



[4] Her employment was not without issue and other than the dismissal three incidents were discussed during the investigation meeting. They shall not, however, be considered in great detail as:

- (a) Ms Rutherford chose to *let things lie* in respect of all three; and
- (b) Rock Ferry states it will attempt to justify the dismissal as a reaction to one single event and none of the three earlier incidents played a part in, or influenced, the decision.

[5] That said, it should be noted the first incident resulted in a *final written warning* which Ms Rutherford initially challenged and which contains advice she would be subject to remedial training. The challenge did not proceed and no training occurred.

[6] The third incident related to events in late September 2013 and resulted in a disciplinary meeting involving Ms Rutherford and two of Rock Ferry's principals (Tom Hutchison, owner and director, and Angela Wilson, Business Director) on 14 October 2013. The process was not complete when the event that led to Ms Rutherford's dismissal occurred, though Rock Ferry states it decided the matter did not warrant disciplinary action immediately upon completing the meeting. It took some days for this to be conveyed to Ms Rutherford.

[7] Rock Ferry had, prior to August 2013, had a policy under which staff could take part consumed bottles of wine from the cellar door for their own use.

[8] This changed on 3 August 2013 when staff were advised:

*ULLAGE / TASTING WINE: all left over wine.*

*As of today all tasting wine is to go into the kitchen for use by the Chefs. There is a large cost attached to tasting wine & we want to utilise it within the business. If you would like to take some wine occasionally please check with myself or Diana. Thank you, Sheryl*

[9] Sheryl Neilsen and Diana Frenon were supervisors and it was Ms Neilsen to whom Ms Rutherford reported.

[10] Ms Rutherford goes on to say:

*After a few weeks I realised that the sparkling wine was being tipped down the sink and that the only bottle of red in the kitchen was not being used. This led me to ask Sheryl Neilsen if sparkling wine (and red wine if not required) could be taken home by staff as previously allowed. As a consequence, Sheryl went to our Head Chef Becky Wiseman and asked Becky what wines were used for cooking. I went with her. Becky responded that only white wines were used in cooking, not the bubbles or the reds. I then asked Sheryl if, in that case, staff could take these unwanted varieties home as per the memo. Her answer of "yeah sure ... can't see why not" seemed quite logical to me. As we were still in the kitchen, I assumed Becky would have heard this, but she may not have.*

[11] Ms Rutherford goes on to say a couple of days later, and in accord with what she now considered an amended policy, she offered a part bottle of red to Ms Neilsen. Ms Rutherford says Ms Neilsen declined the offer so she openly took the bottle home. She claims Ms Frenon similarly declined the offer of a bottle of bubbles which she proceeded to tip down the cellar door sink which, according to the policy of 3 August 2013 would also be a breach. She states neither Ms Neilsen nor Ms Frenon suggested her actions were inappropriate and these were not the only occasions on which she acted in a similar and observed fashion.

[12] Upon completing work on 15 October Ms Rutherford placed four part consumed bottles of still wine in the kitchen. There was also a part used bottle of sparkling wine which she chose to take home. She was seen by Ms Wilson though nothing was said or done as Ms Wilson was engaged in a telephone conversation.

[13] When Ms Rutherford arrived at work the following morning, 16 October, she was handed an envelope by Ms Wilson. Ms Rutherford was then told to gather her belongings and go home on full pay. The letter advises:

*I request you attend meeting to discuss an alleged incident of removing alcohol from the premises of Rock Ferry Cellar door on the evening of Tuesday 15 October 2013.*

*The allegation, which has been made, if substantiated would amount to serious misconduct in the Rock Ferry Wines Code of Conduct, specifically:*

- *Unauthorized possession, removal or disposal of property belonging to another party (for example, the company, a customer or a fellow employee), including scrap, waste or damaged property.*
- *Undermining the trust and confidence of the employment relationship.*

[14] The letter went on to advise an intended meeting time of 10.30am on 17 October and that due to the seriousness of the allegation Ms Rutherford was requested to stay away from work in the interim. It also advised that depending on the findings disciplinary action up to and including dismissal might result.

[15] Ms Rutherford says she immediately tried to explain but Ms Wilson was unwilling to engage on the issue at the time. Ms Wilson agrees with this evidence.

[16] Ms Rutherford went home and immediately took legal advice. That led to a detailed letter from Mr Leggat to Mr Hutchison urging a stop to this latest process.

[17] Mr Hutchison responded with advice the allegation discussed on the 14th would no longer be pursued and the present investigation meeting would be rescheduled to 21 October.

[18] In the interim Mr Leggat's letter was shown to Ms Neilsen who responded, in writing:

*In response to the letter attached I am not prepared to get involved in an alleged conversation regarding the different varieties of ullage as it is insignificant. As recorded in the staff communication book ALL wine is to be supplied to the kitchen. The crucial issue is that Jan removed the wine from the premises without consent from a supervisor – she is not in a position of authority to decide such things for herself.*

[19] This response was further to a telephone conversation between Ms Neilsen and Ms Wilson on the evening of 15 October. Ms Neilsen is said to have advised she had not given permission for Ms Rutherford to take the wine. Ms Frenon is said to have given a similar answer when asked on the morning of the 16th.

