

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 3/07
WRC 40/05**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN PERO TAMARUA
Plaintiff

AND TOLL NZ CONSOLIDATED LIMITED
Defendant

Hearing: 28 and 29 November 2006
(Heard at Napier)

Appearances: D McLeod, Advocate for the Plaintiff
J G H Hannan, Counsel for the Defendant

Judgment: 19 February 2007

JUDGMENT OF JUDGE C M SHAW

[1] Mr Tamarua was dismissed in December 2004 for serious misconduct having taken eight jars of jam from his workplace. His personal grievance alleging unjustified dismissal was determined by the Employment Relations Authority in November 2005.

The Authority determination

[2] Having heard the facts about the alleged theft of company product, and the investigation and dismissal which followed, the Authority's view was that Mr Tamarua gave every impression of sincerely believing that the product he took was destined for the rubbish bin and that there was nothing wrong with this. The Authority found that he knew of the policy against taking customer product and that he had breached it. In spite of it being a single incident of dishonest behaviour and

taking into account his 18 years' experience with the company, it found that the dismissal was justified.

[3] Mr Tamarua has challenged that decision as well as the award of \$1,500 costs made against him by the Authority. He abandoned his claim for reinstatement during the Authority investigation. In his statement of claim he now seeks only lost wages but made no formal request for compensation.

The facts

[4] Mr Tamarua was employed first by New Zealand Rail and then Toll NZ Consolidated Ltd (Toll) for 18 years. For the last 8 years he was a forklift operator at Hastings. His record of employment for that entire time was unblemished.

[5] Toll TranzLink is a subsidiary of Toll and has branches throughout New Zealand one of which is Toll TranzLink Hastings. In 2004 it was handling dry freight and refrigerated freight. Heinz Watties Ltd (Watties) is one of the most important customers of the Hastings branch. Toll transports Watties products to its customers and delivers any return products, including those that are damaged, back to Watties. A service level agreement with Watties documents this process. Watties is stringent about not allowing damaged stock into circulation.

[6] About 98 to 99 percent of damaged product is returned to Watties and only rarely is it so badly damaged that it is dumped by Toll. Usually good product is sorted out to be returned and only unsalvageable product is put into the rubbish. Pallets of goods for return (returns) are shrink-wrapped, documented, and sent back to Watties daily.

[7] The Hastings site includes a very large canopied area for loading and unloading trucks. This is flanked by an enclosed office and administration area and a shed. Beside this is an open area for bins. Returns are kept in a specific closed area of the shed near the office.

[8] In March 2004 Mr Allan, then the branch manager at Hastings, warned staff about the consequences of taking property from the yard without his approval. This

was in response to the disappearance of some refrigerated product destined for return to Watties.

[9] He posted a notice about this in the office and smoko rooms and a staff meeting was held on 16 March 2004 to advise staff verbally. Although it was held between shifts, Mr Tamarua wasn't present at the meeting but heard about it from those who were.

[10] More returns went missing and Mr Allan posted a second set of notices on 20 May 2004 telling staff that if he located the offender they would no longer have employment with Toll. The notice also warned that if staff could not be trusted he would investigate ways to monitor the operation to identify the offender.

[11] In September 2004 security cameras were installed. On 15 December 2004 film from these revealed some staff loading goods into a car. A full site investigation process was commenced and a private investigation firm was engaged to interview all members employed on the site including Mr Tamarua. At that stage he was not specifically suspected of theft.

[12] He was interviewed by Paul Rooney, one of the private investigators, on 20 December 2004. Mr Rooney, who is a former police officer, first took a statement from Mr Tamarua in which he acknowledged that the reason for the interview was unauthorised removal of freight, that he was represented by a union official, Mr Carrington, that he did not have to answer questions, and that if the allegations were established the possible penalties included dismissal, written warning, warning suspension, or no further action.

[13] Mr Rooney then took a formal written statement from Mr Tamarua. This read:

Pero Ama Tamarua states:

That is my name. I live at ...

I am a freight handler for Tranzlink/Toll Hastings. I have worked for Railways/Toll for 18 years.

I am speaking to Paul Rooney about the unauthorised removal of freight from work.

The only freight I have taken from work is 8 jars of jam. That was about a month ago. They were returns.

They were on a pallet down by the office. I put them in a plastic bag and put them in my car.

I have never taken any other freight since I have worked for Railways/Toll.

I took the jam to eat. It was just sitting there on the pallet. It sat there for about 3 days before I took it.

I have never been given freight by any of the workers here.

I knew the beer was missing. Mark talked to us all about it after it happened but I don't know who took it.

I haven't taken any of the Watties returns tins of food and I haven't eaten any of them at work.

This was read to me by Blue Carrington. It is a true account.

Signed

[14] Mr Rooney told the Court that during the interview he did not clarify that there was a distinction between returns which are goods that had come from other Toll branches or returns which were to be sent back to Watties. He understood that Mr Tamarua had taken the jam jars from the returns area. Mr Tamarua did not mention that the jars were from another area destined for the rubbish.

[15] Mr Tamarua's statement was sent to Toll's HR department. He was called in and suspended. He was given an opportunity at that stage to explain his situation but did not and was then called to a disciplinary meeting on 22 December 2004. In a letter about this he was advised that the purpose of the meeting was to discuss three areas of concern: misappropriation of company property, breach of company rules, and loss of trust and confidence.

[16] The meeting was convened by Bronwyn Young, Toll's rail manager who had previously worked as area manager at the Hastings site. Mr Allan was also present. Toll's HR advisor, Ms Caunter, and Toll's security advisor attended by phone link. Ms Caunter took some notes which were not complete and recorded only what she

regarded as important. Mr Tamarua attended the meeting in the company of another union official.

[17] Ms Young told the Court that when she saw Mr Tamarua's statement taken by Mr Rooney she had made up her mind that he had misappropriated property but the meeting was called to find out if what Mr Rooney had established was correct and if so to decide on the company's response. She opened the meeting by explaining the allegations to Mr Tamarua and asked if he understood that it was a serious issue which could lead to his dismissal. She then read out his statement to him.

[18] Mr Tamarua agreed to everything in the statement and confirmed he had taken eight jars of jam. He was asked why he took them but did not answer. He agreed that misappropriation is serious misconduct. When asked if he had anything else to say he said it was wrong of him. He was asked why he did not ask someone before taking the jam but did not answer this and did not take up an invitation to add anything else.

[19] The meeting was adjourned. Ms Young took 5 minutes to confer with her colleagues and then told Mr Tamarua that he was dismissed. She accepted that he had taken customer property knowing it was wrong.

[20] In his evidence to the Court, Mr Tamarua said that when he told Mr Rooney that he referred to the jam he took as returns he meant the returns going from other branches back to Watties. He did not tell him that he took the jam from the rubbish area at the end of the shed. When he told Mr Rooney that he hadn't taken any of the Watties returns tins of food, he meant that he hadn't taken things from the returns and what he had taken was damaged returns going into the rubbish bin.

[21] He also said he told Ms Young that he had taken the jam from the rubbish returns that were on a separate pallet from the good returns.

[22] He explained the reason he told the meeting he knew it was wrong was because he thought that if he admitted it he would be sent back to work. He just

wanted to apologise to them that he was wrong even though in his heart he did not think he had done wrong. He said that to his knowledge what he took home was not a customer product because he knew it was not going back to the customer or to Watties but to the rubbish bin instead. He knew the difference between good stock, returns stock, and rubbish because of his experience at Toll. He knew he was not allowed to take stock returns or damaged stock home or eat it but thought that rubbish was different. If it was going to be thrown away then it was okay to take it home. He said he was never told otherwise and didn't think he was doing anything wrong.

[23] In his evidence to the Court Mr Tamarua explained that he had sorted the jars out of a mess of broken glass and jam and took them from an area outside the covered shed near the bins although they were not actually in the rubbish bins. He said they were so messy that they were not good enough to send back to the customers and he had asked his team leader whether these goods should be dumped. He didn't try to hide what he was doing or the jars. He took them home. His wife cleaned them, kept some, and gave some away.

[24] He told the Court their team leader working with them was the one who authorised him to throw the rubbish out and keep the good ones. He said he had asked his team leader if it was alright to take the jars. He did not believe he removed customer goods because it was not going back to the customer but would be discarded. The jars were in a pile of bad product covered in broken glass that had been sorted from good product which would be returned. The bad product would not be sent back to the customer because they wouldn't accept it. It had happened before.

[25] Unfortunately, apart from telling Ms Young that he had taken the jars from the damaged returns, he did not explain any of the above at any stage of the investigation. When he was asked by his union representative why he did not ask anyone before taking the jam, he did not answer.

[26] Mr Allan's evidence was that there was no policy that rubbish could not be removed from the site. He was looking to the meeting with Ms Young to get some

positive feedback for why the thefts were happening. He was facing losing 90 percent of his staff the week before Christmas and was open to any information that could help him understand the circumstances behind that situation but none was forthcoming. He said that if he had heard that the jam had come out of the rubbish bin he might have thought differently but the information that he had was that it had been taken off a returns pallet from near the office.

[27] As a result of the investigation, seven out of eight permanent staff from Mr Allan's team were dismissed on that same day.

