

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Dean Thomson (Applicant)  
**AND** Blacks Fasteners Limited (Respondent)  
**REPRESENTATIVES** David Beck, Counsel for Applicant  
Tim McGinn, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 13 September 2005  
**DATE OF DETERMINATION** 7 December 2005

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicant (Mr Thomson) alleges that he was unjustifiably dismissed by the respondent Blacks Fasteners Limited (Blacks) and also claims a disadvantage by procedurally unfair suspension.

[2] Blacks deny the allegations and say that Mr Thomson was dismissed for serious misconduct which the statement in reply variously identifies as theft and/or failing to account.

[3] Mr Thomson was an administrative assistant in Blacks Christchurch branch accounts section.

[4] Mr Roger Black gave evidence that he was a director of Blacks and was involved in the day to day operation of the Christchurch branch. He said that he had had concerns about cash discrepancies and after taking advice installed a video camera to record activity at and around the cash register area.

[5] The video camera produced a video cassette tape of the transactions conducted through the cash register over a five day period and that material was analysed by Mr Mike Kyne of Kyne Management Services. Mr Kyne is an experienced private investigator and regularly acts for employers caught up in this kind of situation. Mr Kyne is an ex-sworn Police officer.

[6] Acting on instructions, Mr Kyne reviewed the video tape and produced a log of the video evidence. Mr Thomson features in the video tape. The tape appears to show Mr Thomson removing sums of cash from the cash register in circumstances where no obvious explanation for that activity could be advanced.

[7] Having received this intelligence, Mr Black determined to take the matter further and asked Mr Kyne to take the matter up directly on behalf of Blacks, with Mr Thomson.

[8] Accordingly, Mr Kyne generated a letter dated 22 September 2004 which is in these terms:

*Re – alleged dishonesty – serious misconduct, unauthorised possession of company money/breach of cash management procedures and failing to account for banking.*

*I act as advocate for Blacks Fasteners Limited.*

*Due to discrepancies being noticed in cash receipts an inquiry has been undertaken to attempt to identify the reasons for the discrepancies.*

*My inquiries indicate that you may have been removing money from the till for your own use. I wish to meet with you and seek explanation or reasons for the increasing discrepancies. Because the matter is deemed very serious and in the absence of an acceptable explanation, your job may be in jeopardy, I advise you of your right to have a support person or representative present and I urge you to do so.*

*On being handed this letter and after clarification of any questions you may have, I will discuss a suitable meeting time with you.*

*Because the allegations involve the alleged removal of company cash it is deemed prudent that you are stood down from your duties on full pay to ensure a fair inquiry is completed.*

[9] In Mr Black's presence, Mr Kyne physically presented this letter to Mr Thomson, told Mr Thomson that he and Mr Kyne wanted to meet with him to discuss matters but emphasised Mr Thomson's right to have legal advice.

[10] Mr Thomson elected to obtain legal advice and it was arranged that Mr Thomson's lawyer would ring Mr Kyne to make a time.

[11] Mr Kyne offered Mr Thomson's then counsel Mr Standring the opportunity to view the video tape before the meeting. Mr Standring refused the offer.

[12] The meeting between the parties took place on 24 September and there are two very different versions of what is supposed to have happened. Because of difficulties in the parties engaging with each other directly, it was agreed that Mr Black would not be physically present and Mr Kyne effectively fell into the role of a go-between conveying messages from Mr Thomson and his counsel to Mr Black.

[13] Mr Thomson advanced a number of explanations at different times for what the subject money was used for and these explanations were conveyed by Mr Kyne to Mr Black in the other room.

[14] On the final occasion Mr Standring supervised Mr Kyne's recording of the information that was taken to Mr Black, so the process by which that information was conducted seems to have been robust and fair.

[15] The explanations were not accepted by Mr Black who it seems had already conducted some *open-ended* inquiries with other staff, which discussions were never put to Mr Thomson, and given Mr Thomson's explanations were not considered plausible, Mr Black determined to dismiss Mr Thomson for serious misconduct and that is what then happened.