[20] The disciplinary meeting occurred, as scheduled, on 21 October. It was recorded by both parties, though only Ms Rutherford's recording was available at the investigation. The meeting took nine minutes and was portrayed as being *just an investigation meeting* after which there would be an adjournment during which Rock Ferry could make further inquiries.

[21] Mr Hutchison says Ms Rutherford admitted taking wine from the premises. She also said she was aware of the company policy on left-over wine and that staff who wished to remove wine had to obtain permission. He goes on to say

Ms Rutherford said she had *implied permission* due to the conversation she had had with Ms Neilsen and Ms Wiseman.

[22] Ms Wilson's recollection is similar, though she adds she then read Ms Neilsen's statement (19 above) but Ms Rutherford refused to believe its content. Ms Wilson says she therefore adjourned the meeting so as to make further inquiries of both Ms Neilsen and Ms Wiseman.

[23] The adjournment lasted approximately one hour. Ms Wilson says Ms Neilsen again denied giving Ms Rutherford permission to remove the wine. Ms Wiseman both denied knowledge of hearing the alleged conversation and refuted Ms Rutherford's claim permission had been given.

[24] About the reconvened meeting Ms Rutherford says:

*... Tom began the meeting reading out from a prepared script. He said that they found the allegation of unauthorised removal of property 'can be substantiated'. He said 'we believe' that 'serious misconduct has occurred by way of undermining the trust and confidence of the employment relationship'. He said the company policies surrounding serious misconduct were 'very clear' and he had 'no option but to terminate my employment'. He asked me to return any company property and leave the premises.*

[25] As Ms Wilson put it, Ms Rutherford was dismissed as she accepted she removed wine without consent despite an awareness of the company policy on waste and its requirement she obtain permission. She went on to say:

*Jan's attitude was one of entitlement that she had not done anything wrong, which is very concerning as she is in a position of trust being the person to cash up, handle stock, lock up the daily takings in the safe and lock the premises upon leaving.*

[26] Mr Hutchison, who accepts he was the decision maker, says:

*It was clear from the disciplinary meeting that Jan believed she could remove wine from the premises, which was a highly unacceptable response to the concerns raised with her. Effectively Jan, by her explanations and behaviour, lost all credibility and trust with me. In my view she was in a position of responsibility and abused that position.*

[27] Mr Hutchison's comments are reflected in the letter of dismissal which advises, amongst other things, *your actions are considered to be in breach of company policy, leading to loss of trust and confidence in the employment relationship.*

[28] Further correspondence ensued but the dispute could not be resolved.

### **Determination**

[29] As already said Rock Ferry accepts it dismissed Ms Rutherford. In doing so it also accepts it is required to justify the dismissal.

[30] Section 103A of the Employment Relations Act 2000 ('the Act'), states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.*

[31] In applying the test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[32] Traditionally the objective review has been performed by considering the employer's actions from both substantive and procedural perspectives. While it is clear issues of substance and process overlap and there is no firm delineation, separation provides a useful means of analysis, especially as the elements referred to in 31 (b) to (d) have a procedural focus. They also summarise that which has long been accepted. An employer is required to put issues in its mind, allow a response and consider it.

[33] As Ms Wilson put it, Ms Rutherford:

*...was dismissed as she:*

- *accepted she removed the wine on the evening of 15 October 2013,*
- *was aware of company policy on waste*
- *was aware that she needed to obtain permission to remove wine as per the communication book*
- *had not been provided with permission to remove wine from the premises*

[34] The above then led to a loss of trust and confidence which Mr Hutchison emphasised when giving evidence.

[35] For two reasons I conclude Rock Ferry will be unable to justify its decision from a substantive perspective.

[36] Ms Rutherford's consistently said she had permission to take the wine as a result of the discussion with Ms Neilsen in late August. She contends the authorisation was expressed in a way that amounted to a change in policy. The change was subsequently affirmed by a lack of action when she was seen acting ways which would have contravened it had the policy notified on 3 August remained active.

[37] When questioned about what she had asked Ms Neilsen and Ms Frendon both at the time of the incident and during the adjournment, Ms Walker said, more than once, she had only asked whether permission to remove wine had been sought on 15 October. One example elicited an answer of *no, I just queried this one event*. Ms Wilson also accepted she never discussed Ms Rutherford's proposition the change had been confirmed by subsequent behaviour with either Ms Neilsen or Ms Frendon.

[38] In other words the wrong question was asked and the issue of whether or not Ms Rutherford had permission in the manner she suggested was not fully investigated.

