



New Zealand Employment Relations Authority Decisions

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Russell v Triodent Ltd (Auckland) [2011] NZERA 863; [2011] NZERA Auckland 28 (20 January 2011)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 28
5275405

BETWEEN KATE ELIZABETH RUSSELL

applicant

AND TRIODENT LTD

respondent

Member of Authority: James Wilson

Representatives: Dean Wharekura for the applicant

Wendy Macphail for the respondent

Investigation Meeting: 7 September 2010 in Tauranga

Submissions received: 17 September 2010 from the applicant

24 September 2010 from the respondent

Determination: 20 January 2011

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Ms Kate Russell (“Ms Russell”) says that she was unjustifiably dismissed by her employer, Triodent Ltd (“Triodent”) and is seeking payment for lost wages for the time she was unemployed and compensation for the hurt and humiliation her dismissal caused her. She is also seeking reimbursement of credit card expenditure for which she has subsequently provided receipts and a performance bonus that she says would have been paid to her had she not been dismissed.

[2] Triodent say that Ms Russell was justifiably dismissed for serious misconduct after it had carried out a thorough investigation.

The issues for determination

[3] Ms Russell and her representative/partner, Mr Wharekura, generated a great deal of correspondence and evidence in an attempt to show that Ms Russell had not committed the acts of serious misconduct for which Triodent says she was dismissed. In evidence Ms Russell told me passionately that all of her actions were legitimate, honest and in what she believed were the best interests of her employer. However the sole test which I am required to apply is that set out in section 103A of the Employment Relations Act (the Act) i.e. were Triodent’s actions and how Triodent acted, *what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred*. If they were not then Ms Russell was unjustifiably dismissed and has a personal grievance against her employer. I will then be required to consider what if any remedies she is entitled to receive as a result of that personal grievance.

The events that led to Ms Russell's dismissal

[4] Ms Russell was employed by Trident in the position of Sales Manager for approximately a year and was dismissed from that position in June 2009 for allegedly misusing the company credit card. The following narrative sets out a broad outline of the events which led to Ms Russell's dismissal. I have not attempted to set out all of the details which were provided to me in evidence but have concentrated on those matters that directly impact on my determination of whether Trident's actions in dismissing Ms Russell were those of a *fair and reasonable employer*.

The initial concerns

[5] In November 2008 the company's accounts staff became concerned regarding Ms Russell's use of her company credit card. However after some discussion the company agreed to the repayment of some personal expenditure and she was instructed, at least for some period of time, to hand in the company credit card except when she required it while travelling on company business.

[6] In late November Ms Russell retrieved the company credit card prior to her travelling overseas on company business and she retained the card in her possession on her return.

[7] The company's Managing Director/CEO, Mr Simon McDonald, says that he first became aware of concerns about Ms Russell's credit card use in early 2009. He says that at first he dismissed these concerns as unfounded. However in April 2009 the Accounts Department again questioned Ms Russell's fuel use. Mr McDonald says at first he accepted Ms Russell's explanation for the discrepancy (that the fuel pump had stopped half way through delivery of petrol and had to be reset – hence two separate fuel dockets were produced on the same day). However the accounts department persisted in its concerns and, to lay the matter to rest, Mr McDonald authorised further investigation. As a result of this investigation and subsequent inquiries the company became aware of what they considered to be a number of discrepancies in Ms Russell's credit card use. In particular they were concerned regarding petrol purchases, a KFC purchase and cash withdrawals.

Petrol purchases

[8] Without advising Ms Russell the company arranged for the fuel capacity of the company car she was allocated to be checked. This check revealed that purchases of petrol made by Ms Russell on several occasions were in excess of the fuel tank capacity. Ms Russell's subsequent explanation was that she had filled not only the car but additional petrol cans as she feared that she might run out of petrol during those times that she did not have access to the company credit card.

KFC purchase

[9] On the evening of 7 October 2008 Ms Russell used the company credit card to purchase \$79.00 of KFC meals and drinks.. She says that after arriving home (in Tauranga) from work that evening she decided to return to the work premises in Katikati to catch up with employees on the evening shift and to leave KFC for the three staff that started at 11 pm. She says that she purchased the KFC in Tauranga at about 6 pm and drove immediately to Katikati where she left the food for the employees. The company says that the one employee who may have been on duty in the early evening was on annual leave (a fact that was almost certainly known to Ms Russell) and that

none of the three staff who commenced work later in the evening recall seeing the

KFC.

Cash withdrawals

[10] Company was concerned regarding two cash withdrawals made by Ms Russell using the company credit card. They say that Ms Russell was not authorised to make cash withdrawals for any reason. Her explanation for these withdrawals was that on one occasion the money (\$40.00) was to be used for cash incentives for two of the staff but was subsequently used to buy wine for the staff and on the other the money was used to purchase wine, also as a staff reward. The company says that neither of the two staff concerned recall receiving a cash reward and only one staff member remembers receiving wine. They point out that had it been necessary for Ms Russell to purchase wine she could have done so from the local supermarket and got a receipt for those purchases. No receipt was produced by Ms Russell.

The company's investigation process

[11] On 25 May 2009 Ms Russell was asked to attend a meeting with Mr McDonald. Mr McDonald's say's that this was an informal meeting at which he handed Ms Russell a letter informing her that they were investigating petrol usage and other issues and asking her to attend a formal meeting to hear her explanation. Ms Russell says that she was "quite shocked to be summoned to this meeting" and even more surprised to be confronted by two other managers as well as Mr McDonald. While Ms Russell may have been unhappy with being called to this meeting, in her written statement of evidence she says:

I was given a letter by (Mr McDonald) which stated that I was being investigated for misuse of my company credit card for

pecuniary gain and that I was also being investigated for deceptive conduct. I stated that I didn't need to wait for the schedule meeting and I was quite happy to explain then and there. I proceeded to do so and my explanation is covered quite extensively in the following meetings.

[12] Ms Russell attended two further meetings with Mr McDonald, Yashen Jones (Triodent's Chief Financial Controller) and the company's legal representative, Wendy Macphail, on 28 May and 9 June 2009. (2 other managers also attend the meeting on

28 May). She was accompanied at both meetings by her legal representative

(Mr Stephen Bosman). In addition between these two meetings Mr Bosman supplied a lengthy written explanation regarding the various concerns raised by the company.

[13] At the end of the second meeting the Company made the decision to dismiss

Ms Russell. In his written evidence Mr McDonald says:

(Mr Jones) and I then discussed what a fair and reasonable employer would do in the circumstances, taking into account all the matters relating to the situation. We decided to dismiss (Ms Russell) for serious misconduct. Of particular concern to us was;

- (Ms Russell) giving us a written explanation of her petrol expenditure which she later acknowledged was untruthful. She had time to think about her reply in her e-mail response and so, in our opinion, her reply was intended to mislead.*
- The cash withdrawals on (Ms Russell's) company credit card. She had no authority to withdraw cash, or to pay a cash bonus without authority and income tax compliance. Furthermore, the staff confirmed that they neither received any cash from (Ms Russell).*
- The KFC purchase which (Ms Russell) asserted was brought to the office. Again, the staff confirm they did not receive this. The purchase receipt shows that the \$79 expenditure purchased 30 pieces of chicken, 4 mega-chips, 2 mega- potato and gravy and 2 mega coleslaw and 3 1.5 L large bottles of fizzy drink. We find it very unlikely that she drove with this meal for 30 minutes from Tauranga to give to staff who were not there.*

Before dismissing (Ms Russell) for serious misconduct we gave (her) and (Mr Bosman) the chance to comment on our impending decision. Nothing in (their) comments made us change our decision to dismiss (Ms Russell) for serious misconduct.

Ms Russell's arguments

[14] Ms Russell, and Mr Wharekura, have raised two separate lines of argument as to why they believe Ms Russell's dismissal was unjustified. They point to a number of areas in which they say Triodent's investigation process was flawed and they canvassed in some detail Ms Russell's explanations for the credit card expenditure for which she was dismissed.

Was Triodent's investigation process flawed?

[15] In this regard Ms Russell says that she and her representatives were kept waiting in the reception area for some 45 minutes before the commencement of the meeting on 28 May 2009, that Mr Bosman was "bullied and badgered throughout the proceedings" and that Ms Russell "felt extremely intimidated and afraid through the entire proceedings". I do not accept that these particular concerns undermine the fairness of the Triodent investigation process. Ms Russell was represented throughout this investigation by an experienced legal advocate who I have no doubt had every opportunity to put forward her arguments and is unlikely to have allowed himself to be bullied. I am not at all surprised that Ms Russell felt afraid throughout the proceedings

- she was facing the possibility that she was going to be dismissed. Again however having heard evidence from both Mr McDonald and Mr Jones I find it unlikely that they would behave in ways which would make Ms Russell feel "extremely intimidated". In any event I am confident that her legal representative would have raised appropriate objections had such behaviour been manifest. I have reviewed all of the evidence and correspondence relating to Triodent's investigation and have come to the conclusion that, while not perfect, it was fair and comprehensive. Ms Russell was advised of the company's concerns and was given more than adequate opportunity, with the assistance of her representative, to explain herself, before the company made its decisions that she had misused her company credit card and that it was fair and reasonable to dismiss her.

Was Ms Russell innocent?

[16] During my investigation Ms Russell has canvassed at some length her explanations for the credit card expenditure for which she was dismissed. As I explained at the commencement of this determination it is not the role of the Authority to determine whether or not Ms Russell was guilty or innocent of misuse of her company credit card. The question rather is whether or not, having carried out a full and fair investigation, the decision reached by Triodent (that Ms Russell was guilty of that misuse) was, on the balance of probabilities one that a reasonable employer would have reached. If the answer to that

question is “yes” it is then necessary to consider whether or not, in the light of that decision, it was fair to dismiss her.

[17] As set out above I have found that Triodent did carry out a full and fair investigation. It may be that Ms Russell’s use of the company credit card was legitimate in every instance, but based on their investigation and the evidence in front of them it was reasonable for Triodent to decide that Ms Russell was, on balance, guilty of misusing the company credit card. In particular I agree with Triodent’s conclusion that, at least in relation to the KFC purchases, Ms Russell’s explanations were not credible.

[18] Having determined that Ms Russell was guilty of serious misconduct I also find that it was reasonable for Triodent to dismiss her. Ms Russell was required to manage company expenditure and collect significant amounts of cash. She had authority to approve expenditure and, while travelling extensively overseas, was required to hold and use a company credit card. I agree that it was imperative that the company have complete trust and confidence in her. In light of their finding that she had misused their credit card that trust was irrevocably lost. Under these circumstances it was reasonable that Ms Russell be dismissed.

Determination

[19] Ms Russell was justifiably dismissed from her employment at Triodent after a full and fair investigation had determined that she was, on the balance of probabilities, guilty of serious misconduct. Ms Russell does not have a personal grievance against her employer, Triodent Ltd.

Reimbursement of expenses

[20] Ms Russell says that her final pay from Triodent was reduced by the deduction of what Triodent believed were personal expenses made on her company credit card. Shortly after she had signed the approval for this deduction she found a number of missing receipts, covering this expenditure, that she submitted to Triodent for reimbursement. At the time of my investigation meeting it is my understanding that this expenditure had not been reimbursed. Assuming Triodent accept that this expenditure was legitimate, is owed to Ms Russell and has not yet been paid, they are to reimburse Mr Russell the appropriate amount as soon as practical. Should there be any dispute regarding whether or not Ms Russell is owed this money the parties

should discuss the matter in the first instance between themselves. If they are unable to reach agreement both parties should file submissions in support of their respective positions within 28 days of the date of this determination.

Bonus

[21] Ms Russel has advanced no evidence as to her entitlement to a performance bonus. In the absence of any such evidence I have presumed that she has either withdrawn this claim or now accepts that no bonus is payable. If Ms Russell wishes to pursue this claim she should first discuss the matter with Triodent. If she is unable to reach a satisfactory outcome she may file a submission with the Authority, within 28 days of the date of this determination, setting out why she believes that she is entitled to a bonus in terms of her employment agreement. Triodent will then have 14 days in which to file a response.

Costs

[22] Costs are reserved. If the parties are unable to settle this issue between themselves Triodent may file and serve a submission within 28 days of the date of this determination. Ms Russell will then have 14 days in which to file and serve a response. I will not accept submissions outside of this timeframe except with leave.

James Wilson

Member of the Employment Relations Authority