

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 30/08  
ARC 7/08**

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

BETWEEN                      ANGELINA CRAIG  
   Plaintiff

AND                              CARTER HOLT HARVEY LIMITED  
   Defendant

Hearing:      28 and 29 July 2008 (Rotorua)  
   22 August 2008 (Auckland)

Appearances: Helen White, Counsel for Plaintiff  
   David France, Counsel for Defendant

Judgment:      3 September 2008

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**JUDGMENT OF CHIEF JUDGE GL COLGAN**

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[1]      The issues for decision are whether Carter Holt Harvey Limited (“CHH”) dismissed justifiably Angelina Craig and, if so, the remedies to which she may be entitled.

[2]      The Employment Relations Authority found comprehensively that Ms Craig’s dismissal was justified and rejected her personal grievance. Ms Craig has challenged that determination and has elected a hearing de novo, that is a re-examination by this Court of all the issues that were before the Authority. As is almost inevitable in proceedings of this sort, I have heard a somewhat different case than was before the Authority. For example, Ms Craig has elected, as is her right, to call a witness in support of her case from whom the Authority declined to hear during its investigation. With the benefit of hindsight and a determination, the parties’ cases now have different points of emphasis.

[3] It is common ground that Ms Craig was dismissed and CHH now bears the onus of justifying that dismissal. The statutory test for doing so is set out in s103A of the Employment Relations Act 2000 (“the Act”). I must be satisfied, on an objective basis, whether dismissal was justified by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

### **Relevant facts**

[4] Ms Craig was a long serving CHH employee and, at the relevant time, was a receptionist/administrator. One of Ms Craig’s duties was to be responsible administratively for mobile phones used by CHH staff at its Tasman Mill at Kawerau. These duties included ordering new and replacement mobile phones and associated services, maintaining records of mobile phones and associated equipment and services, arranging for repairs or replacements of mobile phones, and generally ensuring that the numerous CHH staff, who needed mobile phones, had the appropriate equipment on the appropriate plans at all times. In addition to ensuring these requirements, Ms Craig was also tasked with the responsibility of maintaining a pool of temporary replacement mobile phones and associated equipment to be assigned to staff when their usual mobile phone facilities were not available.

[5] This case involves the mobile phone assigned to one CHH manager, Larry Bryers. Mr Bryers preferred the Kyocera brand of mobile phone and had a handset of this make connected to a Telecom mobile phone number. When it came time for Mr Bryers to be provided with an updated handset, a Nokia model was obtained for him. After only about a fortnight’s use of the Nokia mobile phone, Mr Bryers was dissatisfied with its performance for several reasons. So although the Nokia model was newer, Mr Bryers returned the handset to Ms Craig and reverted to another Kyocera phone. When he last used the Nokia handset before returning it to Ms Craig, it was in good working order.

[6] Ms Craig initially consigned the Nokia handset to the pool of temporary replacement mobile phones. Later the same day, she was asked by another member

of staff for a replacement and sought out the Nokia as a relatively new model for temporary allocation to that person. As was her practice, Ms Craig checked that the Nokia handset was working by dialling out and ensuring that she was able to receive the standard Telecom voice message transmitted to disconnected phones. It was then that she discovered that the hearing piece of the phone had developed a fault. Although its loud speaker broadcast function continued to operate, calls could not be listened to privately through the ear piece.

[7] It is not known when or how this defect manifested itself between Mr Bryers' surrender of the Nokia phone, when it was operating normally, and Ms Craig's discovery of the fault that caused the phone to be compromised in its operational use. In any event, it is not material to the case how and when this defect occurred. I accept both that the phone was operating normally when returned by Mr Bryers and abnormally when Ms Craig checked it before temporary allocation to another staff member very shortly afterwards.

[8] In these circumstances Ms Craig did not reconnect and re-allocate the Nokia handset. She considered, whether correctly or erroneously is unclear, both that the Nokia handset was out of warranty and that it would cost CHH money to both assess and have the handset repaired. Ms Craig had a personal mobile phone although an older model than the Nokia handset at issue. Her mobile phone use, at least at work, was principally by texting and there was no fault with this facility on the Nokia phone. Ms Craig did not care particularly whether the relatively few voice calls that she made or received at work might be overheard by others.