[39] Rock Ferry tries to overcome this deficiency by arguing Ms Neilsen's note (paragraph 18 above) addressed the issue. It doesn't. It says Ms Neilsen was not prepared to get involved and does not provide a direct answer. Similarly Rock Ferry says Ms Wiseman refuted the suggestion but it is difficult to see how she could. Both parties now agree she didn't hear the alleged conversation. How can someone say something was not heard when they also claim they did not hear the conversation in question? More importantly, how could Ms Wilson accept the first statement when she also accepts Ms Wiseman did not hear the pertinent conversation? She can't.

[40] In the circumstances I conclude Rock Ferry has insufficient evidence to say permission had not been granted.

[41] Even if that were not the case there is a question as to whether or not removal of wine could justify a dismissal. First, the policy provided for removal, albeit with permission. Secondly, both Mr Hutchison and Ms Wilson said, when answering question about the incidents severity, that had Ms Rutherford accepted wrongdoing and apologised she would still have been employed. As Mr Hutchison put it, Ms Rutherford was challenging the policy and he accepts that view influenced the decision.

[42] The problem with that is he never put that concern to Ms Rutherford. That reflects a failure to adhere to the procedural requirements of s.103A of the Act and ss.103A(3)(b)-(d) in particular (refer paragraphs 31 and 32 above). The failure is repeated in respect of both Ms Rutherford's prime explanation (refer paragraphs 36 to 38) and the issue of trust and confidence.

[43] Both Mr Hutchison and Ms Wilson assert the removal, along with Ms Rutherford's insistence she had permission, destroyed the required level of trust and that was a key consideration in the decision to dismiss. Despite that, and while the letter inviting Ms Rutherford to the meeting mentioned trust, the recording shows it was never raised or discussed during the first meeting. Its first mention came after the decision to dismiss had been made and when it was being conveyed.

[44] Finally I conclude, despite Rock Ferry's contrary protestations, the earlier incidents influenced the decision. I reach this conclusion given various answer from both Mr Hutchison and Ms Wilson. There was, for example, Ms Wilson's reference to *previous experience of Jan* when answering questions about her decision making process while Mr Hutchison admitted the previous issues were in his mind. His claim they were not determinative does not overcome the fact they were in his mind and at least influential. Again, they were not discussed on 21 October and that means another failure to comply with the requirements of s.103A of the Act.

[45] Finally I must, in accordance with s.103A(3)(a) of the Act, consider the resources available to Rock Ferry. I have done so and conclude its size does not excuse the level of deficiency here and especially the failure to properly investigate Ms Rutherford's prime defence. Rock Ferry is large enough to have multiple staff in

supervisory positions and I would expect such an organisation to consider the acquisition of professional advice.

[46] For the above reasons I conclude Rock Ferry has failed to justify its decision to dismiss.

[47] The conclusion the dismissal was unjustified raises the issue of remedies. Ms Rutherford seeks wages lost as a result of the dismissal and \$20,000 as compensation for hurt and humiliation. The later claim is made up of \$5,000 in respect of the events of 16 October with the residue attributable to hurt resulting from the dismissal itself.

[48] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis and Ms Rutherford asks that I exercise this discretion and reimburse her full loss. This totals some \$8,895 (which is the amount lost over the twenty weeks that have passed since the dismissal minus a small amount gained from casual gardening work she would not have otherwise preformed).

[49] I will not exercise the discretion and award the full loss for the following reason. There is a general requirement to mitigate loss (*Allen v Transpacific Group (trading as "Medismart Limited"* [2009] 6 NZELR 530 at [78]). Ms Rutherford accepts she did not attempt to do so prior to Christmas and took this as an opportunity to have an operation which would have made her unfit for work. She also accepts she did not seek work in the wine industry despite her experience there and at least one opportunity to do so. She puts this down to the hurt her dismissal caused and the embarrassment which would have emanated from then having to disclose the fact of dismissal to industry colleagues with whom she was familiar.

[50] For the above reasons I conclude wages are payable from the start of the new year to the date of hearing. That is a period of twelve weeks for which the loss was approximately \$4,825 gross.

[51] Turning to compensation. Ms Rutherford has sought two amounts but her evidence does not distinguish between hurt emanating from occurrence for which she seeks compensation. I shall consider the claim as a single one.

[52] Ms Rutherford supported her claim with evidence of the hurt which emanated from the dismissal, resulting anxiety and loss of sleep. There was also evidence of her reluctance to seek further work in the wine industry and be seen around Blenheim. Her evidence was supported by that of her husband. That said, and while her evidence was not challenged, there was no independent support. Having considered the evidence, I conclude an *average* award of \$5,000 appropriate.

[53] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Rutherford contributed to the situation in which she found herself. Rock Ferry's failure to properly investigate M Rutherford's explanation about having been given permission for her actions means there is no evidence she did and the answer is therefore no.

### **Conclusion and Orders**

[54] For the above reasons I conclude Ms Rutherford has a personal grievance as she was unjustifiably dismissed.

[55] As a result the respondent, Rock Ferry Wines Limited, is ordered to pay the applicant, Ms Jan Rutherford, the following:

- i. \$4,825.00 (four thousand, eight hundred and twenty five dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[56] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority