

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 15/08
5071661

BETWEEN KERRY CHARLES
 WILLIAMS
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Chris Lennon, Advocate for Applicant
 Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 20 October 2007

Submissions received: 23 October 2007 from Applicant
 19 November 2007 from Respondent

Determination: 22 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Kerry Williams, says that he was unjustifiably dismissed by the respondent, The Warehouse Limited, from his position as night fill team leader on 27 October 2006.

Relationship Issues

[2] Mr Williams was employed in late 2005. In December 2005, about two months into his employment, his manager, Mr Rodney Jurgens, had to speak to him about professionalism following complaints by other staff members about Mr Williams' relationship with another employee, Ms Sally French. A similar discussion also took place in February 2006 as a result of a performance review. The

matter was again raised with him following his unsuccessful application for the store manager development programme.

[3] The 22 August 2006 memo specifically raised with Mr Williams the likelihood that a further instance of such behaviour could be dealt with as part of the disciplinary process.

Staff Suspension Issues

[4] In late September, some staff members, including Ms French, were the subject of a disciplinary investigation following certain point of sale irregularities. The investigation and the subsequent disciplinary processes with the four staff members concerned required a significant contribution by Mr Jurgens of his management time.

[5] On 27 September 2006, he had scheduled meetings with each of the four staff members at which it was intended that the allegations would be put to them and issues regarding suspension would be addressed. 27 September was also the day of a managers' meeting. As both Mr Jurgens and his assistant store manager, Mr Paul Young, would be concentrating on those issues, Mr Jurgens delegated responsibility for that meeting to Mr Edwin Prasad, the senior team leader.

[6] He briefed Mr Prasad regarding what was happening with the four employees, two of whom who had, by the time of the managers' meeting, been suspended. It was likely the other two would also be suspended when their meetings took place in the afternoon and the managers needed to be aware of that possibility so they could make operational arrangements on a contingency basis.

[7] Mr Jurgens stressed the need for the confidentiality of that information and Mr Prasad emphasised the need for confidentiality five or six times during the meeting. Mr Jurgens checked with Mr Prasad afterwards that he had stressed the importance of confidentiality. Mr Williams denied that Mr Prasad had made any mention of confidentiality.

[8] After the managers' meeting, Mr Williams met Ms French and disclosed to her that she had been suspended. At that time, Ms French had not had her meeting with the store's management at which the subject was to be broached. Ms French then approached Mr Jurgens and disclosed that she had been told of her suspension.

Mr Williams' Disciplinary Matters

[9] On 10 October, Mr Williams was invited to a disciplinary meeting regarding the allegation of breach of confidentiality and two allegations relating to his possible association with the point of sale irregularities under investigation with the other employees.

[10] The disciplinary meeting took place on 13 October. During the course of the meeting, Mr Williams acknowledged that he had told Ms French she had been suspended, that he was aware that what happened at managers' meetings was confidential and that he should not have said anything. Further investigation was required on other issues and the meeting was accordingly adjourned to enable that to happen.

[11] There were difficulties in establishing a date on which to meet caused by Mr Williams applicant not responding to communications. The disciplinary meeting resumed on 27 October. At that time, one of the point of sale allegations was withdrawn. Mr Williams was asked whether he had any further information he wished to provide. He produced a letter from Ms French. Mr Jurgens adjourned to read and consider the letter. The letter stated that Mr Williams had not told her about the suspension and that she had come to that conclusion herself.

[12] Mr Jurgens considered that was inconsistent, both with the applicant's own admission at the previous meeting and also with the letter sent by Ms French on 29 September. Mr Jurgens concluded that Mr Williams should be dismissed and notified him accordingly. During the adjournment he retrieved a template dismissal letter from the company's system and provided it to Mr Williams.

Evidential Conflicts

[13] There are certain areas where there is a conflict of evidence between Mr Williams and the respondent. Where such a conflict exists, I prefer the evidence of the respondent's witnesses. I accept, therefore, that Mr Prasad did mention at the management meeting that the information was to be kept confidential. I also accept that Mr Prasad announced at that meeting that two employees had been suspended and two other employees were possibly to be suspended. I do not agree with Mr

Williams' evidence that Mr Prasad said all the employees had already been suspended.

[14] Mr Williams alleged that the dismissal letter was sitting on the desk during the second disciplinary interview. I find that this was not so. I asked the respondent to supply me with a copy of the dismissal letter template. It did so. The letter that was given to Mr Williams conforms with that template.

[15] In his written evidence, Mr Williams said that during the meeting of 27 October he once again denied the allegation that he had disclosed private information to anybody before Mr Young and Mr Jurgens had had the opportunity to talk to people. This conflicts with what is in the notes of that second meeting, notes which Mr Williams accepted at the investigation meeting were accurate. He had admitted it during the meeting of 13 October.

[16] The meeting of 13 October was adjourned to enable Mr Jurgens to consider the situation and to investigate further, in particular in relation to the allegation relating to the unauthorised point of sale transactions.

[17] Mr Jurgens telephoned Mr Williams on 17 October 2007 and left a message requesting a follow up meeting with him the next day. Mr Williams returned his phone call and advised he would not be able to attend that meeting because he was going to visit his lawyer. Mr Williams said he would let Mr Jurgens know when he could meet and set up a meeting with his lawyer.

[18] Mr Jurgens had not heard from Mr Williams by 25 October so he wrote to him and asked him to attend the further disciplinary meeting on 27 October. The letter was couriered to Mr Williams. Mr Williams has claimed that he did not receive the letter until 30 October. Mr Williams, however, telephoned Mr Jurgens on 26 October and agreed to attend the follow up meeting on 27 October as set out in the letter of 25 October. I do not therefore accept that Mr Williams did not receive the letter until 30 October because I accept the veracity of Mr Jurgens' evidence.

[19] At the investigation meeting, Mr Williams said he first applied for the job with Air New Zealand a month or so after his dismissal. Mr Williams was asked to provide, from Air New Zealand's records, the date on which he applied for the role. He undertook to do so but a week after the hearing emailed his representative saying he was unable to get a copy of his job application and provided instead a copy of his

interview date, 7 November, which appears in fact to have been a general assessment. On 5 November he forwarded his letter of appointment but that was also not what had been previously requested. I subsequently obtained the information from Air New Zealand within 36 hours of requesting it. The information confirmed that the applicant had applied for the job on 26 November, the day before his dismissal.

[20] Mr Williams is clearly at liberty to apply for other employment whenever he chooses to do so. The issue for this case is that he was not truthful in the information he provided to the Authority.

[21] In other circumstances, I may have believed Mr Williams when he said that what he took from the meeting was that all four staff had already been suspended. However, given the fact that Mr Williams was less than honest in the evidence that he gave, I find it difficult to accept that explanation.

[22] Mr Williams said he was confused when he saw Ms French sitting at her desk after the meeting as he believed that she had been suspended. He was surprised therefore that she was still at work. Mr Williams disclosed information which he himself admitted that even without being told it was confidential, he knew to be confidential. He accepted that it was information that he should not have disclosed.

[23] On a one-off scenario, it may have been possible for the respondent to view this transgression as an unfortunate error of judgement. There is, however, the history of Mr Williams' relationship with Ms French, the fact that he had been told there were difficulties with it on a number of occasions and had been cautioned that he might be the subject of disciplinary proceeding.

[24] An employer is entitled to expect that an employee will keep information such as the suspension and/or potential suspension of other employees confidential. Mr Williams was given notice of the allegations against him. He was given the opportunity to respond to those allegations. The employer was entitled to dismiss Mr Williams. Mr Williams does not have a personal grievance.

Costs

[25] The matter of costs was reserved. If the parties are unable to resolve the matter, the respondent should file a memorandum regarding the matter of costs within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority