

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 405
3301781

BETWEEN

MICHELLE KNUTH
Applicant

AND

KMART NZ HOLDINGS
LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Peter Cranney and Grace Liu, counsel for the Applicant
Scott Worthy, counsel for the Respondent

Investigation Meeting: 14 June 2024 in Wellington

Submissions received: At the investigation meeting

Determination: 8 July 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michelle Knuth was employed by Kmart NZ Holdings Limited (Kmart) at its Palmerston North store. The Palmerston North store is located within a shopping complex known as The Plaza. Ms Knuth was dismissed from her employment on 24 May 2024. The dismissal followed an incident on 23 April 2024 whereby Ms Knuth was alleged to have engaged in serious misconduct when “placing [herself] amid a physical altercation between a mall security guard and a shopper outside of the store”.

[2] Ms Knuth has lodged a statement of problem seeking, amongst other things, permanent reinstatement. Ms Knuth seeks an order, on an interim basis, that she be reinstated to her employment pursuant to s 127 of the Employment Relations Act 2000 (the Act).

[3] Kmart denies that Ms Knuth was unjustifiably dismissed. It says that Ms Knuth was justifiably dismissed for serious misconduct and opposes Ms Knuth's claim for interim reinstatement.

The Authority's investigation

[4] Affidavits were received from Ms Knuth and Dion Martin, Organiser First Union, in support of her application for interim reinstatement. For Kmart, affidavits were received from George May, Store Manager, Symantha Lowe, Line Manager, and Kimberly Mulligan, Zone Manager Central Region.

[5] An affidavit in reply from Mr Martin dated 17 June 2024 was subject to an objection and it was agreed that it would not be read.

[6] An investigation meeting took place on 17 June 2024 for the purpose of hearing oral submissions from the parties.

[7] The evidence given has not been tested. The findings in this determination are provisional in nature and all relevant evidence will be tested in the course of the Authority's substantive investigation. Ms Knuth's substantive claims are to be investigated at a future date and this determination deals only with her application for interim relief until such time as the substantive matter has been determined.

[8] Ms Knuth has provided an undertaking that she will abide by any order that the Authority may make in respect of damages.

The approach to interim reinstatement

[9] The Authority may order interim reinstatement pending the hearing of a personal grievance.¹ In determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the objects of the Act.²

[10] To determine this matter, I must consider whether there is a serious question to be tried.³ That requires consideration as to whether Ms Knuth has an arguable case,

¹ Employment Relations Act 2000, s 127(1).

² Employment Relations Act 2000, s 127(4).

³ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12] and [13].

firstly, as to the substantive application for unjustified dismissal, and if so, secondly, as to Ms Knuth's application for permanent reinstatement.⁴ If Ms Knuth has a serious case to be tried, I must then exercise my discretion by considering where the balance of convenience lies and, standing back from the case, consider what the overall justice of the case requires I do.⁵

Background

[11] Ms Knuth commenced her employment with Kmart, working at the Palmerston North store in The Plaza, in October 2022.

[12] Ms Knuth is a member First Union Incorporated (the "Union") and her employment was covered by the terms and conditions in the Kmart New Zealand / First Union Collective Employment Agreement 2023-2025.

[13] On 23 April 2024 there was an incident in The Plaza outside, although not initiating directly outside, the Kmart store. It is uncontested that at the time of the incident Ms Knuth was returning to the Kmart store at the end of a paid break.

[14] The incident, or at least a substantial part of the incident, was recorded by CCTV which has been provided to the Authority. The CCTV shows a member of the public attacking and kicking, and attempting to kick, two individuals otherwise identified in the evidence as security guards for The Plaza. Ms Knuth is seen in the footage engaging to some degree in the incident. The precise nature of her actions are the subject of some difference of opinion.

[15] Kmart has a "5 D's policy" which is headed "don't be a hero when it comes to your safety" and provides that employees should, "when faced with customer threatening behaviours", follow the 5 D's, being:

1. Distance – keep 3 meters
2. Door – plan an exit
3. De-escalate – stay calm
4. Don't detain – let them go!
5. Don't follow – stay in store

⁴ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36, at [8].

⁵ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 862 (EmpC), at 872.

[16] Kmart also has a code of conduct, which includes sections entitled “responsibilities” and “safety, health and wellbeing”. In general terms, the code of conduct refers to ensuring employees do not put the health and safety of themselves, or others, at risk, and provides that employees should follow any safety requirements. The code of conduct also provides examples of what Kmart considers serious misconduct that is likely to lead to termination of employment.

[17] Ms Knuth met with Ms Lowe and Danda Horsfall-Tahu, Duty Manager, following the incident on 28 April 2024. There is a contention as to whether Ms Knuth made a statement at that meeting to the effect that she “would do it again in a heartbeat”. Ms Knuth was suspended from her employment on 28 April 2024, that decision being recorded in a letter of the same date from Ms Horsfall-Tahu.

[18] On 3 May 2024, Kmart issued a letter requiring Ms Knuth to attend a meeting. The allegation made against Ms Knuth was set out as follows:

It is alleged that on 23 April 2024, at approximately 5.44pm, you were witnessed via CCTV footage, not following the 5D’s process and are seen whilst returning from break, placing yourself amid a physical altercation between a mall security guard and a shopper outside of the store....

[19] A meeting was held on 9 May 2024 with the stated purpose being to seek Ms Knuth’s response to Kmart’s allegation that Ms Knuth breached its code of conduct and 5 D’s policy. Mr Martin attended that meeting as Ms Knuth’s representative. A copy of notes made by Tania Rees, Department Manager, have been provided to the Authority.

[20] Kmart’s internal advisory service, having been sent a copy of the notes from 9 May 2024, recommended that Ms Knuth be issued a final written warning.

[21] Kmart issued Ms Knuth a letter dated 14 May 2024 recording its preliminary decision that it was satisfied that the allegations were correct, that Ms Knuth’s conduct amounted to serious misconduct, and that the appropriate outcome was termination of employment without notice. Ms Lowe is recorded as being the signatory to that letter.

[22] On 20 May 2024, a response was provided on Ms Knuth’s behalf as to the preliminary decision. The response asserted that the code of conduct and 5 D’s policy did not have application to the incident, that there was a disparity of treatment relating to another incident that the Union was aware of, and that any outcome beyond a letter of expectation or counselling would be extremely disproportionate.

[23] On 24 May 2024, Kmart dismissed Ms Knuth from her employment. Morgan Haenga, Department Manager, was recorded as the signatory to the dismissal letter. Kmart dismissed Ms Knuth on the basis that she had engaged in serious misconduct and alleged that Ms Knuth had been observed not following the “5 D’s policy”. The allegation said to have given rise to the serious misconduct, as was recorded in the letter of 3 May 2024, was restated in the dismissal letter.

Is there a serious case to be tried that Ms Knuth was unjustifiably dismissed?

[24] Ms Knuth takes issue with the dismissal for a number of reasons, which include, in summary terms:

- (a) That Ms Knuth’s actions did not amount to misconduct or serious misconduct;
- (b) That Kmart failed to genuinely seek, receive, and consider Ms Knuth’s explanation prior to dismissing her from her employment;
- (c) That Kmart failed to consider alternatives to dismissal;

[25] Ms Knuth, during the disciplinary process, challenged the application of the 5 D’s policy but also said that it was not breached in any event. Counsel for Ms Knuth submitted that such as the relevant policies and procedures related to serious health and safety issues, that it was incumbent on Kmart to ensure such policies and procedures were clear and specific. Ms Knuth also raised an issue as to alleged disparity of treatment.

[26] It was also submitted for Ms Knuth that there is an arguable case that she was unjustifiably dismissed and that that is evidenced by Kmart’s own internal disagreement as to whether Ms Knuth should be dismissed. It was submitted that Kmart “advisory” recommended that Ms Knuth not be dismissed but that that was overruled.

