

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 141
3007552**

BETWEEN LUBELIA WILKINSON
Applicant
AND THE FARMERS' TRADING
COMPANY LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: David Jaques, Counsel for Applicant
Matthew McGoldrick, Counsel for Respondent
Investigation Meeting: 9 May 2017 at Auckland
Determination: 10 May 2017

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Ms Lubelia Wilkinson, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Ms Wilkinson claims that she was unjustifiably dismissed by the Respondent, The Farmers' Trading Company Limited (Farmers), on 7 April 2017.

[3] Interim reinstatement and the substantive claims are all resisted by Farmers.

[4] As required by s 127 of the Act, a signed undertaking has been given by Ms Wilkinson to abide by any order that the Authority may make in respect of damages in determining her employment relationship problem.

Brief Background Facts

[5] Ms Wilkinson was employed by Farmers, a department store, on 13 March 2006. At the time of her dismissal Ms Wilkinson who was a Cosmetician worked as Counter Manager of the Clarins cosmetics counter at the Farmers Manukau store.

[6] Ms Wilkinson was a member of FIRST union and employed pursuant to the Farmers and FIRST Union Collective Agreement – Stores, which sets out at Appendix 1 the Farmers Work Rules and Disciplinary Procedures. These set out that the following behaviours are deemed to be serious misconduct and may result in summary dismissal:

1. Property

Unauthorised possession, unauthorised removal or unauthorised wilful movement of Company property or the property of other persons. This includes scraps/waste/damaged items etc regardless of value. ...

2. Money and Valuables Handling

Failure to follow money handling procedures – including receiving monies/cheques/vouchers etc giving change/refunds/unauthorised discounts.

3. Care and Responsibility

Failure to carry out normal safety procedures, acts of negligence or irresponsible behaviour which affect the quality of Company property and/or safety of personnel. Wilful damage to company or another employee's property or acts of negligence which directly affect the quality of company or another employee's property.

4. Honesty and Integrity

Deliberate falsification of Company records /documents (including timekeeping), or the giving of false information at an interview or wilfully making false declarations.

5. ...

6. Point of Sales Procedures

Failure to follow the point of sale procedures including rules for cash register operation.

[7] Under behaviour deemed to be misconduct resulting in disciplinary action included at point 7:

7. Carrying out instructions

Employees must carry out instructions given by a person authorised to give such instructions ...

[8] A number of other Farmers policies addressed matters dealing with point of sales procedures, namely:

- Staff Discount Policy, which Ms Wilkinson signed on 1 June 2009;
- Returns Policy;
- Gifts with Purchases; and
- Manukau Store procedures, which Ms Wilkinson had signed.

Incident on 26 January 2017

[9] Ms Evette Miller, Store Manager, stated in her untested affidavit evidence that she was made aware on 27 January 2017 by Mr Rajesh Jattan, at that time Loss Prevention Manager, that another employee Ms Naseem Talib, had concerns about a transaction that had occurred the previous day, 26 January 2017.

[10] Ms Miller told Mr Jattan that he should obtain a statement from Ms Talib which he did. The information provided was that Ms Wilkinson had left the Clarins cosmetics counter and gone downstairs to another department to serve her daughter, Ms Cassandra Fernandes-Bogdanovic, who is employed at the Farmers store in Papakura.

[11] Ms Wilkinson had used her daughter's Farmers staff discount card for a purchase which she received. Included in the information was that Ms Wilkinson might have placed un-scanned items into the bag.

[12] Ms Miller stated in her untested affidavit evidence that she was concerned that Ms Wilkinson may have failed to comply with Farmer's policies and procedures. She asked Mr Jattan to look at the CCTV footage and make a copy of anything relevant to the purchases.

[13] Following advice from Mr Hayden Crosby, Regional Loss Prevention Manager, and Mr Barend Pretorius, HR Manager Operations, Mr Pretorius drafted a letter inviting Ms Wilkinson to a disciplinary meeting. However before the letter had been finalised due to Mr Pretorius and Mr Crosby being on leave, there was a second incident involving Ms Wilkinson which gave rise to concern.

Incident on 19 February 2017

[14] Ms Miller stated in her untested affidavit evidence that it had been brought to her attention by members of the store security team that Ms Wilkinson appeared from the CCTV footage to have processed a transaction for Ms Jovelin Lines, another employee and a close personal friend of Ms Wilkinson.

[15] Ms Miller examined the transaction record and she saw that a return which was associated with a Gift for Purchase (GWP) had been processed, but it did not appear that the GWP had been returned; although the transaction record recorded it had been returned.

[16] As a result, the draft letter to Ms Wilkinson was updated and issued to Ms Wilkinson on 23 February 2017. It invited Ms Wilkinson to a meeting on 27 February 2017 to discuss the allegations against her which were stated as:

- (a) *That you moved Company property without authorisation.*
- (b) *That on two occasions you failed to process transactions completely through the register.*
- (c) *That you have knowingly served a family member.*
- (d) *That on two occasions you have caused the Company to suffer a financial loss.*
- (e) *Failed to carry out instructions given to you by a manager.*

...

There are two instances we wish to discuss with you. One relates to serving your daughter and placing items in the shopping bag that were not scanned through the Point of Sale, and the second you appear to have returned an article and Gift with Purchase however you did not recover the Gift with Purchase with the return although the docket says the Gift with Purchase was returned.

[17] The letter described the two instances in detail, invited Ms Wilkinson to have representation, and advised that disciplinary action up to and including dismissal might be the outcome.

Disciplinary Meeting 6 March 2017

[18] Prior to the disciplinary meeting on 6 March 2017, Ms Sarah Thompson, Organiser FIRST union, who was then representing Ms Wilkinson had been provided with all of the transaction records, the CCTV material viewed in store prior to the meeting, and the policy documentation.

[19] Ms Miller was accompanied at the disciplinary meeting by Ms Jo McMahon, Regional HR Manager, and Ms Wilkinson attended with Ms Thompson. During the meeting Ms Miller stated in her untested affidavit evidence that Ms Wilkinson:

- admitted that she had served her daughter;
- had taken the body care items comprising a tube of body lotion which she had not scanned and placed in a bag of dirty towels which were taken home;
- accepted that the items she had purchased did not entitle her to a GWP; and
- she had not previously served her daughter.

[20] In relation to the transaction on 19 February 2017 Ms Wilkinson stated it had been an error in judgment and apologised.

[21] Ms Thompson requested that Farmers put its preliminary decision in writing.

[22] Following the meeting Farmers investigated Ms Wilkinson's statement that she had not previously served her daughter and found that she had done so on 30 December 2016. The disciplinary meeting letter was redrafted to include this concern and as Mr Jaques advised he was now representing Ms Wilkinson, all documentation and the CCTV footage was copied to him.

Disciplinary Meeting 13 March 2017

[23] At a second disciplinary meeting on 13 March 2017 Ms Wilkinson had been accompanied by Mr Jaques who had succeeded Ms Thompson as her representative. Ms Miller stated in her untested affidavit evidence that she had been confused about the explanation being given by Ms Wilkinson and the meeting closed with Mr Jaques confirming Ms Wilkinson's response would be put into writing, and requesting that statements were obtained from the employee who authorised the transaction on 19 February and one of the security team.

[24] Ms Miller stated in her untested affidavit evidence that further investigation was undertaken by Farmers following the second disciplinary meeting.

[25] A written statement was provided by Farmers by Ms Wilkinson in which she:

- Stated she did not recall having served her daughter on 30 December 2016;
- Admitted she should not have served family or close friends;

- Had forgotten her wallet on 26 January 2017 but should not have had her daughter pay for the purchase and apologised;
- Said she regretted what she had said at the first meeting and (i) if she had taken anything it might have been body care products to try them; (ii) in relation to 19 February 2017 incident: she had written down that Ms Lines returned product when she had not, but that was acceptable as Ms Lines would return it later; and (iii) she had a choice what gift to give a customer and to use her discretion.

[26] Ms Miller stated in her untested affidavit evidence that she was concerned Ms Wilkinson had contradicted in her statement what she had said regarding the body care products at the first disciplinary meeting. Moreover she had not told the person processing the return by Ms Lines about the GWP, but had processed it as if the GWP had been returned when it had not.

[27] Ms Miller wrote to Mr Jaques on 17 March 2017 providing the additional statements he had requested, and responded to Ms Wilkinson's additional information, setting out her concerns and asking for additional information. Mr Jaques responded on 21 March 2017 and recommending that Framers issue Ms Wilkinson with a warning.

[28] On 23 March 2017 Ms Miller confirmed Farmers preliminary decision to dismiss Ms Wilkinson on the basis that the allegations had been upheld, namely that she:

- (a) Moved Company property without authorisation.*
- (b) On two occasions you failed to process transactions completely through the register.*
- (c) Knowingly served a family member.*
- (d) On two occasions caused the Company to suffer a financial loss.*
- (e) Failed to carry out instructions given by a manager.*

[29] Following further correspondence with Mr Jaques, Ms Miller reached a view that her final decision was to terminate Ms Wilkinson's employment without notice. Ms Miller stated in her untested affidavit evidence that the actions Ms Wilkinson had admitted to, and statements she had made and changed, concerned her, in particular that Ms Wilkinson:

- Had taken items away from the cosmetics area, gone downstairs and processed the sale for a family member when not allowed to serve family or friends;

- Had said she had never served her daughter before when it had been immediately discovered she had done so a month prior;
- In relation to the incident involving Ms Lines, she had recorded something as happening when it had not done so; and
- It had not been possible to get a clear explanation in return to the taking of the GWP items as these had not been scanned.