[9] Believing that the Nokia handset was the property of Leading Edge Communications NZ Ltd ("LEC") and that it could only be repaired at some cost to CHH, Ms Craig decided to investigate whether she might have the Nokia handset for her personal use.

[10] Ms Craig telephoned LEC and spoke with one of its representatives, Shalom Liki. Ms Craig explained the circumstances of the Nokia handset and inquired whether she might have her own personal mobile number assigned to that handset.

Ms Liki made inquiries with her supervisor or manager and later agreed that the transfer could take place.

[11] Ms Craig assumed that property in the phone remained with LEC because it had no contract ascribed to it, or at least that property in the handset did not lie with CHH. Leading Edge was Telecom's agent and appears to have been very closely associated to Telecom, if not a subsidiary of it.

[12] Ms Liki then arranged to assign Ms Craig's personal mobile number to the Nokia handset. If any documentation evidencing this transaction was generated, either within LEC or Telecom, it was not put before me. Ms Craig thereafter used the Nokia handset as her personal mobile telephone for about 3 months until CHH's investigations disclosed its whereabouts. It is common ground, also, that Ms Craig neither sought CHH's consent to do this nor advised her relevant managers that she had done so.

[13] Several months later and in the temporary absence of Ms Craig, her supervisor attempted to provide a replacement phone from the pool to another CHH staff member. The manager looked for, but could not locate, the Nokia handset and the spreadsheet records kept about these things did not indicate its allocation within CHH. Inquiries of Telecom confirmed the assignment to the handset of Ms Craig's personal mobile phone number and an investigation into misuse of company property was begun.

[14] So far as Ms Craig was concerned, the first notification to her of CHH's concern was a letter delivered late on a Friday afternoon setting out the nature of the company's concern, advice of the possible consequences of the investigation including dismissal, a recommendation that she take advice and be represented, and inviting her to a meeting on the following Monday morning to discuss the matter.

[15] Ms Craig was able to obtain advice and representation over the course of the weekend and attended as requested by the company on the following Monday morning with two union advocates to support her.

[16] A relatively comprehensive but not verbatim transcript of what was said at the company's investigation meetings attended by Ms Craig provides the most accurate summary of what was said by whom.

[17] At the first meeting which commenced at 11 am on Monday 23 July, the following persons were present and took part in discussions. For the company, its human resources manager Jennifer Oakley led the discussion, and its manager of reception, Amanda Hacche, was present as note taker. With Ms Craig were two union representatives, John Mahanga and Massa Geor. Ms Oakley outlined the purpose of the meeting and the company's allegation that Ms Craig had breached Tasman Mill Rule 2.5(e) dealing with "*Wilful damage or abuse of Company property or unauthorised possession or receiving of property obtained from the Mill Site*". Ms Craig was asked for her explanation.

[18] She told her employer's representatives that Mr Bryers had returned his mobile phone because his fingers were too big for the buttons and he could not get good coverage at his home. Ms Craig said that the returned phone went to "*Reception*". She said that the telephone's "microphone" was faulty so she did not think it would matter if she used it. She said it was broken and would not be used by others. Ms Craig explained that she called LEC and asked to have her personal number transferred to the handset. She said this change was approved by LEC and actioned.

[19] When asked by Ms Oakley whether Ms Craig had got authorisation from anyone to take the phone for her personal use, Ms Craig responded that LEC had authorised its use as it was broken and could not be used. When asked what was the normal procedure to deal with a faulty phone Ms Craig responded that if returned to reception it would be placed in a drawer and then go back for recycling. She confirmed that this would have been procedure for the Nokia phone in question, despite it being only a few weeks old, because it was faulty. When asked whether she had sought permission from CHH management if she could have the phone, Ms Craig responded:

*No I was not aware that it belongs to CHH. I didn't ask anyone I thought it was a free phone so it wouldn't matter.*

[20] When asked whether she knew that the mobile phone was part of a 24-month contract deal Ms Craig responded:

*I didn't know that the phone belonged to CHH as when I contacted Leading Edge they transferred my phone number and they approved my use of the phone.*

[21] Ms Oakley then advised Ms Craig that she would need to clarify a number of points with Mr Bryers and LEC and told her that she would be suspended on pay for a number of reasons including that they did not wish her to “*tamper with information*” at the reception area. Ms Oakley said that the parties would meet again at 4 pm that day.

[22] The company's notes record that after this adjournment at 11.20 am, Mr Bryers was contacted. He confirmed Ms Craig's account of the reasons for his return of the Nokia phone and said that it was not faulty when he returned it. He said he had handed it back to the company's reception asking that it be used as a “*loan phone*” for his shift managers.

[23] CHH's investigators then spoke to a temporary receptionist, Carol Dyer, asking about her understanding of the process with faulty phones. Ms Dyer is reported to have said that this was Ms Craig's responsibility but that she understood that they would be sent for servicing. The company's investigators referred to the reception training manual which included a provision for faulty phones being returned for service and for the transfer of the number to a loan phone.

[24] The investigators noticed that this process was recorded in paper work and that many of the records had been processed by Ms Craig. They copied two of these “*for proof of [Ms Craig] knowing the process*” and, in particular, that the phone was relatively new and should have been under warranty as these records had been instigated and signed by Ms Craig. The investigators also identified that the manual contained the process for the transfer of a company cell phone to personal use which directed the reader of it to a link on the company's shared computer drive which, in turn, set out a process requiring approval by a CHH manager. A copy of this was also taken by the investigators.

[25] Inquiries of LEC included whether it would authorise the use of a handset for personal use. This response was given by Ben McRae of LEC in writing by e-mail to Ms Hacche and was to the effect that Mr McRae did not believe that LEC's staff would have authorised the use of a handset for personal use or assisted with transfer of Ms Craig's personal phone number to the handset.

[26] Another receptionist who had recently left CHH (Lynsey Archipow) was contacted to confirm her understanding of the process for faulty phones as was another ex-receptionist, Jackie Harris. Both are recorded to have referred to the process in the training manual for the return of phones because they were under warranty.

[27] The meeting between Ms Craig and her representatives and the company's investigators resumed at 4 pm and was joined by the mill manager, Wu Khoo. Mr Khoo took over control of the meeting. Ms Craig was asked to reiterate her explanation and did so. The record of this part of the meeting indicates:

*Larry returned the phone to reception stating that he didn't want the phone as he couldn't get coverage at his house, that the microphone wasn't working and that his hands were too big for the phone.*

[28] When Ms Oakley put to Ms Craig that Mr Bryers had told her that the phone was not faulty when he returned it, there is no recorded response by Ms Craig to this apparent discrepancy between her account and that of Mr Bryers. The results of the other inquiries conducted by the company investigators between meetings were then put to Ms Craig for her comment. So, too, were the questions and answers put to, and made by, Mr McRae of LEC.

[29] There was discussion about the value of the handset that was participated in by Ms Craig's union representative. It appears to have been agreed that the phone may have been worth anywhere from nothing to a few hundred dollars. Ms Oakley made the point that it was not the cost of the handset but whether Ms Craig had unauthorised possession of company property. She responded that she thought LEC had owned the phone and had, through Ms Liki, transferred her number to the handset.

[30] The meeting was then adjourned by agreement to allow company representatives to get confirmation of the value and ownership of the handset and, in particular, whether it belonged to CHH or LEC and to also find out who had transferred Ms Craig's personal number to the handset.

[31] At the resumption of the meeting some 20 minutes later, Ms Oakley advised Ms Craig that Mr McRae of LEC said that he believed that Telecom Corporation had made the number transfer and not Shalom Liki at LEC because that company's records would have shown, but did not show, that it had made the change. Mr McRae advised that Shalom Liki had left LEC about a month previously and that this could not be confirmed with her. His advice was that the Nokia handset "*now belonged to CHH as the contract on [Mr Bryers's] phone number had been extended for 24 months*". This information was subsequently confirmed in a telephone conference call with Mr McRae at which the members of the employee party were present.

[32] After another 10-minute adjournment the meeting reconvened at 5 pm and Mr Khoo delivered the following decision.