[27] It was submitted on Kmart’s behalf that Ms Knuth chose to put herself in a dangerous situation, that her actions presented a health and safety risk, and that her actions undermined compliance with policy. Kmart contends that the dismissal was procedurally justified and that Ms Knuth, as evident from the four-page response to the preliminary decision, was afforded an opportunity to respond to Kmart’s concerns prior to the dismissal, that no procedural unfairness resulted from Ms Mulligan being the decision maker, and that the disciplinary process was procedurally justified.

[28] Kmart also contends that, in terms of substantive justification, its decision that Ms Knuth's actions amounted to serious misconduct justifying dismissal was one that was open to a fair and reasonable employer.

[29] Kmart submitted that there is no seriously arguable case based on the alleged disparity of treatment. It says that the relevant incident relating to another employee involves a process for which there has not yet been an outcome, that an investigation was commenced in both cases, and that no disparity of treatment exists on the facts.

[30] Notes made relating to the meeting of 9 May 2024 provide that a response was being sought to an alleged breach of Kmart's code of conduct, specifically "everyone's responsibilities, safety health, and wellbeing". Reference was made in the allegation that Ms Knuth did not follow "safety requirements, safe work practices, and directions" and that Ms Knuth did not follow "the correct safety requirements". Ms Mulligan's evidence is that she considered that Ms Knuth breached the code of conduct by endangering herself. Other references, including the meeting notes of 9 May 2024, point to a reliance on the code of conduct's provisions relating generally to an expectation of compliance with health and safety policies.

[31] To the extent Kmart may rely on the code of conduct in isolation as a basis for the dismissal, there would be an arguable case that the dismissal was without substantive justification. The code of conduct is expressed in very broad terms and it is at least arguable that Ms Knuth's actions were outside of the scope of the policy and otherwise were not in breach of it. However, it appears that, primarily at least, Kmart's position is that the code of conduct was breached by virtue of a breach by Ms Knuth of the 5 D's policy.

[32] There is a serious question to be tried in relation to whether there was a substantive justification for the dismissal having regard to the 5 D's policy. First, I consider there are serious questions as to the application of both the code of conduct and the 5 D's policy having regard to the circumstances in which the incident occurred. Second, even in the event the application of those policies was generally accepted, there is an arguable case that Kmart's decision to dismiss was not one that was open to a fair and reasonable employer in all of the circumstances having regard to Ms Knuth's conduct.

[33] Having viewed the CCTV footage it is clearly apparent that the incident did not happen in the store, nor could it be suggested that Ms Knuth failed to remain in the store. Further, it is clear from the CCTV footage that the incident was not simply an incident of threatening behaviour but was one that involved an actual physical attack on two individuals, the security guards, by a member of the public.

[34] There is an arguable case that the 5 D's policy had no application to the circumstances based on the terms of the 5 D's policy itself. At the very least, there is an argument that the policy lacks any clarity as to its application to the relevant circumstances. For example, D's 4 and 5 respectively go to not detaining individuals and staying inside the store. Further, there is an arguable case that the 5 D's policy simply had no application in circumstances where Ms Knuth's actions, at least on the evidence available at this stage, appeared designed to deescalate a situation that involved an active assault on two individuals.

[35] While not apparently raised in the context of the investigation or disciplinary processes, Kmart also referred to training said to have been given in relation to lockdown scenarios. Reference materials seemingly from April 2024 include advice on what to do in such an event, including "do not engage with the dangerous person. This could escalate the situation." Such as it may be suggested that the training is relevant to the incident that occurred, there is an arguable case that it was not, including given it appears uncontentious that Ms Knuth did not leave the store in the context of seeking to involve herself in a threatening situation.

[36] Observing the CCTV footage does not disclose that Ms Knuth's actions involved an escalation of merely a potentially threatening situation such as might be the case, for example, with an employee seeking to detain or physically restrain a suspected shoplifter. Instead, it appears to show Ms Knuth seeking to deescalate the situation by calmly holding her hands up in front of the security guards while also distancing herself from the attacker. While at one point she runs or moves quickly in the general direction of the attacker, she does so in the context of maintaining a distance from them and protecting the security guard.

[37] Ms Knuth's actions appear not only commendable in the face of an apparent active assault, but also consistent with seeking to deescalate the situation in accordance with the third "D". Such as Mr Knuth's actions were an attempt to prevent an ongoing

physical attack on two individuals, and if the 5 D's policy purports to have application to those circumstances, there is also an arguable case that the policy is unreasonable.

[38] On one view, the CCTV footage speaks for itself. However, Ms Knuth has also given direct evidence as to the incident and the relevant events. At this preliminary stage, I consider Ms Knuth's evidence to be, at least in effect, entirely consistent with what can be observed from the CCTV footage.

[39] There is an arguable case that Kmart's actions in dismissing Ms Knuth were not what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred. In other words, there is an arguable case that the dismissal was not an option open to a fair and reasonable employer and that the dismissal was substantively unjustified.

[40] There is a contention as to whether Ms Knuth made statements to the effect that she "would do it again in a heartbeat" at the time of being advised of her suspension on 28 April 2024. Ms Lowe contends that the statement was made and that Ms Horsfall-Tahu also told her afterwards that Ms Knuth had made another similar comment.

[41] Kmart submitted that Ms Knuth's response as reflected in the 9 May 2024 notes was that Ms Knuth twice said she did not remember the comment, and that after a break in the meeting she denied making the comment. I consider it clear the alleged comments were disputed. Mr Martin's evidence is that the comment was disputed at the meeting on 9 May 2024 and that it was not raised again by Kmart. The dismissal letter did not directly address the issue.

[42] It appears that Kmart relied on the alleged comments to some significant degree, and, at this early stage, there is little in the way of evidence suggesting that Kmart adequately investigated whether or not the comments were made. Ms Lowe seemingly disagreed at the meeting on 9 May 2024, albeit that she appears to have been responsible for interviewing Ms Knuth about the issue while purportedly being witness to the relevant comments. Ms Lowe's affidavit makes no reference to any investigation of whether the statement was in fact made, nor of her having been asked, for example, for a statement in relation to that.

[43] It is arguable that the dismissal was both substantively and procedurally unjustified having regard to the disputed nature of the comment. Firstly, Kmart's submissions as to substantive justification assert that Ms Mulligan had lost trust and confidence that Ms Knuth would follow Kmart's safety policies. The disputed comment was a consideration in that assessment, and it is arguable that making a finding that the comment was made, at least absent sufficient investigation and without apparent regard to the clearly recorded denial, was not open to a fair and reasonable employer. Secondly, given the significance of the issue, it is arguable that the process was infected by procedural failings including as to the adequacy of the investigation, provision of notice that the alleged statement was a concern to the decision maker and relevant to the decision to be made, and otherwise as to whether the decision maker was in fact in an appropriate position to take account of Ms Knuth's actual responses.

[44] Ms Knuth and Mr Martin say that they specifically requested to speak to the decision maker prior to any decision being finalised. Ms Knuth says she remained unaware of who the decision maker was until receiving Ms Mulligan's evidence in which she says she was the decision maker. I consider there is an arguable case that the dismissal was procedurally unjustified having regard to the absence of apparent direct involvement of the decision maker and lack of clarity as to who the decision maker was. While arguable, I do not consider that ground as strong as the others I have dealt with.

[45] I am also satisfied that there is at least an arguable case that alternatives to dismiss were not adequately considered. While there was express consideration of the issuing of a final warning, it is not clear that other measures were appropriately considered. To the extent that Ms Mulligan was at least one step removed from direct communication during disciplinary process, I consider there is an arguable case that Kmart did not genuinely consider Ms Knuth's responses.

[46] At this stage, there is limited compelling evidence as to any disparity of treatment. However, there is evidence that the other employee remains in employment and on that basis I consider the claim is at least arguable, albeit not strongly so.

[47] Overall, Ms Knuth has a strongly arguable case that she was unjustifiably dismissed.

Does Ms Knuth have an arguable case for permanent reinstatement?

[48] Section 125 of the Act requires the Authority to provide for reinstatement wherever practicable and reasonable.⁶ Reinstatement is the primary remedy.

[49] Kmart submitted that Ms Knuth does not have an arguable case for permanent reinstatement and contends that reinstatement would not be practicable or reasonable because Kmart has lost trust and confidence in Ms Knuth and that the relationship cannot be repaired. In doing so, some focus was directed at Ms Knuth's contention that the policies did not apply on the basis that she was not at work. Kmart referred to the evidence of Ms Mulligan in doing so. Ms Mulligan's evidence is in no way conclusive as to whether the 5 D's policy had application in the circumstances.

[50] The application of the relevant policies is a live issue and one that is of some significance. Ms Knuth has an arguable case that the dismissal was substantively unjustified having regard to the 5 D's policy and the circumstances in which the incident of 23 April 2024 occurred. This is not a case in my view where the policy had clear and direct application. There is some force in the argument that Ms Knuth is entitled to take issue with the purported application of the policy having regard to the circumstances. On one view, it is arguable that Ms Knuth's approach reflects a lack of clarity in the policy itself.

[51] I also consider it relevant at this stage that the comments said to have been made by Ms Knuth to the effect that she "would do it again in a heartbeat" were apparently made well prior to any formal notification of the allegations being put to Ms Knuth or of any detailed or clear explanation being provided to her as to the application of the policy. I do not consider, on the evidence at this early stage, that the approach taken by Ms Knuth exhibits a complete disregard of Kmart's policies or health and safety requirements. Likely at best, the incident was one outside of the normal circumstances involving customers or incidents in store.

[52] Having reviewed the CCTV footage, I also observe that Ms Knuth's conduct appears to be moderate and deescalating in nature and a reaction to the events that occurred in her presence. It is at least arguable that Ms Knuth's actions did not involve an intentional disregard to the 5 D's policy and were merely a human reaction to a

⁶ Employment Relations Act 2000, s 125.

physical attack on other individuals. Setting aside for the moment questions of policy, the actions of Ms Knuth themselves do not on the current evidence support there being any compelling barrier to her reinstatement.

[53] Ms Knuth has a strongly arguable case for permanent reinstatement if successful in relation to claim that the dismissal lacked justification.

Who does the balance of convenience favour?

[54] There is a serious case to be tried in relation to both the unjustified dismissal claim and permanent reinstatement. The case in relation to both is strongly arguable.

[55] Ms Knuth says that the dismissal has put her in financial hardship. She says she has been forced to live off her holiday pay but that that has now been used up. Ms Knuth referred to concern as to how she would pay her rent, basic living expenses, and hire purchase agreements including significant payments for a car. She says her partner's work is not secure and that he cannot really support her.

[56] Ms Knuth also referred to a likely inability to take an annual holiday to the South Island to see family, including grandchildren. Further, she also referred to an inability to travel to take care of her grandchild, which she says she would do regularly on the weekends, due to the costs of travel.

[57] Ms Knuth says that it would be no problem for Kmart to reinstate her and that there is no real possibility for a similar incident occurring again. Her evidence is that she needs her income and that the dismissal has caused her family huge concern. Ms Knuth says she has been looking for other jobs since the dismissal but has not been successful in securing other work and that there is a stand down period for obtaining any benefits.

[58] Kmart submitted that the Authority cannot be confident that Ms Knuth would comply with Kmart health and safety policies if reinstated. In doing so, it referred to the view expressed by her that the policies did not apply to the circumstances of the incident, that there is a real risk of such an incident occurring again and that Ms Knuth does not acknowledge that, and that the "applicant's apparent attitude is that she was correct to intervene and would do so again". Kmart also point to Ms Knuth's role being on nightshift and claims there is an increased possibility of incidents on night shift.

[59] Kmart also submitted that interim reinstatement would impact third parties in that there was a possibility of Ms Knuth's actions bringing the conflict into the store and endangering other employees, that Ms Knuth has not recognised that, and that reintegrating Ms Knuth into the night shift would cause disruption. Mr May's evidence was that "... the night shift team is running very smoothly and is a very positive environment since [Ms Knuth] left. Reintroducing her into the night team would be disruptive."

[60] I am not satisfied that Ms May's observations, in their present form, disclose any sound or reliable basis on which it would be appropriate to find there would be any significant impact causing disruption in any meaningful sense. The purported basis for suggestion is not disclosed by Mr May other than reference to disruption itself.

[61] Health and safety considerations are important. They should not be overstated, nor understated. Here, the incident involved what was apparently an active assault on two individuals. It was not merely an "altercation", nor did it occur in Kmart's premises. Ms Knuth is entitled to take a position as to the application or otherwise of the 5 D's policy. I do not consider her doing so exposes a fundamental health and safety issue relating to her compliance with policies and procedures in the ordinary course of her work for Kmart.

[62] Kmart assert that Ms Knuth, if reinstated, would be working under the direction of Mr May, a person who she has accused of making statements that were "not true", that there are at least difficulties in that relationship, and that Ms Knuth has had difficulties in other relationships at work including arising from an incident of alleged offensive language in February 2024. While those issues favour Kmart in terms of the balance of convenience, I am not satisfied that they in any way displace or outweigh the considerations favouring Ms Knuth.

[63] Kmart submitted that any detriment suffered by Ms Knuth, should she be successful, could be substantially rectified by damages. It says there would be no loss of skills in the interim period and that damages are an adequate remedy. Kmart also submitted that given Ms Knuth's evidence was that she is suffering financial hardship, that she is unlikely to have the means to support the undertaking she has signed.

[64] While the parties are still conferring as to proposed procedural arrangements for the Authority's investigation, it is likely that the substantive investigation meeting

would not take place until at least October 2024. Having considered all of the relevant evidence, I conclude that the exclusion from her work and financial deprivation are compelling factors that favour Ms Knuth's interim reinstatement. While damages may remedy aspects of that, they do not account for the ongoing exclusion from the workplace nor consequential implications to Ms Knuth's family life in the interim.

[65] I conclude that the balance of convenience favours Ms Knuth.

Where does the overall justice lie?

[66] I have concluded that Ms Knuth has an arguable case and that the balance of convenience in this case favours her. I must now, standing back from the case, consider what the overall justice of the case requires I do.⁷

[67] Kmart submitted that there would be minimal hardship to Ms Knuth if interim reinstatement is not awarded. It contends that the harm to Kmart would be significant if she were reinstated and failed to follow Kmart's health and safety policies resulting in "harm to herself or her colleagues or Kmart customers". For reasons which I have already dealt with, and on the basis of the current evidence, I do not consider those concerns are sufficiently well founded such as would lead to a conclusion that Ms Knuth should not be reinstated on an interim basis.

[68] Kmart also submitted that if the Authority were to grant interim reinstatement that any such order should permit it to reinstate her to payroll only. I decline to do so and do not consider there is a sufficient basis on which to exclude Ms Knuth from the workplace.

[69] I consider that the overall justice of the case requires that Ms Knuth be reinstated on an interim basis. Ms Knuth's application for interim reinstatement is successful.

Order

[70] I order Kmart to reinstate Ms Knuth to her employment on an interim basis. This order is deemed to have effect from the date of termination of Ms Knuth's employment and is to remain in place pending the Authority's determination of her substantive claims or further order of the Authority.

⁷ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 862 (EmpC), at 872.

[71] The parties are to confer as to any necessary practical arrangements to arrange Ms Knuth's return to the workplace.

Next steps

[72] The parties are conferring as to proposed timetable directions relating to the substantive matter. Subject to the outcome of that process, the Authority will either issue written directions or schedule a further case management conference.

Costs

[73] Costs are reserved pending consideration of Ms Knuth's substantive claims.

Rowan Anderson
Member of the Employment Relations Authority