

# Theft of Trust and Confidence

A recent determination of the Employment Relations Authority, **Tania Mercer-Black v. Zaibatsu 2006 Limited** [2012] NZERA Christchurch 25, has emphasised the importance of the requirement of trust and confidence in an employment relationship. This case involved a claim by Ms Mercer-Black that she had been unjustifiably dismissed by Zaibatsu 2006 Limited (Zaibatsu). Zaibatsu argued in the first instance that it had never employed her but had allowed Ms Mercer-Black to operate her own hairdressing business from its salon. Alternatively Zaibatsu argued that if it was established that Ms Mercer-Black was an employee then the termination of her employment was justified on the basis that she had stolen money from the company and “totally destroyed the element of trust crucial to the maintenance of the relationship.”

The employee essentially accepted the charges of theft however maintained that the dismissal was unjustified “as the process leading to termination was so grossly deficient that termination may not have resulted. In particular she relies on the fact that she was summonsed to a meeting without warning of its purpose; that the discussion she had with her employer was heated and abusive and, most particularly, she was not given a fair opportunity to explain. Ms Mercer-Black is of the view that she had a valid explanation for her actions which may have satisfied Mrs Smith and prevented the termination.”

By way of background the evidence before the Authority was as follows:

1. Ms Mercer-Black was a personal friend of Mrs Smith (owner of Zaibatsu).
2. Ms Mercer-Black was paid a percentage of her sales as the basis of remuneration which was “subject to PAYE; her tax code was that of an employee (M); she was entitled to holiday pay and sick leave and was required to work set hours to meet Zaibatsu’s needs.”
3. Zaibatsu experienced difficulties balancing the till and experienced “regular unexplained cash shortfalls”; this problem becoming more significant in the period leading up to a trip to Hair Expo in June 2008, which all of the staff, including Ms Mercer-Black, attended. Cash also went missing from Mrs Smith’s wallet in her handbag. Mrs Smith estimated the amount that went missing “could have been in the order of \$12,000.00”.
4. Mrs Smith arranged for a security company to install a covert camera in the office at Zaibatsu in early July 2008. On Ms Mercer-Black’s first working day after the installation of the camera the video footage disclosed her taking money from Mrs Smith’s handbag and wallet and from the cash drawer and then putting that money in her own bag and also “hiding it about her person”. Mrs Smith stated that she was “absolutely distraught at the thought that someone whom I liked and trusted had been behaving in this way.”

5. At approximately 6.15 pm on the evening that Mrs Smith viewed the video footage, she asked Ms Mercer-Black to stay behind at the end of her day and then asked the employee to attend a meeting with Mrs Smith and her husband.

6. Ms Mercer-Black complained “that she was not told what the meeting was to be about, its possible consequences or given an opportunity to get support . . .”.

7. Ms Mercer-Black alleged the following occurred at this meeting:

*“Jaimee and Ryan began talking about our personal relationship and accusing me of theft and stating that I had been doing this for some time.*

*I denied this and stated this occurred today only and tried to explain but was not given an opportunity to.*

*I asked Jaimee to continue to view the tape to show my further actions but she said she didn’t believe a word I said and would not watch any more until later in the evening*

*Jaimee told me she had spoken to the Police and asked for the return of my salon keys and that I was dismissed.*

*I again tried to explain my actions but was not given a chance with Jaimee and Ryan talking over me.*

*I complied with their request and handed my keys to her.”*

8. Ms Mercer-Black gave evidence before the Authority that the explanation she wanted to give to Mr and Mrs Smith was that she believed Mrs Smith was withholding monies that “were rightfully owing to her” in relation to an earlier work related trip to Sydney to attend the Hair Expo. The employee gave evidence that:

*“ ... knowing my Visa bill was coming due, I needed to make at least the interest payment, I in an error judgment, entered Jaimee’s office on the day in question and removed \$60 from her bag and drawer.*

*I felt extremely guilty about this and I worked out that I only needed \$40 for my initial interest payment so I later returned and replaced \$20 with this amount ...*

*I am extremely remorseful for this event and wish I had never made this decision.”*



9. There was some dispute between the parties as to what occurred during the course of the meeting. Ms Smith accepted that at the conclusion of the meeting she advised the employee the relationship was over:

*"I think it was probably pretty clear to both of us that there was a complete breakdown in trust between us which would make it difficult for us to continue our arrangement."*