The decision to dismiss

[28] Ms Young said that she was aware of Mr Tamarua's length of service and his unblemished service record but in spite of this could not condone staff taking customer goods. This was a fundamental trust issue for Toll. Mr Tamarua had taken Watties goods without authorisation and he had not given any reason to the meeting why he should not be dismissed. On the same day other staff with similar lengths of service had been dismissed as well.

[29] Ms Young did not discuss any options other than dismissal because based on the information she had from Mr Tamarua there was no outcome possible other than dismissal. If he had been told by a manager that he could take the jam there would have been a different outcome but she was not told that.

Discussion

[30] To determine if a dismissal is justified, the Court must assess on an objective basis whether the dismissal was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred – s103A Employment Relations Act 2000.

[31] As noted in my judgment on the plaintiff's application to challenge the Employment Relations Authority determination out of time¹, this test is subtly different from the test applied by the Authority member in the determination which

¹ *Tamarua v Toll TranzLink Ltd*, unreported, 11 July 2006, WC 11/06

is under challenge and which was made before the first judgment on s103A had been delivered by the Court.

[32] In essence, the difference is that s103A requires the Authority or the Court to consider objectively what the employer did and measure those circumstances against what a fair and reasonable employer would have done rather than to ask whether the employer's actions were open to it as a fair and reasonable employer.² The starting point is the circumstances at the time of the dismissal.

[33] The circumstances in this case which confronted Toll management were that Mr Tamarua had admitted taking eight jars of jam from returns and accepted that that was wrong. Apart from possibly telling Ms Young that he had got them from damaged returns, he offered no other explanation. He did not tell her that he had checked with his team leader first; he did not explain the jars were in a pile of messy and broken product which made their return impossible or unlikely; and he did not mention that they were destined for the rubbish.

[34] I have no doubt from the explanation he gave in Court that his actions were genuine and credible. Like the Authority I accept that he honestly believed that he was entitled to take the intact but messy stock from the pile of broken product.

[35] It is also possible, based on the evidence of Mr Allan and Ms Young, that if he had given this explanation a different outcome may have eventuated. However, that is only speculation. He did not give any other explanation that they could rely on.

[36] While Mr Tamarua's English is not entirely fluent, I am satisfied that he was articulate enough to have given his explanation in English to the investigation and the disciplinary meeting. He was able to do this in Court although from his demeanour it is very likely that his failure to defend his position to Mr Rooney and at the meeting was because of his natural modesty and reticence. There was no evidence that the meeting was conducted in a way that deliberately or even accidentally stifled his ability to explain. Ms Young gave Mr Tamarua several

² *Air New Zealand Ltd v Hudson, Unreported, Shaw J, 30 May 2006, ACRG 30/06*

opportunities to explain or add to the information for them to consider. He did not respond. It certainly seems that Mr Tamarua was let down by his union representative who had not extracted his explanation before the meeting and appeared to have done little to encourage him to articulate his position during it.

[37] In those circumstances, whatever the truth as it has subsequently been revealed, the employer cannot be criticised for treating this as an unequivocal and inexcusable theft of customer product based on what they knew at the time the decision was made. From the evidence they had it was serious misconduct. His summary dismissal was a justified consequence of that. It was consistent with the treatment of the other employees in similar circumstances.

[38] Faced with the information it had, Toll acted in a way which a fair and reasonable employer would have acted. It had no material or evidence to justify a different course of action.

[39] This case concerns a single admitted but comparatively minor act of theft which resulted in a dismissal which in fact and law was justified. The reason for the justification is that the employer acted properly on the basis of what it knew at the time after a fair investigation. There is a reasonable possibility that, had Toll known the explanation subsequently given, it would have reached a different conclusion. That does not however enable the Court, having heard that explanation, to substitute its judgment for that of the employer. The Court is also limited to assessing the circumstances as they were known to the employer at the time of the dismissal. For these reasons the outcome of the Authority's determination was correct and Mr Tamarua's challenge is dismissed.

[40] The outcome for Mr Tamarua has been disastrous. He has been unable to obtain any work since and is now on a sickness benefit. However, the responsibility for this cannot lie with his previous employer who was justified in dismissing him because they had no explanation to persuade them otherwise.

[41] I have considered the challenge to the award of costs in the Authority. This is a case where the circumstances of the parties is an important factor. The

defendant is a large, well resourced company. It is quite evident that Mr Tamarua would be unable to meet any award of costs without considerable hardship. He is now financially supported by a sickness benefit but this barely pays enough to get by on. His wife and granddaughter live with him and his wife is also on a sickness benefit. In those circumstances, and because he is on legal aid, the challenge to the award of costs in the Authority is allowed. Costs on this challenge will lie where they fall for the same reasons.

C M Shaw
JUDGE

Judgment signed at 12.30pm on 19 February 2007