*[Ms Craig] sees the phone as having no value to the company as it did not work properly. [Mr Bryers] said it was working fine when he returned it but that is not the point. [Ms Craig] must have seen value of the handset for herself as she wouldn't have taken it otherwise. [Ms Craig] had gained a personal benefit from having the new handset. Therefore I see there has been theft of company property. I believe [Ms Craig] has taken advantage of her position and taken company property for personal use this (sic) destroys my trust and to put it bluntly is considered stealing. Therefore there has been a loss of trust and confidence based on [Ms Craig's] actions. Given this I don't believe that the employment relationship can continue. [Ms Craig] will be dismissed on the grounds of loss of trust and confidence in the employment relationship.*

[33] The employer's grounds for dismissal were set out in its letter of 24 July 2007 to Ms Craig confirming the advice of her dismissal earlier that day. The letter included the following paragraph:

*The reasons as outlined in the notes for the decision to terminate your employment are through a loss of trust and confidence in the employee/employer relationship.*



## Contractual provisions

[34] Clause 10 of Ms Craig's individual employment agreement provided for its termination by the giving of one month's notice in writing either way. It reserved to CHH the right to pay out salary in lieu of notice and to stipulate that this did not need to be worked out by her. Clause 10.3 provided, in particular:

*Nothing in the above clause will prevent your dismissal without notice at any time in the case of serious misconduct, serious breach (including substantial non performance), or other cause justifying summary dismissal.*

[35] Clause 10.4 provided:

*Should it become necessary to pursue any of the options outlined in these clauses, the Company will act in good faith, and in accordance with the rules of procedural fairness.*

[36] Under clause 16 ("COMPANY POLICIES") CHH's policies, guidelines and procedures formed part of Ms Craig's terms of employment and she was required to comply with them at all times. So too was the employer.

[37] Unlike many sets of employment rules, whether incorporated in contract or not, CHH's "MILL RULES" provided, at clause 2.1:

...  
*A Breach (sic) of these rules may result in a warning being issued to the worker concerned, or in cases of repeated or serious breaches, may result in dismissal. However, in cases of gross misconduct summary dismissal may result.*

[38] The rules were "designed to fairly and impartially regulate the actions of employees in order to assure a safe, orderly and efficient operation of the Company". Clause 2.5 ("General Conduct and Safety") provided materially that:

*Breaches of the following may result in disciplinary action. Please note the list is not all inclusive.*

...  
(e) *Wilful damage or abuse of Company property or unauthorised possession or receiving of property obtained from the Mill Site.*

...

[39] CHH's human resources manager accepted in evidence, and I find as a matter of interpretation of the rules, that the following sequential steps had to be determined by the company in respect of Ms Craig's conduct. First, under clause 2.5(e), it had to amount to unauthorised possession or receiving of property obtained from the mill site. If the conduct met this test, the company then had to determine, pursuant to clause 2.1 set out above, whether, in all the circumstances, this breach constituted:

- misconduct in which case a warning might be issued; or
- a repeated or serious breach, in which case it might result in dismissal; or
- "*gross misconduct*", in which case summary dismissal might result.

[40] The breach alleged against Ms Craig was not repetitious. It was not ever suggested that it was "*gross misconduct*" that might have resulted in summary dismissal. The employer categorised it as a "*serious breach*" which may have resulted in dismissal but may have resulted in a lesser sanction under the Mill Rules. Because Ms Craig challenges the company's assessment of her conduct as a serious breach, it will be necessary to consider whether it constituted a breach less than a repeated or serious breach so that a warning should have been the consequence.

### **Grounds for dismissal**

[41] It is noteworthy that when Mr Khoo announced his finding to Ms Craig on 23 July, he did not categorise the misconduct according to the rules. Various, he said he saw it as theft of company property, the taking advantage by Ms Craig of her position, the taking of company property for her personal use, conduct that destroyed his trust in her, and "*stealing*". Mr Khoo said he had therefore lost trust and confidence in Ms Craig. She was said to have been dismissed "*on the grounds of loss of trust and confidence in the employment relationship*". Significantly, Mr Khoo's announcement referred to Ms Craig's contract saying that if she was dismissed summarily, she would not be entitled to any further salary payments. Mr Khoo then said that because Ms Craig had been with CHH for 10 years, he would

offer her one month's salary in lieu of notice but that the employment relationship would end there and then. Ms Craig was to be paid out her notice period.

[42] Although less than certainly, I find that Ms Craig was probably dismissed for a single incident of serious misconduct for which she was discharged with one month's pay in lieu of notice.