***Issues***

[16] The principal issue for determination will be whether the procedure adopted by the employer was a fair one in all the circumstances.

[17] However, it is also appropriate for the Authority to consider the underlying substantive justification for the dismissal by considering whether the dismissal was the response of a fair and reasonable employer.

[18] It is convenient to consider the procedural aspects in various sections.

***The suspension***

[19] Mr Thomson says that he was suspended from duty without a proper process. He draws attention to the fact that there is no provision for suspension in his employment agreement and that he was given no opportunity to comment on the need for suspension before that course of action was implemented.

[20] He says that what happened (and this is not contested by the employer) was that he was simply handed a letter by Mr Kyne (the letter of 22 September 2004) and that letter said that he would be suspended, but on full pay.

[21] Mr Thomson is correct that there is in fact no provision in his employment agreement in respect to suspension. He is also correct that he was not given an opportunity to comment on the need for suspension.

[22] However, Blacks no doubt took the view that the allegations against Mr Thomson were so serious that to protect themselves and Mr Thomson they needed to remove him from the workplace.

[23] On balance, an employer's decision to suspend in circumstances where there is an apprehension of theft or misappropriation by an employee is an understandable decision but I will need to consider whether Mr Thomson's complaints about the process should sound in compensation.

***Did Mr Thomson get notice of the allegations?***

[24] Mr Thomson received a letter from his employer's advocate dated 22 September 2004 which set out the nature of the allegations, advised a provisional conclusion, encouraged the pursuit of legal advice and indicated that a meeting was required to discuss the allegations.

[25] Contemporaneously with the delivery of this letter, Mr Thomson was given a log of transactions from the video tape. This document is in the form of a list chronicling the apparently separate incidents on the video tape.

[26] Mr Thomson was also of course advised that there had been video surveillance and a day or two later, Mr Thomson's lawyer was offered a copy of the video tape to review before the disciplinary meeting took place.

[27] Looked at in the round, I am satisfied that this process constitutes adequate and proper notice of the specific allegations of misconduct.

[28] The only aspect that, in my opinion, could have been improved was the failure to offer Mr Thomson a copy of the video tape on 22 September when he was confronted with the allegations. In my opinion, that was the proper time to provide that visual information rather than to hold it back and offer it to his lawyer subsequently.

[29] A potentially more damaging allegation made on behalf of Mr Thomson is that Blacks failed to deal appropriately with information allegedly conveyed to Mr Black by other staff. After Mr Black saw the video, he said in his evidence that he discussed matters with other staff and he asked them open ended questions to assist him in evaluating what he had seen on the video tape.

[30] It is clear evidence that those discussions were only notified to Mr Thomson and no detail of what Mr Thomson's colleagues allegedly said was ever provided.

[31] There is dispute about whether Mr Thomson was told these discussions were reduced to writing but whatever he was told, the factual position is that there were no notes taken of those discussions yet it is clear they happened and it seems highly likely that they assisted Mr Black to form a view about Mr Thomson's guilt or innocence.

[32] Plainly, Mr Thomson was entitled to know about these discussions.

[33] Although I refer to this matter under this head for the sake of completeness, I will deal with it more fully in relation to the issue of pre-determination.

***Was Mr Thomson given a real opportunity to explain himself?***

[34] There was a properly constituted disciplinary meeting which was preceded by discussions between the parties' representatives. There is significant dispute about what happened at the disciplinary meeting but all accounts of the meeting which were given to me in evidence suggest that the meeting was a real shambles. Neither of the principal protagonists emerges from the meeting with any great credit and sadly the inability of the parties to behave themselves continued at the investigation meeting.

[35] It seems that the parties' representatives had very different views about what the disciplinary meeting ought to encompass and it is disappointing that these difficulties were not resolved before the parties themselves engaged because the end result of the disjointed process makes it more difficult to identify culpability.

