IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 70/08
5075682

	BETWEEN	LEESA ROBERTS Applicant
	AND	CONVERTING TECHNOLOGY (NZ) LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Simon Lance, counsel for Applicant Clive Bennett, advocate for Respondent
Investigation Meeting:	11 September 2007
Submissions received:	24 September 2007 from Applicant 23 October 2007 from Respondent
Determination:	3 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Up to a few weeks before her dismissal, Ms Leesa Roberts had for many years enjoyed an amicable and mutually beneficial employment relationship with Mr Matthew Richardson, the sole owner and director of Converting Technology (NZ) Limited ("CTNZ"). Mr Richardson set the company up in 1991 and employed Ms Roberts from the beginning of operations. The pair had worked closely together before this, when Mr Richardson was the general manager of another company they both were employed by.

[2] For the first few years of their long association at CTNZ only Mr Richardson and Ms Roberts were working in the business.

[3] Ms Roberts was given wide responsibility to manage the office. She did so effectively and successfully, allowing Mr Richardson to travel overseas on sales trips bringing in business. He was clearly appreciative of her work and showed this in various ways, including the amount of remuneration paid to her.

[4] By the time of her dismissal from employment with this small but apparently very successful company, Ms Roberts had a remuneration package that had grown to approximately $100,000. This was made up of salary of $66,000, annual bonus of $18,000, and a company car with full personal use which saved her about $15,000 a year as the cost of owning and running her own vehicle.

[5] Ms Roberts had been paid bonus for a number of years and she always received it net of tax. The tax treatment of the bonus was one of four matters that led to the decision taken by Mr Richardson to dismiss Ms Roberts on 6 November 2006.

[6] The three other matters were the alleged misuse of her company taxi card by charging private travel to it, her alleged failure to pay overseas creditors in a timely way avoiding the loss of funds through currency exchange rate fluctuations, and her alleged failure with regard to the unauthorised use of a company petrol card by an employee she supervised.

[7] The employment relationship problem has been expressed by Ms Roberts as being a personal grievance claim of unjustified suspension and dismissal, for which she seeks remedies of reimbursement of lost wages and compensation against CTNZ to a total of nearly $80,000. The problem contended in relation to the suspension of Ms Roberts was raised in the Authority when the investigation meeting commenced, although it had not been included in the statement of problem.

[8] Before lodging her claim mediation was undertaken by Ms Roberts and CTNZ to try and resolve the problem, but settlement was not achieved.

[9] As there is no dispute about the dismissal of Ms Roberts, the investigation of the Authority has focused upon the justification for that action of the employer. There is also no dispute about the suspension of Ms Roberts. Her claim that that action was unjustified has also been considered.

[10] The legal test of justification which must be applied by the Authority in giving this determination is contained in s 103A of the Employment Relations Act 2000.

[11] That test has been explained by the Employment Court in *Air New Zealand Ltd v. Hudson* [2006] 3 NZELR 155.

[12] In its decision the Court noted that under s 103A justification for dismissal must be determined by the Authority on an objective basis. This part of the test was held by the Court to mean that:

> *… the matter must be viewed from the point of view of a neutral observer.*

[13] The Court noted further that the Authority must judge objectively all of the relevant circumstances and, as s 103A states, judge those at the time the dismissal occurred.

[14] The test of justification for action taken by an employer other than dismissal, such as suspension, is also s 103A.

[15] From the point of view of a neutral observer, the Authority has no doubt in this case that in the circumstances prevailing at the time of the dismissal, taking that action was what a fair and reasonable employer would have done in response to Ms Roberts' conduct.

[16] In relation to the action of suspending Ms Roberts, the Authority finds that while CTNZ had grounds for doing that a fair and reasonable employer would have consulted before finally deciding to disadvantage Ms Roberts in her employment in this way.

[17] Generally and for the entire duration of it, the employment relationship between CTNZ/Mr Richardson and Ms Roberts operated on the basis of loose and unwritten arrangements. These suited both, as Mr Richardson could get with doing what he did best to make the business a profitable one, and Ms Roberts was not hampered by excessively documented rules and policies but worked best relying on her own judgement and discretion in many important respects of business administration. Undoubtedly this would have increased her satisfaction in doing the work, and she was also relatively well paid for what she did.

[18] On occasions Mr Richardson had been supported and assisted by Ms Roberts in his private life. He said that at one stage Ms Roberts had been entrusted with the administration of his own finances, when he was under some strain in his personal

life, and for a time she was a trustee of the family trust set up by him and an executor of his will. In his evidence Mr Richardson readily acknowledged that over 15 years Ms Roberts had done a "tremendous" job for him and CTNZ. Until shortly before her dismissal he had regarded her as "just the best" because of her performance, Mr Richardson said.

[19] For her part, Ms Roberts' observation made to the Authority that Mr Richardson "made a lot of money and spent a lot of money" is consistent with evidence of a relaxed attitude to financial control and good commercial practice that prevailed in some areas of the business under her administration.

[20] Mr Richardson, who was effectively the employer of Ms Roberts, must bear responsibility for the culture that grew within the office over many years. Ms Roberts' conduct that led to her dismissal must be considered in the context of this particular workplace and the way it ran.

[21] Notably lacking throughout the 16 years of this employment relationship was a written employment agreement, such as all employers have been required to provide since 2000 under s 65 of the Employment Relations Act.

[22] Apart from a single letter dated 31 March 1998, written by Mr Richardson over 8 years before Ms Robert's dismissal, nothing was written to say what her remuneration was and how it would be taxed. The 1998 letter expressed that an agreed bonus of $4,000 per annum would be paid "NET" to Ms Roberts. Her entitlement to receive bonus payments at any time during her employment is not in dispute, but the issue is whether she was to continue to be paid them net of tax after 1998.

[23] The amount of bonus agreed by Mr Roberts did not remain at $4,000. By 2004 it had grown progressively to $18,000. There is no dispute that the bonus was part of Ms Roberts' income and was therefore taxable. She administered the payment of her own remuneration as part of her job and she also prepared the company accounts. It seems that no tax was ever paid by Ms Roberts or by CTNZ on the bonus, or if tax was paid it was not on the full amount of bonus received.

[24] Mr Richardson believed that some time after 1998 he had stopped bonus payments being made net of tax. He claims that after about 2000 he made it clear to Ms Roberts that she was to receive her bonus after tax. There are no records to verify

this claim by Mr Richardson, and Ms Roberts denies it. He must take responsibility for not documenting any changes he says were made in this regard. I found his evidence was vague of this change being made and advised to Ms Roberts.

[25] It is a further relevant consideration in this case that in 1998 when the bonus was around $4,000 and had been expressed by Mr Richardson to be payable net, if not in later years as well, he suggested or approved of an improper arrangement for Ms Roberts to receive some of her bonus payments as expenses reimbursed. These 'expenses' had not been legitimately incurred by her in the course of employment.

[26] Mr Richardson referred to this method of payment as a contra arrangement under which the bonus payments were received by Ms Roberts as repayment of expenses. His term for this was "expensing" the bonus. Under this arrangement with his knowledge his own personal shareholder account in the company was used to repay Ms Roberts for fictitious expenses. Mr Richardson acknowledged that to Ms Roberts he had referred to the account as his "swindle" account. In 2006 professional accountants engaged by CTNZ warned him and advised him to end the payment of tax free bonuses to Ms Roberts. At the same time the accountants pointed out other deficiencies in the office administration.

[27] Ms Roberts had been the main if not the sole beneficiary of these arrangements for the payment of her bonus. She clearly knew from her considerable experience of all aspects of running and administering the business, including preparing the company accounts, that neither herself nor her employer was paying tax on this part of her remuneration and that the expense claims were not legitimate even if made with Mr Richardson's approval. It suited her to participate in the arrangement and Ms Roberts cannot claim to be innocent of any wrongdoing associated with the payment of bonus she received.

[28] I am satisfied that following the inquiries Mr Richardson made of Ms Roberts he was able to fairly conclude that she had no reasonable basis for believing the 1998 expensing arrangements had been approved of for use in later years and up until 2005 and 2006. The explanation Ms Roberts gave about the payments confirmed to Mr Richardson that she knew $18,000 was too large a sum to try and pass off as expenses she had incurred in her employment. She explained that she had "contra'd" $6,000 to expenses and had paid herself the balance of $12,000 net.

[29] I am satisfied it was reasonable for Mr Richardson to conclude that Ms Roberts had not been expressly authorised by him to treat her bonus in this way in 2005 and 2006 and that neither had she honestly thought the 1998 arrangement had been extended by him to permit this. Mr Richardson found that Ms Roberts' explanation was not backed up by records in the accounts payable file of claims for expenses and any cheque drawn for payment. It was safe for Mr Richardson to assume that the 1998 rort he had been party to, was continued by Ms Roberts well beyond that time but without his authorisation, whether given expressly or tacitly.

[30] I find it was reasonable for Mr Richardson to regard Ms Roberts' actions as serious misconduct, in that she had paid herself more remuneration than she was authorised by her employer to receive net and as office manager she had failed to see that tax due on payments was properly accounted for in the company books she was responsible for keeping.

[31] There were three other matters that led to dismissal. Mr Richardson must share responsibility with Ms Roberts for at least one of them. He had allowed Ms Roberts considerable freedom to make payments to overseas creditors when she saw fit. Having funds to pay at any particular time was not an issue for CTNZ and this enabled payment to be timed to take advantage of movements favourable to CTNZ in currency exchange rates. Money had usually been made rather than lost from the timing decided by Ms Roberts for making payment to overseas creditors.

[32] Following an audit, CTNZ's accountants drew it to the attention of Mr Richardson that Ms Roberts had allowed some creditors to go unpaid for seven months or longer. As well as bad commercial practice this meant that in some cases by the time creditors were paid the exchange rates had become unfavourable and consequently as much as $30,000 was lost to CTNZ through this practice. I agree with Mr Richardson's assessment that delaying payment for this long was negligence on the part of a competent and experienced office manager, as Ms Roberts was. But insufficient control and direction had been exercised over her. It seems Mr Richardson had not wanted to be a stickler for repayment to creditors within 30 days, especially when there was the possibility of achieving a financial advantage through the timing of the repayment.

[33] In the circumstances I do not consider that the matter of timely payment to creditors on its own could justify the dismissal of Ms Roberts, although lesser disciplinary action was warranted.

[34] A third matter is one that Mr Richardson had no responsibility for. This was the unauthorised use of the petrol card by another employee who was directly controlled and supervised by Ms Roberts. As a term of employment that employee had been permitted by Mr Richardson each month to have two free petrol fills of her private car. After a while, the invoices began to show that she was having three, four and even five fills a month, at around $70 a tank. When Mr Richardson was inquiring into this matter of concern, I accept that he received unsatisfactory responses from Ms Roberts about her knowledge of it. In my view Mr Richardson reasonably concluded that she had not supervised or managed the employee concerned properly but had knowingly allowed the misuse of the petrol card, or at least had failed to stop this when she must have known about it.

[35] Ms Roberts' own evidence was that she had told the employee, "it would probably not concern Matthew if she had the odd extra fill-up per month." This was as good as inviting the employee Ms Roberts supervised to ignore the limits Mr Richardson had placed on receiving this benefit.

[36] Again, a culture that had developed of casual arrangements and lack of attention to financial accountability and detail probably led Ms Roberts into this situation. She did not directly gain from her failure to act but nevertheless it could reasonably be viewed by Mr Richardson as serious misconduct.

[37] For the last matter, the unauthorised use of the CTNZ taxi card, Ms Roberts had no excuse. On at least six occasions Ms Roberts had taxi transport paid for by her employer when she was not on company business. The total amount involved was some $255. Some of the trips were to Auckland airport and in relation to those initially Ms Roberts raised the excuse that because she received for her private use a free flight to Christchurch as part of her remuneration package, the taxi transport to the airport was a necessary part of utilising that benefit. That explanation, if acceptable, would account for two of the taxi trips, but not four others. Ms Roberts did not persist with her explanation but quickly conceded she had had no excuse, by offering to repay the amounts involved.

[38] Ms Roberts acknowledged in her evidence that a warning for this conduct would have been justified.

[39] I find this conduct was capable of being serious misconduct and dismissal in the circumstances would have been the action of a fair and reasonable employer. Mr Richardson told the Authority he did not dismiss Ms Roberts for the taxi travel matter alone.

[40] A neutral observer, present at the time the dismissal occurred and during the inquiry that preceded it, would have concluded that Ms Roberts had not acted competently or proficiently as an employee of CTNZ and had participated in an arrangement she knew was highly irregular, if not unlawful. Further, and compounding the first two matters, Ms Roberts had approved of or turned a blind eye to another employee taking advantage of the inattention paid by Mr Richardson to details he had employed Ms Roberts to look after, and finally there had been several instances of unauthorised use of company funds for personal travel outside of any agreement or approval given by Mr Richardson. It is clear, and Mr Richardson viewed it in this light, that Ms Roberts realised that her actions had been wrong and she, to her credit, immediately offered to repay the amounts involved.

[41] The neutral observer is likely to have considered that Mr Richardson and Ms Roberts had enjoyed a mutually advantageous and productive working relationship for many years but eventually things went so seriously wrong through the actions or inactions of Mr Richardson as well as Ms Roberts, that the trust and confidence required to maintain the employment relationship was lost on both sides. In my view, it was a fair and reasonable action in the circumstances for the employer to end the relationship by dismissing Ms Roberts.

[42] Had I found that dismissal was unjustified, the measure of contribution from Ms Roberts to the four matters combined is likely to have eliminated or significantly reduced her entitlement to any remedies. The taxi charge matter in particular would have called for a heavy reduction of remedies.

[43] As to the justification for suspending Ms Roberts, I conclude that a fair and reasonable employer would have viewed that action as reasonably necessary to allow the records Ms Roberts was in charge of keeping to be examined without disturbance or interruption and also without causing embarrassment to Ms Roberts if she was

present in the office while this was being done. However this action was carried out without consultation which in the circumstances was unjustified.

[44] I am satisfied pursuant to s 124 of the Act that the fault or blame on the part of Ms Roberts for the situation that gave rise to her suspension grievance was so great as to reduce to nil her entitlement to any remedies.

Determination

[45] The determination of the Authority is that the dismissal of Ms Roberts was justified in all the circumstances at the time that action was taken by CTNZ. In this regard Ms Roberts does not have a sustainable personal grievance and therefore no orders are required to be made against CTNZ. Her suspension although procedurally unjustified does not deserve remedies and no orders are made on this account.

Costs

[46] If the parties, through their representatives, are unable to resolve any question of costs that arises, application can be made to the Authority in writing.

A Dumbleton
Member of the Employment Relations Authority