[43] Although, in advising Ms Craig of her dismissal, Mr Khoo used terms such as "*theft*" and "*stealing*", I accept that these were erroneous descriptions of Ms Craig's conduct by someone without human resources responsibilities or expertise and for whom English was not his first language. However, having seen and heard Mr Khoo give evidence, I am satisfied that he is very competent in his command of the language and his erroneous description of Ms Craig's misconduct is no more or less than many others might have uttered in similar circumstances. What is important, however, is the assessment and expression by Mr Khoo of the taking of wrongful advantage by Ms Craig of her position and the appropriation by her of CHH property for her personal use. Also significant was Mr Khoo's assessment that this had destroyed his trust and confidence in Ms Craig.

### **Predetermination/Irrelevant criteria**

[44] One element of Ms Craig's challenge to the justification for her dismissal is that, in effect, it was motivated, at least in part, by vindictive reasons that had nothing to do with the grounds purportedly relied on by the employer.

[45] The background to this assertion is as follows. In early July 2007 CHH was proposing to restructure those parts of its mill operation in which Ms Craig was employed. Her immediate manager in respect of the reception duties that she performed erroneously offered her a new restructured reception position. Ms Craig accepted this offer and indicated her wish to negotiate the terms and conditions of her new position. In particular, she wished to negotiate for better redundancy provisions that she had previously enjoyed in her work at the mill but which had been reduced in an earlier restructuring. Ms Craig appointed, as her bargaining

agent, John Mahanga of the Pulp and Paper Workers' Union of which she was a member, who was known to be a tough negotiator.

[46] Once Ms Hacche appreciated that she had erroneously offered Ms Craig a position, she proposed withdrawing that offer. Whether under pressure from Ms Craig through Mr Mahanga or CHH's own volition is not entirely clear but Ms Hacche's managers felt compelled to honour the offer of a position that had been accepted by Ms Craig although it should have been advertised and an appointment made of the most meritorious applicant.

[47] This much is beyond dispute. What is in issue is whether Ms Hacche or anyone else, embarrassed and under pressure from more senior managers as a result of this error, set out to ensure that Ms Craig would not take up the role, or indeed continue in employment with CHH, and did so by the prosecution of a complaint that would not otherwise have been pursued or would at least not have otherwise resulted in Ms Craig's dismissal. Ms Craig and her union representative, who gave evidence, clearly believed that such motivation was behind the company's investigation into, and eventual dismissal of, her. Company representatives, including Ms Hacche herself, denied that there was any connection between these events.

[48] I am not satisfied by evidence, as opposed to her genuine suspicion or even belief, that Ms Craig's dismissal was so motivated.

[49] I do not find that Ms Hacche's error and any consequent embarrassment or resentment, caused Ms Craig to have been dismissed when she would otherwise not have been so, absent improper motive. That is for a number of reasons including, but not limited to, the following. Although Ms Hacche instigated the complaint against Ms Craig and played a significant role in the company's investigation, the process was dictated by more senior managers as was the decision to dismiss that was made by the mill's manager, Mr Khoo, for CHH. Ms Hacche's account of how she came to suspect, first, the absence of a handset and, subsequently, Ms Craig's responsibility for this, is plausible. The complaint was not manufactured in the sense that there was clearly a missing telephone handset that warranted an investigation.

As against these facts, Ms Craig's suspicions were not supported by evidence. This ground of challenge to the justification for dismissal fails.

### **Justification for dismissal**

[50] Applying the first test under s103A, I am satisfied that the employer acted justifiably in the manner in which it investigated the alleged misconduct of Ms Craig and determined to dismiss her.

[51] Although it is possible to discern some procedural irregularities with the company's process, the object of this part of the test is to assess overall procedural fairness and reasonableness. The particular features of the case meeting that test include the following. After becoming aware of an irregularity between its records and the unavailability of the Nokia handset in the pool of replacement phones, CHH made appropriate checks which identified that the Nokia handset had been allocated to Ms Craig's personal Telecom mobile phone number. At the relevant time Ms Craig was responsible within that part of CHH's operations for such matters.

[52] The company gave Ms Craig a letter setting out the general nature of its concern, suggesting that she obtain advice and representation, and forewarning of her of the possible consequences if it concluded that there had been misconduct. The letter asked Ms Craig to attend a meeting which, although it was scheduled for the next business day, was after a weekend, thus allowing the plaintiff time to collect her thoughts, to take advice and to arrange representation, all of which she did.

[53] At the first of a series of meetings on the day Ms Craig was dismissed, she was represented by two union advocates who participated appropriately in that and following meetings on her behalf.

[54] Comprehensive records of what was said and done throughout that day were kept by CHH and made available to Ms Craig promptly following her dismissal. There was no challenge to the accuracy of these comprehensive records.

[55] The relevant events concerning the Nokia mobile phone were not really in contest. Rather, it was Ms Craig's explanation for these that was going to be crucial. This was sought and then considered by the company. Further inquiries were made by it and the results of these conveyed to Ms Craig at the reconvened meeting later that day. An opportunity was given to, and taken by, Ms Craig and her representatives to speak with a representative of LEC and her advocates participated fully in that exercise asking a number of questions on her behalf.

[56] CHH separated the functions of investigators and decision maker and, in the case of the investigators, separated again the roles of the person who had first discovered the discrepancy and a more senior HR manager who supervised the investigative process. The ultimate decision maker, Mr Khoo, was both fully briefed on the results of the investigation and heard and considered Ms Craig's explanation for himself.

[57] Consideration was given to all of the relevant information before the dismissal decision was made. Although Ms White criticised the defendant for not engaging in a separate consultation with Ms Craig about the consequences of the company's finding of serious misconduct, I do not consider that this was so necessary as to make its absence an unfair procedure. Ms Craig had been on notice from the outset of the potential seriousness of the misconduct being inquired about. The company had referred to the specific provisions in its Mill Rules that may have been breached. A combination of those rules and Ms Craig's individual employment agreement into which they were incorporated expressly, would have made it clear that she was at risk of a finding of serious misconduct for which the consequence could well have been dismissal on notice.

[58] In these circumstances and despite some arguable procedural deficiencies, I conclude that the way in which the employer acted leading up to Ms Craig's dismissal was how a fair and reasonable employer would have acted in all the circumstances at the time.

[59] I turn next to what might be called conveniently, substantive justification. The employer must establish that what it did was what a fair and reasonable

employer would have done in all the circumstances at the time. As with the first limb of the s103A test, this too must be determined objectively.

[60] Although more finely balanced than my conclusion on the procedural test, I have nevertheless concluded that in all the circumstances at the time, a fair and reasonable employer would have dismissed Ms Craig on notice for serious misconduct. That is for the following reasons.

[61] Ms Craig was the person at the Tasman mill responsible for the handling and administration of CHH provided cellular phones. There were numerous staff provided with these. Many, but not all, conceivable circumstances to do with mobile phones were addressed in policies or procedures of which Ms Craig was aware. There were records kept of mobile telephone transactions and of the whereabouts of those phones by reference to names of persons, ESN numbers, phone make and model, and mobile telephone line numbers. Ms Craig was responsible for ensuring that CHH's policies were adhered to and that it got fair value for the money it expended on these services. She was also responsible for ensuring that employees allocated mobile phones did not abuse the ability by, for example, seeking to obtain upgraded models before that facility became available to CHH at appropriate times on the plans the company had arranged with Telecom.

[62] In this role, Ms Craig was in frequent, almost daily, contact with LEC. She knew and was known by LEC staff as the person responsible for mobile phones at the mill and was authorised to transact business on CHH's behalf. LEC was entitled reasonably to assume that if Ms Craig transacted mobile phone business with it, she was authorised to do so on behalf of CHH.

[63] Ms Craig's previous service with CHH illustrated that she was aware of these obligations and responsibilities that went with her position. She had followed the appropriate procedures in numerous other instances. Although this was said by Ms White to illustrate an unblemished record of responsible conduct by Ms Craig and that is right, the evidence also reinforces the company's conclusion that she could not reasonably have been mistaken about what she was entitled to do or not when dealing with company mobile phones.

[64] I think the focus of both parties, not only at the time of the disciplinary investigation but also subsequently in the hearing before me, on “ownership” of the Nokia handset was both distracting and in some respects irrelevant. Legal questions of ownership of or property in the handset are not easy ones to determine given the triangular commercial relationship between CHH, LEC and Telecom.

[65] The focus was and is more properly on the respective rights and responsibilities of the parties in the employment relationship between Ms Craig and CHH. The company was her employer. Except as its agent, Ms Craig was not in any relevant commercial relationship with either LEC or Telecom so far as the issues in this case are concerned. It is clear that CHH had entered into a commercial arrangement whereby its manager Mr Bryers was to use the Nokia handset for calls and other communications in accordance with a plan for which CHH paid Telecom, through LEC, a monthly fee and ad hoc charges. A part of that arrangement was that the Nokia handset was provided at no capital cost to CHH, although its provision was clearly part of a package of goods and services for which CHH paid. When Mr Bryers returned the Nokia handset to Ms Craig and obtained a replacement on the same plan, the Nokia handset retained an inherent value for CHH, whether as a fully working model as it was when Mr Bryers relinquished it, or even subsequently in the partially inoperable condition in which Ms Craig used it personally. The phone’s value to the company is illustrated by its brief retirement to the pool of replacement phones for which Ms Craig was responsible.

[66] Given all of these circumstances and the employment relationship between Ms Craig and CHH, it is inescapable that Ms Craig was obliged to not only let her employer know what was to happen to the phone, but indeed to seek its approval to her proposed course of action. To do otherwise meant that Ms Craig took advantage of her representative status in her dealings with LEC to obtain a personal benefit to which she would not otherwise have been entitled.

[67] Looked at another way, Ms Craig’s statutory obligations of good faith dealing with her employer required her to conduct herself in a way that would not deceive or mislead CHH or be likely to do so: s4 of the Act. Ms Craig’s conduct with the Nokia handset breached that statutory obligation. She misled or deceived



her employer as to the status, whereabouts and use of a device that CHH was entitled to control. It expected, and was entitled to expect, that the Nokia handset would be available as a temporary replacement phone for other staff. Ms Craig's failure to record its whereabouts or status and/or to seek CHH's agreement to her proposed personal use of the handset, misled and deceived it.

[68] Although Ms Craig may honestly have believed that the Nokia handset was the property of LEC and its consent to her personal use of this item was only required, that was not a reasonable belief in all the circumstances. The only reasonable conclusion is that, irrespective of ownership, CHH was entitled to determine the possession, control and use of the handset in all the circumstances. Ms Craig was obliged both to keep the company informed of its status and to seek CHH's consent to her removal of it from company control and use to her own. She did not do so before appropriating it to her own use.

[69] I should emphasise, because it is a matter of grave concern to Ms Craig, that she did not steal the mobile phone handset or was guilty of any other criminal misconduct. Mr Khoo's references to theft and stealing when he dismissed her were wrong, unfortunate and have rankled with Ms Craig. It is a great pity that one of the experienced human resources' practitioners present at the time, or subsequently, could not have corrected the erroneous and damning expression of Mr Khoo's conclusion. I have found that Ms Craig believed that she was entitled to appropriate the handset to her own use, but that this was an unreasonable belief in all the circumstances. Ms Craig is entitled to the removal of this stigma of criminality against her name.

[70] However, in all the circumstances a fair and reasonable employer would have concluded that Ms Craig breached seriously the company's contractual rule against unauthorised possession of company property.

[71] Turning to the consequence of that conclusion, I find also that a fair and reasonable employer would have concluded that dismissal was the appropriate consequence. The company was right, in my assessment, that it could not continue to trust and have confidence in Ms Craig's performance of her duties that required

attributes of trust, even after a single breach following long and materially uneventful service. CHH had reposed unsupervised trust in Ms Craig to administer its mobile phone inventory and she had taken personal advantage of that trust by misleading or deceiving the company, including by breach of s4 of the Act. In these circumstances dismissal on notice was what a fair and reasonable employer would have done following a justifiable conclusion of serious misconduct.

[72] It follows that Ms Craig's dismissal was justified, that the Employment Relations Authority's conclusion to that effect was correct, and that the challenge must be and is dismissed.

[73] Questions of costs are reserved for the parties to attempt to resolve these between themselves directly, but with leave to apply by memorandum if that is not possible.

GL Colgan  
Chief Judge

Judgment signed at 3.30 pm on Wednesday 3 September 2008