[30] Ms Miller stated that she considered the issues were misleading and affected her trust and confidence in Ms Wilkinson. Each of the issues were very serious and amounted to serious misconduct.

[31] Ms Miller wrote to Mr Jaques on 7 April 2017 confirming Ms Wilkinson's dismissal without notice.

The Law

[32] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions "*having regard to the object of this Act*" pursuant to s. 127 (4) of the Act.

[33] In respect of the object of the Act, the Authority is to have regard to the principle that productive employment relationships are founded on good faith behaviour and on mutual trust and confidence. Reinstatement may be provided by the Authority if it is reasonable and practicable to do so pursuant to s 125(2) of the Act.

[34] In a decision of the Employment Court, *McKean v Ports of Auckland Limited*¹, the Court clarified the relevant principles at para [4]:

In determining an application for interim reinstatement the court must have regard to:

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s 103A of the Act;*
- *Whether the plaintiff has an arguable case for interim reinstatement in employment under s125 of the Act if he is found to have been dismissed unjustifiably;*

¹ [2011] NZEmpC 128

- *Where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *The overall justice of the case.*

[35] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as is usual in such applications in affidavit form by Ms Wilkinson and by witnesses on her behalf and that of Farmers.

[36] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined on their evidence.

An Arguable Case for unjustifiable dismissal and for interim reinstatement

[37] As a matter of principle, Ms Wilkinson must not only establish an arguable case for her unjustifiable dismissal, but must also establish that if she is successful in such a claim she will be reinstated in addition to, or instead of, being compensated monetarily, such as to support an application for interim reinstatement.

[38] This principle was articulated by the Employment Court in *Cliff v Air New Zealand Ltd*²:

So whilst plaintiffs must establish an arguable case of personal grievance (unjustified dismissal), they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievance.

[39] The threshold for an arguable case is relatively low being described in *X v Y Ltd and the NZ Stock Exchange*³ as: “*a case with some serious or arguable, but not necessarily certain, prospects of success*”.

[40] Ms Wilkinson submits she has an arguable case that she was unjustifiably dismissed and that the untested affidavit evidence surpasses the threshold of a *prima facie* case.

[41] Ms Wilkinson's dismissal was stated in the letter dated 7 April 2017 to be in respect of serious misconduct and misconduct as a result of which Farmers did not consider: “*that it can have in her the necessary trust and confidence to maintain her employment*”.

² CA6A/05, per Judge Colgan at para [12]

³ [1992] 1 ERNZ 863, 872-3

[42] The decision to dismiss Ms Wilkinson on the basis of serious misconduct must be a justifiable decision in accordance with the Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) which states:

S103A Test of Justification

- 1) *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- 2) *The test is 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 or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the court must consider –*
 - (a) *Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and..*
 - (d) *Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee;*
- (4)
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-*
 - (a) *Minor; and*
 - (b) *Did not result in the employee being treated unfairly.*

[43] Ms Wilkinson had been employed by Farmers for 11 years at the date of her dismissal. She was in a position of responsibility and aware of Farmers policies and procedures.

[44] Ms Miller stated in her untested affidavit evidence that Farmers policies and procedures concerning product transactions are designed to protect and keep track of stock, and failure to follow procedures will lead to inaccurate stock records and potentially to financial loss.

[45] At the first disciplinary meeting Ms Wilkinson admitted she had served herself and her daughter in breach of company policy and that she had processed a transaction recording the return of a GWP which had not been returned.

[46] These were breaches of Farmers policies and procedures which were considered to be serious misconduct and which had the potential to result in summary dismissal.

[47] During the investigation process undertaken by Farmers, which included further investigatory steps following the meetings with Ms Wilkinson, there was concern by Ms Miller that Ms Wilkinson's explanations underwent change and contradiction. Together with Ms Wilkinson's acceptance that she had breached procedures, this gave rise to Farmers considering that it did not have the requisite degree of trust and confidence in her.

[48] Serious misconduct is conduct that: *deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*"⁴

[49] Having found serious misconduct and following investigation, a fair and reasonable employer in considering what action to take, may do so in accordance with s 103A of the Act, that is he or she may take action that is within a range of reasonable responses. This action may include dismissal.

[50] A fair and reasonable employer in reaching a decision regarding outcome will take into consideration other factors, in this case Ms Wilkinson submits that she had 11 years of previously unblemished service, was under stress at the time the incidents occurred, and there is disparity of treatment. These factors might result in a finding of unjustifiable dismissal when her claims are considered at a substantive hearing.

[51] However Ms Wilkinson must not only establish an arguable case for unjustifiable dismissal, but must also establish that she would be reinstated if successful in such a claim.

⁴ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA) at [487]

[52] Section 125 (2) of the Act states the Authority may provide for reinstatement if it is practicable and reasonable to do so.

[53] Practicability involves considering whether a successful employment relationship can be successfully re-established.

[54] Ms Miller states in her untested affidavit evidence that she has lost trust and confidence in Ms Wilkinson. I accept that a loss of trust and confidence by the employer can present a strong barrier to reinstatement.

[55] Ms Wilkinson submits that she works as part of a team and that there is no opposition to her being reappointed by members of that team such as a successful working relationship can be re-established.

[56] Ms Wilkinson has also provided an undertaking that she will not: *“buy anything herself, or serve anyone who is not an arm’s length customer”*

[57] In relation to this undertaking Ms Miller states in her untested affidavit evidence that Farmers procedure dictates that Ms Wilkinson should not process any sale for herself or any of her family. Consequently this undertaking to adhere to already established procedures in fact serves to undermine confidence on the part of Farmers that Ms Wilkinson understands the need to follow procedures.

[58] It is also submitted that even if Ms Wilkinson were successful in her unjustifiable dismissal claim, there was contributory behaviour on her part based on her acknowledgment that there was fault in her behaviour, and that she breached the procedures which required that she not serve herself or her family; and recorded that Ms Lines had returned a GWP when in fact she had not.

[59] Given the mandatory requirement that the Authority consider an Applicant’s contributory behaviour, Farmers submits that Ms Wilkinson’s behaviour militates against permanent reinstatement.

[60] I find that there is a possibility that contributory behaviour may be found on the part of Ms Wilkinson, resulting in a more than theoretical risk that she may establish a personal grievance but fail to obtain reinstatement.

Balance of convenience

[61] It is relevant to this principle that reinstatement is no longer the primary remedy under the Act, but may be awarded if it is reasonable and practicable to do so.

[62] As set out in the Employment Court case *X v Y Limited*⁵ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to Farmers which will have to bear the burden of an order reinstating Ms Wilkinson until the substantive case is heard, against the inconvenience to Ms Wilkinson who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[63] Ms Wilkinson submits that her position at Farmers has not been filled at this time. Practicability includes an assessment of whether or not workplace relationships can be restored.

[64] As already stated, Farmers' position is that it has lost trust and confidence in Ms Wilkinson such as to irrevocably damage the possibility of a working relationship.

[65] Ms Wilkinson submits that there would be no opposition from colleagues to her re-appointment. She has offered an undertaking not to process purchases for herself or family members, and submits that Farmers could monitor her via the store CCTV cameras.

[66] I accept the submission by Farmers that monitoring Ms Wilkinson during her daily duties would impose a burden on it in terms of reallocating another employee from his or her duties to monitor Ms Wilkinson. Moreover this would not address the issue of trust and confidence concerns.

[67] An Investigation Meeting on the substantive matter is scheduled for 14 and 15 August 2017. Although Ms Wilkinson has submitted that the termination of her employment has involved financial difficulties, there is no evidence before me to substantiate this assertion.

[68] There is no suggestion that Farmers as a significant New Zealand retail organisation could not meet any compensation for lost remuneration should Ms Wilkinson eventually succeed. Awards of compensation could substantially or wholly restore Ms Wilkinson to her pre-dismissal position.

[69] Having considered all the circumstances and the submissions put forward by the parties, balancing the potential prejudice to Ms Wilkinson of not reinstating her, against the potential prejudice to Farmers of so doing, and particularly in light of the relatively short time until the substantive investigation meeting, I find that the balance of convenience favours not reinstating Ms Wilkinson.

⁵[1992] 1 ERNZ 863, at pg 10

[70] Taken as a whole, I find that the balance of convenience favours Farmers.

Overall Justice

[71] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:⁶

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience'

[72] I observe that I have found a possibility that contributory behaviour may be found on the part of Ms Wilkinson, resulting in a more than theoretical risk that she may establish a personal grievance but fail to obtain reinstatement.

[73] I observe that at a substantive level there is a possibility that contributory behaviour may be found on the part of Ms Wilkinson as a result of the incidents on 26 January and 19 February 2017.

[74] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in declining Ms Wilkinson's application for interim reinstatement.

Determination

[75] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by not making the order sought.

Next Steps

[76] A case management conference will be held shortly in connection with the scheduling of the investigation meeting into Ms Wilkinson's substantive claims.

Costs

[77] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority

⁶ *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47]