



New Zealand Employment Relations Authority Decisions

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M'Nijel v Lush (New Zealand) Limited [2011] NZERA 211; [2011] NZERA Wellington 55 (12 April 2011)

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 55 5333308

BETWEEN LEILA M'NIJEL

Applicant

AND LUSH (NEW ZEALAND)

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Written Submissions by Determination:

P R Stapp

Jeremy McGuire for the Applicant Alan Stuart for the Respondent

24 February 2011 at Palmerston North

8 March 2011

12 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] During Leila M'Nijel's employment with Lush she was accused of failing to follow cash handling procedures. An investigation found a number of discrepancies involving petty cash that could not be unaccounted for and/or were unexplained. A financial audit was then undertaken. Ms M'Nijel was asked to participate in the investigation and audit and was required to answer questions. She explained that there had been a lack of training to explain the discrepancies.

[2] Ms M'Nijel was suspended on full pay by a director of Lush based in Sydney while the investigation continued. Ms M'Nijel did not have any access to him before the suspension decision was made.

[3] On 12 January 2011 a meeting was arranged for Ms M'Nijel to attend with a support person. She chose to take a lawyer.

[4] In the meantime Lush considered that there were three options :

- a. To take no disciplinary action; or
- b. To issue a warning; or
- c. To consider dismissal.

[5] Draft letters in regard to the three options above were prepared by Lush's two representatives, the New Zealand Area Manager and a Sydney based National Trainer for Australasia. The purpose for preparing the letters was to use them for the meeting, if necessary.

[6] The meeting took place on 12 January 2011. Lush's two representatives (the area/retail support manager and national training manager) went through all the alleged discrepancies with Ms M'Nijel. Ms M'Nijel blamed a lack of training for the situation and that if she had known the seriousness of the situation she would have been more careful. Ms M'Nijel's lawyer sought clarification on whether or not Ms M'Nijel was being accused of dishonesty, but the Lush representatives emphasised that the issue was about Ms M'Nijel's failure to follow cash handling procedures and not accusing her of any dishonesty. The issue related to her failure on eleven occasions to put receipts with petty cash dockets and send them together to head office. A number of other matters were referred to, but it was accepted by the area manager and national training manager that these could be fixed with further training. An adjournment was taken for a decision to be made. Ms M'Nijel was not informed about what the decision would involve and indeed that the three options were being considered.

[7] The decision was made by the area manager and the national training manager to dismiss Ms M'Nijel. They say they informed the Sydney based director before giving the decision to Ms M'Nijel, and they both say that the director agreed with their action to be taken. Ms M'Nijel was informed of the decision to dismiss her and she was handed the dismissal letter. She became upset. Ms M'Nijel was not informed that the area manager and national training manager were considering a decision to dismiss her or that there were any other options.

Issues

[8] Would a fair and reasonable employer have dismissed the applicant in all the circumstances?

The facts

[9] Ms M'Nijel commenced her employment with Lush in its store in Palmerston North on or about 28 September 2009. She was employed as the Store Manager and her salary was \$35,000 per annum. Ms M'Nijel had an individual employment agreement and there are two relevant clauses in that agreement as follows:

6. Policies and Rules

6.1 The Employee will be subject to and must observe and comply with all rules, policies and procedures in force from time to time as set out in the Employer's Policy and Procedure Manual/House Rules. The Employer is entitled from time to time to amend, cancel or introduce such rules, policies and procedures, as it considers necessary. Any Employee who breaches any of the rules, policies or procedures in the Employer's Policy and Procedure Manual/House Rules may be subject to disciplinary action, which may result in the termination of the Employee's employment.

40. Termination of employment

40.6 Serious misconduct by an employee may give rise to summary dismissal and no notice period will be given to the Employee by the Employer. Conduct that may give rise to summary dismissal includes (but is not limited to): ...failure to follow cash handling procedures ...

[10] Lush has two written manuals that are located in each store. The two manuals are: (1) the Lush Futura Navigator Managers Manual and (2) the Operations Manual. Both Manuals make provision for petty cash arrangements, in particular the Operations Manual states:

Staple Futura slip to the original receipt. Put all receipts together in one bag or envelope. Clearly write your store name and the date on the front of the envelope.

[11] During a routine store audit by the area manager and the national trainer, various matters were discovered about accounts, till receipts and cash handling procedures and the handling of gift vouchers, discount vouchers and returns. There were a number of petty cash dockets without receipts discovered. These activities were Ms M'Nijel's responsibility, although other staff members had their own staff number that would be placed on petty cash dockets and apparently the staff knew each other's numbers. Ms M'Nijel was asked to explain what the petty cash dockets without receipts involved. She attempted to do so.

[12] Also, Ms M'Nijel complained that she had not been trained properly, and that she did not know that Lush wanted her to process the petty cash documents with receipts as nobody had shown what to do. Ms M'Nijel accepted that she failed to put the receipts on the petty cash dockets and that this was due to oversight, mistake or the dockets being lost or mislaid. During the Authority's investigation Ms M'Nijel also commented that on some occasions it was just not possible to obtain receipts.

[13] Ms M'Nijel accepted that there was some error involved because all petty cash documents should have had invoices attached to them to verify the money spent, as she has now learnt. She says she understood that her explanation had been accepted by the two managers and that they had agreed appropriate training would fix some of the problems. Indeed, during the Authority's investigation there were a number of other problems identified and the area manager and training manager agreed that those problems would be fixed by training. However, the matter in regard to the petty cash dockets without invoices attached was a significant issue for them both, and they regarded this as serious because there were eleven instances whereas on other occasions Ms M'Nijel had complied with the requirement to provide head office with a receipt on

the petty cash docket.

[14] On 11 January 2011 Ms M'Nijel was informed that she had been suspended on full pay. A director based in Sydney made this decision without consulting Ms M'Nijel and giving her an opportunity for some input. This is only background because no personal grievance was raised to challenge the decision.

[15] A disciplinary meeting was held on 12 January 2011. I am satisfied that the Ms M'Nijel would have known that there was a serious concern. This is because she arranged to have a lawyer present with her.

[16] At this meeting there was a focus on the petty cash dockets without receipts and Ms M'Nijel's representative asked for proof that Ms M'Nijel was responsible for the petty cash dockets using the employee identity number on the dockets. There were seven employees who worked in the store (a number of whom were and are casuals) and everyone knew each other's number. Ms M'Nijel's explanation that somebody other than her could have entered the transactions on the till was not raised by her or by her representative at the meeting held on 12 January. Ms M'Nijel has accepted, as the store manager, she was responsible for the petty cash dockets and receipts. In any event she accepted that there were a number of transactions where she failed to follow the procedure to provide receipts.

[17] Ms M'Nijel was then dismissed after her explanation over the petty cash documents had been rejected. The decision related to serious misconduct for failing to follow cash handling procedures which meant that she had not put receipts on petty cash documents as required. There were eleven instances relied upon and this number was enough for the company to consider her behaviour amounted to serious misconduct.

Determination

[18] In the background to this employment relationship problem is a suspension that was procedurally inadequate, and that would have led to a finding of an unjustified action if that had been pursued. The decision was made by a decision-maker who was not available to Ms M'Nijel. She had no contact with him and did not have any opportunity to have any input, comment and consultation. However, as there was no personal grievance raised on this it can only be considered as background. In any event Ms M'Nijel was not disadvantaged because she remained on pay, a meeting was held shortly after and she had an opportunity to get a representative to help her.

[19] The employer's decision to dismiss Ms M'Nijel was unjustified because:

a. Ms M'Nijel was not provided with any findings and put on notice that there was the possibility of disciplinary action, a warning and/or dismissal before she was informed of the decision. This is different to the requirement to have told Ms M'Nijel that her position was at risk if the allegations were proved before the investigation/disciplinary meetings held on 11 and 12 January. The proof for my finding above is supported by the confusion that Ms M'Nijel had about the reason for her dismissal and what the particulars were that Lush relied on. In particular, Lush's evidence included all the issues initially raised in respect of Ms M'Nijel. Ms M'Nijel was correct in her evidence that the matter only related to the petty cash dockets and receipts. Lush's witnesses conceded that the other issues could have been fixed with training and that is what both Ms M'Nijel and Lush considered at the meeting and were included in their deliberations at the time. Those matters have subsequently been included in the reasons used to justify the dismissal. Also, Ms M'Nijel's plea for another chance was not linked to this, but followed from the general discussion at the time, I hold.

b. Lush never gave Ms M'Nijel an opportunity for any input into other options before making a decision to dismiss her. I am supported in this conclusion by Ms M'Nijel's reaction to the decision at the time and the matters discussed after the decision had been conveyed to her that included the prepared options. Discussion on the options took place after the decision and that is not the action of a fair and reasonable employer because the decision had been made and there was no certainty that there could be any change made if necessary, I

hold.

c. The decision was conveyed without Ms M'Nijel being told what the findings were and what the decision would potentially involve and that she faced being dismissed. That's a pity for Lush because the managers had open minds and had other options to discuss. Failing to follow the correct process was not the action of a fair and reasonable employer, I hold.

d. It was not fatal that Lush had pre-prepared the three letters in anticipation of the meeting of 12 January. The fact that there were three letters that covered the different options does support that they had an open mind as to the outcome and that there were options to be considered.

e. Lush would like me to apportion responsibility on Ms M'Nijel that she should have raised any options, but in this case, Lush itself had the options already and a fair and reasonable employer would have included Ms M'Nijel in a discussion on them before making a final decision. I hold that the process and procedure were Lush's responsibility, and it should have raised the options particularly since draft letters had been prepared for Lush's reference.

[20] A number of other matters have been raised and I will deal with each of these for completeness. Firstly, I am satisfied that the decision makers were the area manager and the training manager and not the Sydney based director. This became absolutely clear from the Lush witnesses during the Authority's investigation meeting. The decision makers accepted that they adjourned the meeting on 12 January to make a decision and in making that decision they informed the director in Sydney before telling Ms M'Nijel. In this regard I have considered that there was a difference in the area manager's and the training manager's evidence during the Authority's investigation meeting (in their written statements) about the background to do with the suspension decision. There was no fault or flaw in this, I hold. I conclude that the training manager made a mistake in recalling what happened. This is because the area manager was emphatic, did not resile from her written evidence and was certain about what she recalled happening. Also, the training manager accepted that her evidence was different and genuinely explained it was a mistake. I accept that.

[21] Secondly I hold that there was no predetermination. The letters prepared in advance was an unusual way of dealing with the matter, but I am entirely satisfied that they were genuinely prepared for assistance and reference as to the options available. This is because there were three letters prepared with different options. I accept that they were used as possible options depending on the outcome. No decision had been made. Also, I hold that the arrangement made for another manager to be brought in to the store was entirely reasonable considering that there was an investigation, it is a small shop with one shop manager and there were matters requiring attention. The area manager and training manager could not stay in Palmerston North so they had to plan some coverage. The above do not support the claim that there was any predetermination I hold. There was no evidence that Ms M'Nijel was being replaced.

[22] Thirdly, the next question is whether the reason relied upon would amount to serious misconduct under the provision of the employment agreement. Unfortunately for Lush, its dismissal letter was too general about the applicant's failure to follow cash handling procedures, which implied that all the matters that had been the subject of the investigation were included. In fact that is how the evidence came across before the two managers were interviewed by me. In fact it was not the case that all the matters that had been the subject of the investigation were included for serious misconduct because the only remaining issue was about the petty cash dockets not having receipts and where Ms M'Nijel had on other occasions provided receipts. The reason can best be described I think as the risk Lush considered was associated with Ms M'Nijel's failure to comply with a policy and the manual procedures. This is especially so when Lush ruled out that it had anything to do with Ms M'Nijel's honesty, which it seemed to accept was not at issue, I hold. The problem at the time was compounded by Ms M'Nijel's failure to recall the petty cash without having receipts. However there has been no finding reached at the time of any wilful and deliberate misconduct to place this on the scale of serious misconduct as Lush did, I

hold.

[23] I hold that a fair and reasonable employer would not have categorised this as serious misconduct because:

- a. There was no evidence of either wilful or deliberate behaviour by the applicant because she had on other occasions provided receipts with the petty cash dockets.
- b. It is more than likely that Ms M'Nijel's work in the store involved her very poor administration and attention to detail.
- c. Lush acknowledged that there was no issue about Ms M'Nijel's honesty.
- d. Furthermore Lush had accepted that the other matters at issue could have been fixed with training.

[24] Finally there is a keenly argued dispute about the level of training and the information that Ms M'Nijel had about the cash handling procedures. I will come back to that matter in the course of my discussion on remedies. Suffice to say I do not find Ms M'Nijel's defence that she did not get adequate training plausible. Indeed Ms M'Nijel acknowledged the manuals were in the shop and that she had signed an employment agreement that required her to comply with them.

Conclusion

[25] I hold that Ms M'Nijel has a personal grievance for unjustified dismissal. **Remedies**

[26] Ms M'Nijel is seeking reinstatement. A number of witnesses expressed their opposition to this. One of the factors is that Ms M'Nijel's position has been kept open, but it is in a small store with one other permanent worker and a number of casuals. The other permanent worker currently filling Ms M'Nijel's position (on an acting basis) is very much opposed to her returning because she says Ms M'Nijel was an extremely bad manager and because of this the place was always in a shambles. She stated that things were not always done such as training. One of the managers involved in the audit and investigation was opposed to her returning because of the way she ran the store. The other manager has since left. A replacement manager put in the store at the time stated that she had to set about to improve the running of the store and set it up with the acting store manager. The replacement manager at the time says it would be a risk to reinstate Ms M'Nijel considering what she found and needed to fix in the store at that time. She says the store is a happy place now and Ms M'Nijel's return there would create disharmony and tension. I accept that evidence. For this reason I am not willing to reinstate Ms M'Nijel. As such I hold that this would make reinstatement impracticable. The impracticability of reinstatement is further supported by Ms M'Nijel needing to be managed from a distance I hold. That would more than likely have to happen given her poor administration and failings with the procedures required. There are no other arrangements that

would be satisfactory other than causing unnecessary cost to the employer. I also have found earlier that Ms M'Nijel's explanation about inadequate training was not plausible. This causes me some concern about Ms M'Nijel's attitude where she has put the blame on poor training and that Lush should have trusted her notwithstanding the responsibility she had and which she has not properly accounted for. This has to be balanced by Lush's right to require receipts to be provided with the petty cash vouchers. I decline Ms M'Nijel's application for reinstatement because it would be impracticable for the reasons above.

[27] I accept that Ms M'Nijel has lost wages. Her loss that she has claimed is \$3,076 between 12 January 2011 and 13 February 2011 (the date Ms M'Nijel started another job at the same rate of pay).

[28] I hold that she has contributed to the situation and I find her explanation of not having enough training implausible. This is because:

- a. There were manuals available in the store to assist Ms M'Nijel in the cash handling processes required.
- b. Ms M'Nijel had a responsibility to find out what was required if as she claims she did not know because the employer's money was an issue.
 - c. Ms M'Nijel could have contacted managers for advice and help and she could have looked in the manuals that were in the store. Handling cash and relying on receipts is a significant matter.
 - d. Ms M'Nijel had on some occasions provided receipts with the dockets which contradicts her evidence that she had not had sufficient training.
 - e. She expressed contrition and said that she did not realise the importance of the issues.
 - f. Ms M'Nijel raised a new explanation that she did not raise on 11 and 12 January that someone else in the shop may have been using her code to enter cash transactions. There was insufficient proof to support this claim.
- g. Ms M'Nijel accepted responsibility for most of the transactions.

[29] She however cannot be held responsible for the employer's process and reasons for justification of the dismissal relied upon by the employer. I assess Ms M'Nijel's contribution at 30% of her lost wages.

[30] I now turn to compensation and I accept there is some evidence that there has been an impact on Ms M'Nijel because of her dismissal. I assess her compensation as \$5,000 under s123 (1) (c) (i) of the Employment Relations Act.

[31] However, the lost wages and compensation will be reduced to account for the 30% contribution.

[32] **Orders of the Authority**

[33] I order Lush New Zealand Limited to pay Leila M'Nijel the sum of \$2,153.20 lost wages and \$3,500 compensation for humiliation loss of dignity and injury to feelings.

[34] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority