

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Marlene Ann Hunt and Shirley Tamaiparea (Applicants)
AND Christchurch Yarns New Zealand Ltd (Respondent)
REPRESENTATIVES Greg Lloyd, counsel for the applicants
Peter Zwart, advocate for the respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING Christchurch 22 June 2006
DATE OF DETERMINATION 10 August 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicants, Marlene Hunt and Shirley Tamaiparea, were employed as textile workers at the respondent company, Christchurch Yarns NZ Limited. Ms Hunt commenced her employment with the respondent in October 1999 and Ms Tamaiparea in April 1994.

[2] Both applicants were summarily dismissed from their employment on 21 March 2006 and say that their dismissals were unjustified. By agreement their employment relationship problems were investigated together as they arise out of the same factual background.

[3] Ms Hunt seeks lost wages and compensation and Ms Tamaiparea permanent reinstatement, lost wages and compensation.

[4] The respondent Christchurch Yarns NZ Limited ("Christchurch Yarns") is a duly incorporated company and carries on the business of carpet production.

[5] Christchurch Yarns believe that the dismissal of Ms Hunt and Ms Tamaiparea was justified and say that the applicants are not entitled to the remedies that they seek.

The Issues

[6] The issue in this case is whether the dismissal of Ms Hunt and Ms Tamaiparea is justifiable?

[7] The test for justification in section 103A of the Employment Relations Act 2000 has been the subject of one Employment Court case, *Hudson v Air New Zealand Limited* (Unrep AC30/06, 30 May 2006).

[8] Objective evaluation of the following questions is required:

- Was there a full and fair investigation by Christchurch Yarns which disclosed conduct by Ms Hunt and Ms Tamaiparea which a fair and reasonable employer would regard as serious misconduct?

- Would a fair and reasonable employer have made the decision to summarily dismiss Ms Hunt and Ms Tamaiparea?

[9] If the applicants were unjustifiably dismissed then it is necessary to consider what remedies they should receive and issues of contribution?

What did Ms Hunt and Ms Tamaiparea do?

[10] The essential facts in this case are not in dispute and can therefore be set out succinctly.

[11] Christchurch Yarns installed two hidden cameras. One of the cameras was above the time clocking machine.

[12] On 7 February 2006 the general manager of Christchurch Yarns, Glenn Wilcock, issued all employees including Ms Hunt and Ms Tamaiparea with a memorandum in their pay packets. The memorandum stated:

I would like to remind everyone, that clocking other peoples' clock cards is Serious Misconduct as stated in the house rules. Any one caught clocking in or out another workers card will face disciplinary action, and eventually dismissal.

While on the issue of clocking in, I would like to remind everybody that the working hours finish on the hour, not 10 minutes to, as in the case of a few people, the Company pays up to the hour for your labour, not for you to stand in front of the clocking machine for up to 10 minutes.

Things are tough enough at the present time with the high dollar and competition from offshore, we need all the efficiencies we can get.

Glenn Wilcock

[13] The house rules provided under serious misconduct:

Infringement of any of these rules will result in suspension pending investigation and, if the infringement is proven, dismissal.

1. *Falsification of company records including clocking another employee's time-card.*

[14] Mr Wilcock had talked in general staff meetings about rules around clocking in and out a few months prior to the issuing of the memorandum although the applicants probably thought the focus of the discussion was those who stood and waited in front of the clocking machine before work had finished.

[15] At the material time Ms Hunt and Ms Tamaiparea worked on the night shift at Christchurch Yarns between the hours of 10pm and 6am.

[16] Ms Hunt would travel to work by car and would always pick Ms Tamaiparea up on the way to work at about 9.30pm. They would both arrive together at Christchurch Yarns between 9.40am and 9.45am.

[17] On 14 March 2006 Ms Hunt clocked Ms Tamaiparea in to work and this was recorded on the hidden camera. Ms Hunt's explanation during the subsequent disciplinary meeting was that she did this for convenience. She said that they arrived at work and both got out of the car. Ms Tamaiparea headed toward the shed for a cigarette before the start of work. Ms Hunt does not smoke and she recalled she was carrying pizzas that day so went inside to the cafeteria.

[18] I accept that there must have been some dialogue between Ms Hunt and Ms Tamaiparea about the clocking in of Ms Tamaiparea otherwise Ms Tamaiparea would have been clocked in twice. Ms Hunt said that she commenced her work about two to three minutes before 10.00pm and Ms Tamaiparea came in from the shed before 10.00 pm as well.