### **Employee or Contractor?**

In reaching a decision that Ms Mercer-Black was an employee instead of an independent contractor, the Authority relied upon the following factors:

*"Whilst I accept that Ms Mercer-Black's hours were not as onerous as others engaged at the salon, I conclude that the indicia referred to by Mr Sim are overwhelmed by those that suggest the relationship was that of employer and employee. In particular I refer to:*

- a. *The fact the relationship was governed by a individual employment agreement (emphasis is mine);*
- b. *The agreement bestowed benefits that simply would not be available to a contractor such as public holidays and annual leave;*
- c. *The agreement is extremely complete and contains various terms and obligations that simply would not apply to a contractor or self employed person;*
- d. *The tax arrangements applied by Zaibatsu to Ms Mercer-Black's remuneration were those of an employee and there is no evidence that she engaged in any of the tax or accounting practices expected of a person conducting their own business; and*
- e. *There is no evidence that Ms Mercer-Black was charged chair rental or similar fees that would be expected had she been using Zaibatsu's premises for the conduct of her own business; "*

### **Was Ms Mercer-Black dismissed during the course of the meeting?**

As indicated above Ms Mercer-Black alleged she was dismissed during the course of the meeting however Ms Smith denies that occurred, *"She says that the discussion remained incomplete with the termination being affected by Ms Mercer-Black's decision not to return."*

In this regard Ms Smith was adamant that she did not tell Ms Mercer-Black she was dismissed, however she accepted that when she asked for the keys, she also told Ms Mercer-Black to take her belongings.

The Authority in concluding that Ms Mercer-Black had been dismissed noted:

*"A dismissal is a sending away. A comment such as get your gear and go, when combined with a request for the keys which have permitted an ability to access the workplace enjoyed since commencement can, in my view, be interpreted as a sending away. They amount, in my view, to an act of dismissal and I consider that Ms Mercer-Black can, given the circumstances and facts, rightfully conclude she was dismissed that evening."*

### **Was the dismissal justified?**

In this case the Authority was faced with a situation where Ms Mercer-Black did not deny she stole from her employer but instead relied upon a range of "procedural improprieties" that in her view rendered the dismissal unjustified, including the fact that she was not given the opportunity to provide an explanation.

In considering whether the dismissal was justified the Authority noted:

*"The law, as it applied at the time, accepts there could be actions so grievously destructive of the employment relationship that irrespective of procedural deficiencies an employer's knowledge of them destroyed the trust required for the maintenance of a viable relationship. There are, albeit rare, examples where an employer can act without inquiry . . .*

*This is not, however, a matter where the process is so bereft of fairness that I consider it to render the dismissal unjustified. Here the employee was aware of her obligations, but chose to ignore them. Indeed she did so more than once, admitting that she repeated her act of theft three times on the one day. Her admission came, according to Ms Mercer-Black's own evidence, before she was advised of her dismissal. In such circumstances I consider the employer had enough knowledge — they had put the concern and despite initial denial (which perhaps aggravated matters further) obtained an admission.*

*I consider that most employers would, in such circumstances, dismiss and justifiably so as the admitted conduct is, I conclude, totally destructive of the trust that is an essential element in an ongoing employment arrangement, especially given the fact this agreement was initially founded on personal friendship."*

The Authority went further to say that even if the conclusion that the dismissal was justified was wrong that *"I do not believe the outcome would alter."* on the following basis:

*"Explanation aside, and even if I concluded that the dismissal was unjustified on some procedural ground, section 124 of the Act requires that I then consider whether or not the "successful" employee contributed to the situation in which she found herself and reduce any award accordingly.*

*I can not get past the fact that theft is theft. By engaging in that activity Ms Mercer-Black contributed absolutely to the situation in which she found herself. When the dismissal occurred, the employer had an admission and an acceptance that the behaviour was totally unacceptable. In such circumstances I would consider a finding of 100% contribution appropriate."*

### **CONCLUSION:**

Clearly the employee's conduct in this case completely damaged the requisite trust and confidence necessary for an ongoing employment relationship and consequently resulted in a determination that the dismissal was justified despite what appeared to be a lack of due process followed by the employer. However we would strongly advise that even in circumstances where you are faced with what appears to be a "clear cut" situation which would justify a dismissal that "due process" is followed; had this occurred in the current case it is unlikely the case would have even come before the Authority in a personal grievance setting (a costly process to defend) and any potential exposure for the employer would have been minimal.