[36] Mr Kyne for Blacks was clearly of the view that all that the disciplinary meeting ought to involve was an opportunity for Mr Thomson to respond directly to the particular allegations that flowed out of the video tape evidence. Mr Kyne had a series of questions which he wanted responses to on behalf of his client. Plainly then Mr Kyne's view of what was involved was a narrow one.

[37] Mr Standring on the other hand who then acted for Mr Thomson saw the matter in wider terms. In particular Mr Standring wanted to introduce into the debate matters pertaining to an earlier allegation against Mr Thomson which was in somewhat similar terms but which had been withdrawn apparently on the recommendation of the lawyer then acting for Blacks.

[38] Mr Standring also wanted to introduce material relating to the wider context in which Mr Thomson had worked and in particular Mr Thomson's apparent anxiety over a reasonably lengthy period of time that the systems in the business were not robust and that therefore all staff were vulnerable to the kind of allegation which he now faced.

[39] In his evidence, Mr Thomson referred to a letter he had written to Blacks sometime prior to the events complained of in which he set out his anxiety about the financial systems in the firm. Mr Thomson also claimed in his evidence that the company's accountant was similarly anxious about the systems failure in the firm but no evidence was offered by that individual.

[40] This very basic difference between the representatives was, as I mentioned above, not resolved in advance and so when the disciplinary meeting started there was the inevitable clash between these two competing views of how the allegation needed to be responded to.

[41] In the result, it is fair to say that the meeting ultimately took the direction which Mr Kyne sought, namely the narrow view of dealing only with the allegations emanating from the video surveillance and nothing more. Mr Thomson and his counsel were effectively prevented and discouraged from going further and I need to decide whether that prejudiced Mr Thomson's rights.

[42] It is necessary to sketch briefly the rather extraordinary nature of this disciplinary meeting. Once it started, it was clear that there was a difference between the representatives as the breath of the subject matter that should be canvassed and the meeting immediately became quite intemperate.

[43] Mr Black, the employer's representative was removed from the meeting and placed in a separate room adjoining the meeting room. There is dispute about why this happened but I do not consider that germane to the matters I need to determine. The meeting proper then continued in a more or less intemperate fashion with Mr Kyne effectively running messages between the main room and the room where Mr Black was sitting alone.

[44] There is no agreement between the parties as to how long the meeting took but it clearly was an inordinately long meeting presumably because of the difficulty the parties had in engaging with each other in any sort of sensible fashion.

[45] The upshot of this whole process was that Mr Thomson eventually responded to his employer's allegations by way of writing which Mr Kyne took down under Mr Standing's supervision. Mr Kyne then took that writing to Mr Black who after reflecting on the explanation decided to dismiss.

[46] In essence the video tape shows Mr Thomson removing money from the till. Blacks say that a total of \$1,405.70 was taken from the cash register over the five day period covered by the tape and its associated log. The argument is essentially around what happened to that money.

[47] Blacks evidence was Mr Thomson was not authorised to remove money from the till except in one very specified circumstance. Mr Black's evidence was as follows:

*The tapes highlighted a number of apparently irregular till transactions by Dean [Mr Thomson]. I was suspicious at the outset over the transactions as the only authorised purpose Dean had for access to the till was to check that there was sufficient change in the till, and on the occasions there was not enough change and he was to remove a small amount of cash and change that at the bank when he did the other banking. Dean was not authorised to remove any other cash from the till.*

[48] That evidence is at variance from Mr Thomson's evidence. Mr Thomson said:

*The video was no surprise to me as it was showing me undertaking my normal duties as Mr Black was fully aware as he was often present during these actions.*

[49] Mr Standing said in his evidence that when his client saw the video ...*he said that is what he did and that was his job.*

[50] Critically, Mr Standring said that neither Mr Black nor Mr Kyne made it clear at the disciplinary meeting that Blacks position was that Mr Thomson was not authorised to take money from the till. Mr Standring went on to observe that the disciplinary meeting might well have taken an entirely different course if he and his client had known that that was the mindset that the employer was reviewing the evidence from.

[51] Mr Standring emphasised in his evidence on a number of occasions that the client regarded the activity at the till which was now being the subject of disciplinary action as being *role appropriate*.

[52] Further, Mr Standring thought that this incident was just another example of Blacks incompetent process and it would end in the same way as the early incident had, namely with a finding that Mr Thomson had no case to answer.

[53] It seems to me that even if the system at Blacks was somehow fundamentally unsatisfactory, if there is a demonstrable removal of monies from the till (and prima facie the video tape evidences that) then Blacks are entitled to an explanation from Mr Thomson which is reasonable and credible.

[54] It must be Mr Thomson's obligation to satisfy his employer that the purposes for which he was using his employer's asset (its cash resources) were appropriate and within the employer's contemplation.

[55] Even if the system is unsatisfactory (as Mr Thomson alleges), that still cannot constitute a justification for taking money from the till for improper purposes.

[56] It is in that context then that the explanation that Mr Thomson gave to Blacks must be considered. It is not necessary for me to recite each and every one of those explanations. It suffices for me to record that Mr Thomson advanced a number of different explanations for what the money was removed for but after reflecting on those explanations, Mr Black as a director of the employer and an operational manager as well was not minded to accept them as credible.

[57] At the investigation meeting, Mr Thomson initially gave evidence that the amount he removed from the till on the five day period the video was operating (around \$1,400) was the amount that was going out of the till every week but subsequently he resiled from that and said that in fact that amount of money was larger than he would have taken from the till in an ordinary week.

[58] He changed his evidence on this point when it was pointed out to him that Mr Black's evidence was that he had spoken to the other staff after seeing the video tape to establish if anything out of the ordinary had happened during the week in question. The other staffs' response, according to Mr Black's evidence was that nothing out of the ordinary had happened.

[59] Mr Thomson, in endeavouring to deal with that point said that *the other staff would have referred to an ordinary week* whereas the week that he had been filmed was apparently now out of the ordinary.

[60] The issue of just what Mr Thomson was authorised to do with the till is as Mr Standring rightly observed in his evidence, of some significance.

[61] The employer said that Mr Thomson was only authorised to access the till for the purposes of organising change. Mr Thomson accepted in answer to a question from me that organising change was not an explanation for the alleged discrepancies because all that he would have been doing was removing large denomination notes and replacing them with smaller denomination notes, if he was doing the job properly.

[62] However what is important is that Mr Thomson denied that that was the only reason he was authorised to access the till. He said Mr Black would be well aware of that and that Mr Black was physically present from time to time when he (Mr Thomson) was accessing the till for other purposes.

[63] Mr Black denies that evidence and as I have already mentioned, is firmly of the view that change was the only reason that Mr Thomson was to access the till. Indeed, Mr Black emphasises the point by observing in his evidence that another staff member was responsible for the day to day management of the till not Mr Thomson.

[64] In all the circumstances, I am satisfied that Mr Thomson had a fair opportunity to explain himself at the disciplinary meeting. In my opinion, any deficit that existed in respect to the appalling confusion that seems to surround that meeting is at least partly Mr Thomson's fault and he cannot be seen to benefit from his own wrongdoing.

[65] Taken in its totality, I am satisfied that the disciplinary meeting gave Mr Thomson a fair and genuine opportunity to advance his position and that he did in fact advance his position notwithstanding the difficulties of the way in which the meeting was run.

***Was there an unbiased consideration of Mr Thomson's explanation?***

[66] The first issue that I need to deal with here is one that I have referred to already, namely the evidence that Mr Black spoke to a number of staff before the disciplinary meeting, in effect to try to exclude innocent explanations for the apparent wrong doing that was evident from viewing the tape. As I mentioned above, although Mr Thomson was told that those interviews had taken place, he was never provided with any detail of what those colleagues actually said and the evidence from the respondent employer suggests some shilly-shallying over this issue.

[67] I accept the evidence that the impression was given that some of the staff that Mr Black spoke to gave written statements. I accept that that impression was gained because it is very clear that Mr Thomson asked for those statements through his counsel and was then told some months later, again via his counsel, that the statements did not exist and that all that happened was in the nature of oral interviews.

[68] Whatever the nature of the interviews, the question is whether Mr Thomson is prejudiced by not having the substance of what these colleagues said to Mr Black, put to him. Undoubtedly this evidence from Mr Thomson's colleagues influenced Mr Black. He said so himself. That being the case, should not Mr Thomson have had the opportunity to respond appropriately to what these people said?

[69] I think the answer to that question is yes, although I do accept that what Mr Black was about was conducting what amounted to a preliminary investigation to see if there was an innocent explanation for what he had seen on the tapes. That fact of itself does not excuse the default in not disclosing the information.

[70] Mr Thomson should have been told what his workmates had said about the week in which it transpired that he was under investigation. It is relevant to the way in which Mr Thomson would have dealt with his defence of the allegation and it is clearly highly material because it influenced Mr Black.

[71] In my opinion then Blacks have failed in this respect to run a fair process in that they have not disclosed to Mr Thomson what his co-workers said in response to questions from Mr Black.

[72] It may be that Mr Black did not do this early interviewing very elegantly and that he asked leading questions and did not take notes but nonetheless I think that those early inquiries are relevant and they ought to have been disclosed to Mr Thomson.

[73] I am satisfied that the length of the disciplinary meeting was at least in part a function of Mr Kyne's numerous attempts to get Mr Thomson to focus on accurate and credible responses to the allegations he faced and in the end, as I say, I am not satisfied that it would be fair and equitable to sheet home to the employer the blame for a dysfunctional disciplinary meeting when it seems to me on the evidence that much of that responsibility lies with Mr Thomson.

[74] I am also not persuaded that the absence of Mr Black from the room that the disciplinary meeting was held created any deficit in terms of a fair and reasonable consideration of the matters which Mr Thomson put to Mr Black in his statement.

[75] However, it seems to me the position is otherwise in respect of the question of penalty. Given that Mr Black was not physically in the room, in effect what seems to have happened is that Mr Black indicated, after reflecting on Mr Thomson's statement, that there was a finding of serious misconduct and contemporaneously with that, said that the appropriate response to that finding was summary dismissal.

[76] Clearly this process fails to give Mr Thomson the opportunity to be heard on penalty although, given the seriousness of the allegation that has by that process been found against him, any response other than a dismissal would seem highly unlikely.

### ***Substantive Justification***

[77] The question the Authority must determine is whether the dismissal was justifiable on an objective basis after considering if the employer's actions in the dismissal were fair and reasonable.

[78] It is clear law that the Authority is not to replace the employer's judgment with a judgment of its own. The matter is to be looked at in the round and in a practical and commonsense sort of way.

[79] It seems to me that it is difficult to avoid the general conclusion that misconduct found to involve theft of the employer's money will in principle be a *reasonable and sufficient* ground for dismissal: *Wellington Road Transport IUOW v Fletcher Construction Co. Ltd (1983) ACJ653*.

[80] The next question is whether in the particular circumstance of the instant case, there is a valid reason for dismissal.

[81] To put it in other words, no one could reasonably contend that an employee who steals his employer's money ought not as a general principle to be dismissed for that behaviour. The only question really is whether Blacks have done enough to satisfy themselves that Mr Thomson did in fact take its money.

[82] Both Mr Black and Mr Thomson seem to accept that money was missing but their explanation for why that should be the case is different. Mr Thomson regularly advanced concerns about the robustness of Blacks accounting system.

[83] Mr Black on the other hand preferred a simpler explanation that in respect to the week in question where there was video tape evidence, Mr Thomson appeared to have been taking money from the till and could not provide a reasonable explanation for that.

[84] I consider Blacks are entitled to reach the conclusion that Mr Thomson is guilty of serious misconduct by reason of his inability to explain to Black's satisfaction what became of the money that he is seen taking from the till in the video tape. In the end, the absence of a proper explanation is in my judgment sufficient justification for a finding of serious misconduct and, given the serious nature of the allegation found proved, is justification of a summary dismissal.

[85] While it in no way affects that decision, being in effect ex post facto rationalisation, the evidence given before me in the investigation meeting of Mr David Crichton (no relation) an expert forensic accountant tended to support the conclusion which the employer had made, notwithstanding that that intelligence was not available to the employer at the time the dismissal was effected.

[86] In effect Mr David Crichton's evidence was that the most likely explanation for the missing money was dishonesty and that incompetence was not an explanation. Mr David Crichton also identified Mr Thomson as the most likely perpetrator of the major items of loss.

### *Procedural Irregularities*

[87] There are three respects in which the procedure which Blacks followed needs to be considered. The first is in relation to Black's handling of Mr Thomson's suspension, the second is their failure to disclose to Mr Thomson details of what his colleagues said when interviewed by Mr Black and the third is Black's failure to hear Mr Thomson in respect to penalty having reached the conclusion that he was guilty of serious misconduct.

[88] As to the suspension, it is clear that there has been a breach of Mr Thomson's rights. The question is whether it is simply a technical breach or one of substance. As I have already remarked, it is an understandable reaction of an employer faced with a possible theft situation to suspend the suspected employee to enable an investigation to be conducted, that act not only protecting the employer but also potentially protecting the accused employee.

[89] It is difficult to see how matters could have taken a different course if Mr Thomson had not been suspended. The allegations against him were of a most serious kind and presumably an investigation could have been conducted even if he remained at the workplace.

[90] I also note that, despite the matter being raised on Mr Thomson's behalf, there is scant evidence of any hurt, humiliation and injury to feelings associated with the suspension.

[91] On balance, I am inclined to the view that the breach of Mr Thomson's rights is no more than a technical breach and in the absence of any significant evidence of hurt, humiliation and injury to feelings I find there is neither justification for a finding of an unjustified action to Mr Thomson's disadvantage nor sufficient evidence of hurt to support an award of compensation were a personal grievance found.

[92] The second procedural deficit is the question relating to Black's failure to advise Mr Thomson of the details given to Mr Black by Mr Thomson's colleagues.

[93] As I mention, it is clear that Mr Black was influenced by what he was told by Mr Thomson's colleagues and equally clear that Mr Thomson was never told what his colleagues had to say about the issues in contention.

[94] However, on balance I am satisfied that the overall effect of this deficit was not such as to invalidate the process which led to a finding of serious misconduct and then to a justified dismissal.

[95] The final issue I wish to comment on is Black's failure to give Mr Thomson the opportunity to comment on the penalty that should be imposed after a finding of summary dismissal was made. I found as a fact that Blacks effectively made the finding of serious misconduct almost contemporaneously with their decision to summarily dismiss Mr Thomson and that fails to give Mr Thomson the opportunity to comment on the appropriateness of any particular penalty.

[96] However, I am not persuaded that any comment that Mr Thomson might have made to his employer would have changed their view. Given the finding of serious misconduct, it is difficult to conceive what other penalty could reasonably be imposed in response to the circumstances that Blacks had found proved.

[97] Accordingly, I am satisfied that this breach is technical in nature and not substantial enough to destabilize the employer's process.

### ***Determination***

[99] Mr Thomson's claim fails in its entirety, the Authority having reached the conclusion that Mr Thomson does not have a personal grievance in relation to the manner of his dismissal or in relation to his earlier suspension.

### ***Costs***

[100] Costs are reserved.

James Crichton  
Member of Employment Relations Authority