for what had occurred, and had only, at the second disciplinary meeting, acknowledged she had made the comment '*arrogant*' and offered, through Mr Hetherington, to write an apology to the customer.

[117] The Warehouse is a business in which customer service is of paramount importance. Ms Harris had received training in customer service and would have been fully aware of the expectations of her as a company representative.

[118] Ejecting a customer from a store is a process which needed to be handled with delicacy to avoid offence, and Ms Harris had failed to handle this situation appropriately.

[119] I consider Ms Harris's contribution to the situation in which she subsequently found herself to be assessed at 100%, and accordingly award her no remedies

Costs

[120] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority