

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 83/09  
5135772**

BETWEEN      SANI LE'AU  
                         Applicant  
  
AND              HINDIN MARQUIP LIMITED  
                         Respondent

Member of Authority:      Leon Robinson  
  
Representatives:          Louise Darroch, Advocate for Applicant  
   Jo Phipps and Hayden Martelli, Advocates for Respondent  
  
Investigation Meeting:      4 February 2009  
  
Determination:              23 March 2009

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1]    The applicant Mr Sani Le'au ("Mr Le'au") was summarily dismissed from his employment with the respondent Hindin Marquip Limited ("Hindin") because he had "let his work mates believe" that he had urinated in a co-worker's coke bottle at Friday drinks. Hindin raises a counter-problem against Mr Le'au and asks for an order that Mr Le'au repay to it overpaid holiday pay.

[2]    The parties were unable to resolve the differences between them by the use of mediation.

**The facts**

[3]    Hindin is a wholesale retailer of industrial automotive equipment.

[4]    Mr Le'au commenced employed with Hindin in May 2000 in a Sales support role.

[5]    Mr Le'au denies any knowledge of having signed an employment agreement. Hindin maintains he did, but it is unable to produce the document to the Authority. I

find therefore, that the terms of Mr Le'au's employment were not recorded in a written individual employment agreement.

[6] On Wednesday 25 July 2007, Mr Paul Reilly ("Mr Reilly") informed Hindin director Mr Fergus Brown (Fergus Brown) that he was resigning. Eventually, Mr Reilly disclosed the reason he was resigning was because Mr Le'au had urinated in his (Mr Reilly's) coke bottle at after-work drinks the previous Friday 20 July 2007. Mr Reilly said he was "sick" of the "lack of management". I am not persuaded that Mr Reilly said anything further to Fergus Brown. He did not pursue a complaint or insist that any action be taken against Mr Le'au. Fergus Brown persuaded Mr Reilly to stay on and informed him that the matter would be investigated.

[7] Fergus Brown then informed his fellow director and brother Mr Hamish Brown ("Hamish Brown") of the situation. They resolved that they would investigate and they took advice about how they ought to proceed.

[8] Fergus Brown and Hamish Brown then met with Mr Le'au. Fergus Brown informed Mr Le'au they were conducting an investigation into an allegation that Mr Le'au had urinated into Mr Reilly's coke bottle at the after work drinks the previous Friday. He told Mr Le'au the allegation was serious and his job was in jeopardy. He told Mr Le'au not to talk to anyone else about the matter and that they would talk to him "later". Mr Le'au then returned to work. I am persuaded that Mr Le'au was advised that he could have a support person present. I find Mr Le'au was not advised he could take advice. I find that Mr Le'au was not invited to formally respond in this discussion.

[9] Fergus Brown and Hamish Brown say they then interviewed other employees who had been present at the Friday drinks in question. They say they formally interviewed Mr Ross Gosnall ("Mr Gosnall"), Mr Stanley Bradshaw ("Mr Bradshaw") and Mr Cody Cerutti ("Mr Cerutti"). Fergus Brown produces to the Authority notes he says he made of the interviews. Mr Bradshaw denies a formal interview and says he was questioned briefly at his machine. Mr Cerutti is vehement and adamant that he was not spoken to at all. He says he was angry that Mr Le'au was dismissed without the employer speaking to anybody. Fergus Brown and Hamish Brown say that both Mr Bradshaw and Mr Cerutti are mistaken. I accept that Fergus Brown made notes

and those notes record substantive responses from interviewees. In Mr Cerutti's case, his recorded response is essentially consistent with that he recorded in a written statement he provides to the Authority for present purposes. On balance, I am persuaded that the three employees were asked by Fergus Brown and Hamish Brown as to what had occurred at the previous Friday drinks. I am unconvinced as to whether those interviews were formal.

[10] I find that Mr Bradshaw said he believed Mr Le'au had actually urinated in the coke bottle. He said he felt guilty by association and that that was why he had told Mr Reilly of what Mr Le'au had done when Mr Reilly was at his (Mr Bradshaw's) home at a BBQ the previous weekend. He said that at the Friday drinks Mr Le'au had taken Mr Reilly's coke bottle around the corner for a "couple of minutes", brought it back and put it back on the bench where he got it from. He said that Mr Le'au was laughing and said "keep it amongst ourselves". Mr Bradshaw said he was under the impression that Mr Le'au had in fact urinated in the coke bottle, but was not 100% sure "but wouldn't put it past Mr Le'au". He said he had discarded the bottle as soon as he got to work on Monday so that Mr Reilly did not drink from the bottle.

[11] Mr Cerutti said Mr Le'au had joked about "pissing" into Mr Reilly's bottle and then Mr Le'au and another employee Alvin went around the corner for a "short time". He said he did not think it happened, meaning he did not believe Mr Le'au had actually urinated into the bottle. He said that when Mr Le'au returned he (Mr Cerutti) said he was going to drink it and because Mr Le'au did not discourage him, he did not believe Mr Le'au had actually urinated in the bottle. He said Mr Le'au said "do you want to drink it" and laughed and then he returned the bottle from where he had retrieved it.

[12] Mr Gosnall said Mr Le'au had joked about urinating into Mr Reilly's coke bottle. He said Mr Le'au had then taken the coke bottle away for a few minutes and then brought it back.

[13] Mr Le'au was called back to Fergus Brown's office at around 2.00 - 3.00pm. I accept his evidence of the discussion that occurred. He was informed that the allegation that he had urinated in [Mr Reilly's] drink was a serious one and that his job was "not looking good". Mr Le'au was told that others present at the drinks had been

spoken to but I accept Mr Le'au's evidence that he was not informed of the detail of what specifically those others had said. Mr Le'au said "[I] didn't do it". He agreed he had joked about urinating in the bottle but said he had not actually done so.

[14] Mr Le'au was then informed he was being "let go".

[15] Mr Fergus Brown obliquely suggested to Mr Le'au that Hindin was prepared to accept his resignation as an alternative to dismissal. Mr Le'au eventually accepted that suggestion. Mr Fergus Brown then typed this letter which both parties signed:-

*Wednesday, 25 July 2007*

*To Hamish and Fergus*

*Effective from today I wish to resign from my employment with Hindin Marquip*

*I understand that the Direct Credit in Mid July, 2007, covers my pay for the full month of July, 2007. I also accept the offer to write off the holiday liability that is owed by me.*

*I accept this is full and final settlement of all monies outstanding between Hindin Marquip Ltd & myself.*

*Signed  
Sani Le'au*

*Signed  
Hindin Marquip Ltd*

[16] Mr Le'au was then escorted off Hindin's premises.

## The merits

[17] Although Mr Le'au agreed to resign, I find that the reality of the situation was that he was in fact dismissed. I concentrate then on resolving that as the employment relationship problem.

[18] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

*103A. Test of justification*

*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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[19] Hindin says in justification of its decision to terminate Mr Le'au's employment immediately this way:-

*[t]hat from the statements the witnesses provided and the fact that Mr Le'au had admitted to taking the coke bottle from the table with the implied intention of urinating in it and then returning it for the victim to drink. Even if he did not admit to urinating in the coke bottle [it] found, on the balance of probabilities that his actions constituted serious misconduct ...*

[20] Fergus Brown says that he and Hamish Brown did not conclude that Mr Le'au had "actually peed in the bottle" but rather, that Mr Le'au had let his work mates believe that he had. This in turn led to Mr Reilly genuinely believing that Mr Le'au had done so. I am not persuaded that this distinction or any discussion of it was actually made in the final conversation with Mr Le'au.

[21] There is no doubt that Mr Le'au's admitted conduct vileness foolish. Mr Le'au conceded the same to the Authority however, he says that his behaviour was deserving only of a final warning and not instant dismissal.

[22] The context of the behaviour is pertinent. Mr Le'au says he was merely joking around with his workmates at after work drinks. He points out that the discussion and interaction between employees at such events are clearly very different from that which occurs and which is to be expected when employees are working together during business hours. Mr Le'au asks that his conduct been seen in that context.

[23] The evidence is that Mr Le'au was known in the workplace as a practical joker.

[24] Hindin says it intended to speak with the temporary worker Alvin but he did not return to work after the Friday drinks. It also tells the Authority it attempted to contact Alvin through the recruitment agency but was unsuccessful. This enquiry was pertinent because Alvin was witnessed to have accompanied Mr Le'au when Mr Le'au absented himself with the coke bottle. Alvin may have assisted Hindin to get some certainty around whether Mr Le'au had actually urinated in the soft drink bottle.

[25] It is critical to understand that Hindin does not say Mr Le'au actually urinated in the coke bottle. Rather, it says that Mr Le'au let his workmates think that he had. It

concluded that action was serious misconduct and that Mr Le'au was to be summarily dismissed because of it.

[26] Fergus Brown tells the Authority he and his brother decided Mr Le'au's behaviour "was bullying under clause 15 of the Policy". That clause is this:-

*15. AGGRESSIVE AND OR ABUSIVE ANTISOCIAL BEHAVIOUR INCLUDING BULLYING AND SEXUAL HARASSMENT. Such behaviour (either physical or verbal) will not be tolerated and will lead to disciplinary process. This includes any personal insults, racial comments or swearing at someone. It should be clearly understood that reported incidents of a serious nature will result in suspension pending investigation, which may result in dismissal.*

[27] Allowing his workmates to think that he had urinated in the coke bottle, is not the conduct contemplated by clause 15 of the Policy.

[28] There is no doubt that Mr Le'au's behaviour was not sensible. The relevant question however, is whether a fair and reasonable employer would have made a decision to instantly dismiss Mr Le'au because he had allowed his workmates to think that he had urinated in a co-worker's drink bottle at work drinks.

[29] Mr Le'au's foolishness is not to be condoned. However, I do not consider that Mr Le'au's actions can be said to have been repudiatory in nature or so deeply destructive of the relationship of trust and confidence that he had with Hindin, that it required his instant dismissal.

[30] The conduct in question, that is, allowing his workmates to think he had urinated in a co-worker's drink bottle, must be kept in context. The behaviour occurred at after work drinks. It was a single act that I have concluded had no real or material connection with his continuing faithful service to Hindin, that is, service as a salesperson.

[31] There are attendant surrounding circumstances and the alleged serious misconduct must be assessed in context. It is relevant in my assessment that Mr Reilly did not particularly complain or pursue action against Mr Le'au. Also relevant is that the drink bottle was discarded and there was never any question of Mr Reilly being harmed. It is true that we will never know whether Mr Le'au did actually

urinate in the bottle. In the end it does not matter, because he was not dismissed for that. As well, there is evidence of somewhat lax management at Hindin which in reality is what Mr Reilly complained of. In that regard, I note that Mr Le'au's line manager was aware of Mr Le'au's behaviour but did not pursue any action in respect of it prior to Fergus and Hamish Browns' intervention.

[32] I have decided that Hindin's response to Mr Le'au's admitted conduct was an over-reaction in the circumstances. It was an understandable over-reaction however. I consider that a fair and reasonable employer would have taken the view that Mr Le'au's actions were socially unacceptable and unpleasant but did not warrant a drastic response in the form of instant dismissal. I consider a fair and reasonable employer would have viewed such foolishness as calling for a final warning and not summary dismissal.

### The determination

[33] For the reasons I have set out above, I determine that Hindin's decision to instantly terminate Mr Le'au's six and half year employment for his admitted conduct, was unjustifiable in that a fair and reasonable employer would not, in all the same circumstances, have reached that same decision. A fair and reasonable employer would have more likely in my considered view, decided Mr Le'au's foolishness was worthy of a final warning not summary dismissal. **I determine that Mr Le'au was unjustifiably dismissed. I find he has a personal grievance and he is entitled to remedies in settlement of that personal grievance.**

### The resolution

[34] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Le'au's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I conclude that Mr Le'au's actions were blameworthy and contributed directly to the situation that led to the personal grievance. I therefore reduce the nature of the remedies to be awarded to Mr Le'au. I decline to make any award of compensation to Mr Le'au because I consider that any hurt and humiliation he suffered was entirely his own doing and a result of his unfortunate sense of humour. There will be no award of compensation.

***Reimbursement***

[35] Mr Le'au did not find alternative work until November 2007. I am therefore satisfied he has lost income between his dismissal and late November 2007. I award him three months lost wages as reimbursement. **I order Hindin Marquip to pay to Sani Le'au the gross sum of \$9,812.40 as reimbursement<sup>1</sup>.**

**The counter-problem**

[36] Hindin asks for an order that Mr Le'au repay to it overpaid holiday pay. I find that it is not entitled to such an order because it entered into an arrangement where it agreed to write-off Mr Le'au's indebtedness as evidenced by the letter signed by the parties dated 25 July 2007. Hindin is not permitted to resile from that accommodation. **There will be no formal orders in respect of Hindin's counter-problem.**

**Costs**

[37] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Darroch is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Phipps is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson  
**Member of Employment Relations Authority**

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<sup>1</sup> 40 hours @ \$18.87 x 13 weeks = \$9,812.40