[19] Ms Hunt said with respect to the clocking in that she *just did it* and didn't think about the consequences. She said that she did not give the fact that she shouldn't be doing it a thought.

[20] Ms Tamaiparea was recorded on the camera clocking Ms Hunt on three separate occasions. These occasions were on 28 February, 6 and 8 March 2006.

[21] Ms Tamaiparea could not remember swiping Ms Hunt in. For some reason although Ms Hunt was shown the evidence from the hidden camera during the disciplinary process, Ms Tamaiparea did not see the footage until the Authority viewed it in the presence of representatives and parties at the time of the application for interim reinstatement.

[22] Ms Tamaiparea said that the clocking of Ms Hunt was a *reflex action*. She may have pre-arranged the clocking in or may have just done it and then advised Ms Hunt that she had before Ms Hunt clocked herself in again.

[23] Ms Tamaiparea and Ms Hunt had clocked each other in the past as well in similar circumstances.

[24] Following disciplinary meetings on 15, 16 and 21 March 2006 Ms Hunt and Ms Tamaiparea were separately dismissed after the final meeting on 21 March 2006. They were represented by their union, the National Distribution Union ("the union"), throughout the disciplinary process.

Was there a full and fair investigation by Christchurch Yarns which disclosed conduct by Ms Hunt and Ms Tamaiparea which a fair and reasonable employer would regard as serious misconduct?

[25] The reason for the dismissal of Ms Hunt and Ms Tamaiparea was requested by the union organiser Bob Brough in a letter to Christchurch Yarns dated 22 March 2006. Mr Zwart responded to this and other matters on behalf of Christchurch Yarns by letter dated 29 March 2006 and specifically in paragraph 3 of his letter said:

3. *You were present at the investigation and therefore are aware of the reasons for dismissal. Ms Hunt and Ms Tamaiparea were both dismissed for breaching clear instructions regarding the clocking in of other people. This was regarded as serious misconduct.*

[26] The conduct is not in dispute in that Ms Hunt and Ms Tamaiparea clocked each other in and were recorded on camera doing so.

[27] Neither Ms Tamaiparea nor Ms Hunt knew about the hidden cameras. Mr Lloyd says in his submissions that the placement of the camera should have been discussed at the monthly consultative meetings that Christchurch Yarns, the union and non-union employees have. Mr Lloyd says that not advising that such a camera was installed contributed to the situation.

[28] Mr Zwart submits that it is illogical to suggest that the consultative committee ought to have been informed of the decision to place the cameras. He says that the camera was only viewed following the issue of the 7 February 2006 memorandum and employees were therefore fairly warned about their obligations. Mr Zwart also said that the unchallenged evidence of Mr Wilcock was that the majority of the committee, in hindsight, accepted that the camera placement was the employer's decision.

[29] I find Mr Lloyd's argument that the situation may well have been different if the position of the camera over the clocking machine had been disclosed at the committee meetings

persuasive. The evidence I heard supported that the meeting works well as a vehicle for all parties to raise concerns and issues in the workplace. Knowledge of the camera would in all probability have absolutely deterred employees clocking in each other or lining up early.

[30] I do not find though in this particular case that the failure to raise the issue of the camera with the consultative committee and with employees was procedurally unfair.

[31] The process of the disciplinary investigation overall was fair and reasonable except in one respect which I shall come to shortly. Both Ms Hunt and Ms Tamaiparea were represented at the meetings and submissions with respect to disciplinary action were allowed. Although these submissions with respect to penalty were ultimately not accepted there is no reason for me to conclude that they were not considered.

[32] The one matter that I do consider was unfair about the disciplinary process was the fact that Ms Tamaiparea did not view herself recorded on video swiping Ms Hunt in until after her dismissal. I accept that not showing Ms Tamaiparea the video may well have been unintentional.

[33] In this case though I conclude that it was particularly disadvantageous to Ms Tamaiparea because, as Mr Wilcock says in his written evidence he felt his trust in Ms Tamaiparea was further eroded by her reluctance to accept either blame or the actual events. He says that Ms Tamaiparea did not acknowledge that she had clocked Ms Hunt in. Mr Wilcock may well have had a different response from Ms Tamaiparea if he had shown her the actual video evidence.

[34] I now turn to the conduct itself and whether a fair and reasonable employer would have concluded that the conduct of Ms Hunt and Ms Tamaiparea was serious misconduct.

[35] Mr Zwart submits that a fair and reasonable employer would find the conduct of Ms Hunt and Ms Tamaiparea destructive of the requirement of trust and confidence and/or misleading. Mr Zwart submits that the conduct was intentional even if there was no thought of the consequences. He submitted that the cards were used to establish a record of attendance for health and safety purposes although this was not an issue raised during the disciplinary process.

[36] Mr Zwart submits that the rule was reasonable and a breach does not become justifiable because there is little or no pecuniary loss for the employer. He submits that the conduct of the applicants was an act of direct disobedience being a deliberate refusal to obey a reasonable and lawful instruction and the applicants knew they ought not to clock each other in. He said that Christchurch Yarns was entitled to rely on Ms Hunt's and Ms Tamaiparea's lack of remorse or acceptance that they had done something wrong. He referred in his submissions to Mr Wilcock's evidence that the house rules were *basic and not hard*. He submitted alternatively that the actions were a breach of Ms Hunt's and Ms Tamaiparea's obligations to act in good faith.

[37] Mr Lloyd submits that the conduct of Ms Hunt and Ms Tamaiparea was a relatively minor infringement of the rules and done without any intention of defrauding or undermining the authority of Mr Wilcock. He contrasts it with clocking in another employee's timecard for the purpose of defrauding or deceiving an employer. He submits that the applicants simply acted out of convenience, arrived early to work and did not turn their minds to the question as to whether they were committing an act of serious misconduct.

[38] In terms of the seriousness of the conduct I have firstly considered the first house rule. It provides that it is an infringement of the house rules and serious misconduct to falsify company records including clocking another employee's time card.

[39] Falsification of records is clear if an employee clocked in or out another employee knowing the other employee was not at work or had already left for the day. The employee in

that situation intends to make the record inaccurate to deceive the employer as to the true states of affairs.

[40] There was no conclusion reached by Christchurch Yarns that Ms Hunt and Ms Tamaiparea were not both at the work site when the clocking in of each other took place on four occasions. There was no conclusion that Ms Hunt and Ms Tamaiparea had not commenced work at the correct time on any of the occasions. There was no conclusion that clocking in took place just on ten o'clock. There was no benefit to the applicants in terms of the clocking except, it would seem, convenience. There was no additional payment, for example, for clocking in early. Accordingly Christchurch Yarns could not and did not conclude that Ms Hunt or Ms Tamaiparea intended in this case to deliberately defraud or obtain some advantage from Christchurch Yarn.

[41] Falsification requires some intention to make a record inaccurate so as to deceive. Ms Hunt and Ms Tamaiparea did not intend to make the record inaccurate to deceive Christchurch Yarns when they clocked each other in as they were both at the work site. They should not have clocked each others cards in but in the circumstances of this case a fair and reasonable employer would not conclude that that behaviour is serious misconduct in terms of falsification of company records.

[42] I have considered whether a fair and reasonable employer would conclude that the acts of the applicants were, as submitted by Mr Zwart, direct disobedience and a refusal to obey a reasonable and lawful instruction in light of the memorandum of 7 February 2006. The evidence was that the applicants just didn't think about their actions. Ms Tamaiparea said it was a reflex action. There was no evidence to support that when the clocking in took place they thought about the memorandum and then made a conscious decision to deliberately and wilfully disregard it. There was no attempt to hide the fact that they were clocking each other in. The actions may have been foolish but I do not find that a fair and reasonable employer would conclude that there was a deliberate and wilful refusal by the applicants to follow the instructions not to clock another employer. The circumstances of the conduct do not support a conclusion that they did an act likely or intended to mislead or deceive Christchurch Yarns.

[43] I have also considered Mr Wilcock's evidence as to why he made a decision to dismiss. Mr Wilcock said that not clocking another employee in was a basic rule. He said that it was *not hard* and *black and white*. Mr Wilcock relied on the lack of remorse shown by the applicants and that Ms Tamaiparea and Ms Hunt did not consider that they had done anything wrong. He said that he had raised the issue at meetings, put out the memorandum and felt that if he didn't dismiss then he would have undermined his authority with other employees. He said *if they couldn't be trusted to follow that instruction what could they be trusted to do?*

[44] All of the factors that Mr Wilcock put forward to conclude that the misconduct was serious and dismissal justified have to be weighed against the circumstances of the clocking in as detailed above. I am not of the view that exercise was properly undertaken. I do not conclude that a fair and reasonable employer undertaking such an exercise would have, after considering the circumstances of the conduct, concluded that the actions of Ms Hunt and Ms Tamaiparea were serious misconduct that significantly undermined trust and confidence.

[45] In conclusion I do not find that the investigation carried out by Christchurch Yarns disclosed conduct by Ms Hunt and Ms Tamaiparea which a fair and reasonable employer would regard as serious misconduct.

Would a fair and reasonable employer have made the decision to summarily dismiss Ms Hunt and Ms Tamaiparea?

[46] I have found that there was no conduct on the part of Ms Hunt and Ms Tamaiparea that a fair and reasonable employer would regard as serious misconduct. I do not find therefore that the foundation of trust and confidence that is essential in an employment relationship was undermined to such a significant degree to justify the summary dismissal of Ms Hunt and Ms Tamaiparea.

[47] It was open to a fair and reasonable employer in this case to have concluded that there was misconduct by the clocking in of another employee. A fair and reasonable employer would have turned to the collective agreement between Christchurch Yarns and the union which covered the work of the applicants and followed the procedures set out in clause 23.2 of the collective agreement for offences less than serious misconduct. The applicants had not had any previous warnings. Ms Hunt had been employed for 6 years and Ms Tamaiparea for 11 years. Clause 23.2 of the collective agreement provides that for a first offence there should be an oral warning which shall be recorded in the employee's personnel file.

[48] In conclusion therefore a fair and reasonable employer would not have made the decision to summarily dismiss Ms Hunt and Ms Tamaiparea.

[49] Ms Hunt and Ms Tamaiparea have personal grievances that they were unjustifiably dismissed. They are entitled to remedies.

Remedies

MARLENE HUNT

Lost wages

[50] In a determination dated 15 May 2006 (CA 70/06) I made an interim order that both Ms Hunt and Ms Tamaiparea be reinstated to the previous positions that they held with Christchurch Yarns from 18 May 2006.

[51] Mr Lloyd advised on 17 May 2006 that Ms Hunt did not wish to return to work as she had obtained alternative employment.

[52] Ms Hunt is entitled to lost wages from the date of dismissal on 21 March 2006 to 18 May 2006. I shall leave the amount of the lost wages for the parties to calculate. In the event of any difficulty then I reserve leave for either party to come back to the Authority. The amount is subject to any findings I make about contribution and any wages that Ms Hunt earned during this period.

Compensation

[53] Ms Hunt seeks the sum of \$5000.00 compensation for humiliation, loss of dignity and injury to feelings. Ms Hunt, who has custody of her granddaughter, described the financial hardship that she suffered as a result of being summarily dismissed. She had to borrow money from her parents to maintain mortgage payments. It had taken her time to get relief by way of benefit and hardship payments.

[54] I find that the effect on Ms Hunt of her dismissal was significant. I balance that with the fact that there was an interim reinstatement order made with effect from 18 May 2006 that entitled her to return to work and that she managed to find a job which she enjoys. Mr Lloyd submits that because Ms Hunt is no longer seeking reinstatement then any order as to compensation should be increased. I do not agree with that submission because an interim order was made for Ms Hunt for reinstatement to her previous position although she chose not to return to work at Christchurch Yarns. I find that would have gone a considerable way toward reducing the humiliation suffered. I am of the view that subject to any findings with respect to contribution a suitable award for compensation would be \$3000.00.

Contribution

[55] I am required under section 124 of the Employment Relations Act 2000 to consider the extent to which Ms Hunt's actions contributed toward the situation that gave rise to the personal grievance. If I consider that there is contribution then I must reduce the remedies that may otherwise be awarded. Mr Zwart submits that contribution between 70% and 100% is appropriate for any award I should make.

[56] Whilst there was recognition by Ms Hunt that she should not have clocked in another employee I am of the view that this level of contribution is simply not called for. The action that contributed toward the personal grievance was an error of judgement and probably foolish but it did not amount to serious misconduct. There was no financial consequence for Christchurch Yarns. I assess an appropriate award for contribution in these circumstances at 20%.

Application of contribution to lost wages and compensation

[57] The contribution should be applied to the award for lost wages from the date of dismissal on 21 March 2006 until the date of the interim reinstatement order of 18 May 2006.

[58] Applying the contribution assessed to the figure I have found should be awarded to Ms Hunt for compensation I order Christchurch Yarns to pay to Marlene Hunt the sum of \$2400.00 without deduction being compensation for humiliation, loss of dignity and injury to feelings under section 123 (c)(i) of the Employment Relations Act 2000.

SHIRLEY TAMAIPAREA

Lost Wages

[59] Ms Tamaiparea returned to work at Christchurch Yarns on 18 May 2006 as a result of the interim order for reinstatement. Prior to that date Ms Tamaiparea did obtain some casual employment.

[60] Ms Tamaiparea is entitled to lost wages from the date of dismissal on 21 March 2006 to 18 May 2006. I shall leave the amount of the lost wages for the parties to calculate. In the event of any difficulty then I reserve leave for either party to come back to the Authority. The amount is subject to any findings I make about contribution and any wages that Ms Tamaiparea earned during this period.

Compensation

[61] There were significant financial difficulties for Ms Tamaiparea from her dismissal. She could not afford to remain in her flat after her dismissal and had to board with her cousin. I find that some of the humiliation and loss of dignity would have been reduced when the order for interim reinstatement was made.

[62] Subject to any order for contribution I may find then a suitable award for compensation is \$3000.00.

Reinstatement

[63] Ms Tamaiparea seeks permanent reinstatement. Section 125(2) of the Employment Relations Act 2000 provides that the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement. Mr Zwart says that it is not practicable to reinstate Ms Tamaiparea because of a genuinely held lack of trust and confidence on the part of Christchurch Yarns.

[64] I do not find that there is a good and reasonable reason for a complete loss of trust and confidence in Ms Tamaiparea who whilst employed by Christchurch Yarns for 11 years had not had any previous disciplinary issues. Mr Wilcock confirmed that there was no difficulty with her ability to perform the work required of her. Ms Tamaiparea confirmed at the investigation meeting that she wants to abide by the rules and that with her exemplary work record she felt Mr Wilcock could trust her. Ms Tamaiparea also said that she would read any memoranda issued carefully. I do not consider that Ms Tamaiparea's contribution acts as a bar to reinstatement.

[65] I am satisfied that it is practicable for Ms Tamaiparea to be reinstated.

[66] I make the interim order for reinstatement permanent.

[67] I order Christchurch Yarns to permanently reinstate Shirley Tamaiparea to the previous position that she held with the company.

Contribution

[68] I am required under section 124 of the Employment Relations Act 2000 to consider the extent to which Ms Tamaiparea's actions contributed toward the situation that gave rise to the personal grievance. If I consider that there is contribution then I must reduce the remedies that may otherwise be awarded. Mr Zwart submits that contribution between 70% and 100% is appropriate for any award I should make.

[69] Ms Tamaiparea should not have clocked in another employee but I am of the view that this level of contribution is simply not called for. The action that contributed toward the personal grievance was an error of judgement and probably foolish but it did not amount to serious misconduct. There was no financial consequence for Christchurch Yarns. I assess an appropriate award for contribution in these circumstances at 20%.

Application of contribution to lost wages and compensation

[70] The contribution should be applied to the award for lost wages from the date of dismissal on 21 March 2006 until the date of the interim reinstatement order of 18 May 2006.

[71] I now apply the contribution assessed to the figure I have found should be awarded to Ms Tamaiparea for compensation and I order Christchurch Yarns to pay to Shirley Tamaiparea the sum of \$2400.00 without deduction being compensation for humiliation, loss of dignity and injury to feelings under section 123 (c)(i) of the Employment Relations Act 2000.

Costs

[72] I reserve the issue of costs.

Summary of orders and findings

- I have found that Ms Hunt and Ms Tamaiparea were unjustifiably dismissed.
- I have assessed the contribution to the personal grievance by both applicants at 20%.
- I have made an order with respect to Ms Tamaiparea that she be permanently reinstated to her previous position at Christchurch Yarns.
- I have ordered Christchurch Yarns to pay to both Ms Hunt and Ms Tamaiparea lost wages from 21 March 2006 being the date of dismissal until 18 May 2006 when an interim order for reinstatement took effect. I have left the amount for the parties to calculate taking contribution and any earnings during the period into account and reserved leave, in the event there are difficulties, for the parties to return to the Authority.
- I have ordered Christchurch Yarns to pay to both Ms Hunt and Ms Tamaiparea, taking contribution into account, the sum of \$2,400, each without deduction for compensation.
- I have reserved the issue of costs.