

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 39
5372967

BETWEEN JAMIE GWEN HAMMOND
 Applicant

AND POLLADIO HOLDINGS LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: John Black, Counsel for Applicant
 Alyn Higgins, Counsel for Respondent

Investigation Meeting: 7 December 2012 at Timaru and 10 January 2013 by
 telephone

Submissions received: 7 February 2013 from the Applicant; 21 February 2013
 from the respondent.

Determination: 26 February 2013

DETERMINATION OF THE AUTHORITY

- A. The Applicant was unjustifiably dismissed and, accordingly, is awarded the remedies set out in this determination.**
- B. Costs are reserved**

Prohibition from publication

[1] During the investigation meeting evidence emerged from a former employee (not the Applicant) that potentially implicated a former manager of the respondent in what could amount to an unlawful act relating to the handling of winnings from gaming machines. This former manager did not have the opportunity to comment on this evidence. In light of this, I order that the name of this former manager not be published. She shall be called Ms X in this determination.

Employment relationship problem

[2] Ms Hammond claims that she was unjustifiably dismissed from her employment as a guest services attendant in the respondent's premises, the Grosvenor Hotel in Timaru, on 15 December 2011. The respondent denies that the dismissal was unjustified.

Brief account of the events leading to the dismissal

[3] Ms Hammond, who was aged 18 at the date of her dismissal, was employed to serve customers at the bar of the hotel, deal with guests and assist patrons gambling in the hotel's gaming room (which contained pokie machines). Ms Hammond had undergone training in problem gambling and harm minimisation awareness, as required by the Gambling Act 2003, and was undergoing training in bar work so that she could apply for her bar manager's certificate in the future. It was Ms Hammond's first permanent full time job.

[4] On Monday 5 December 2011 a patron who had had a win on one of the pokie machines handed to Ms Hammond \$24 in coins, asking for the coins to be changed into notes. The customer then left the bar without collecting the notes.

[5] Ms Hammond's evidence is that she asked a colleague (Ms Spooncer) to put the \$24 into a bag with a description of the customer and left it on the bar in case the customer returned. She advised Ms Spooncer that if the customer did not claim it in a few days, they could split the money. Ms Spooncer's evidence was that Ms Hammond took the money into the office of the general manager, Ms Herd. This difference in evidence is not, however, material, although it appears that Ms Hammond's version of the evidence in this respect is more accurate.

[6] The following day, Ms Herd found the money in the bag on the bar, and put it into the gaming till (also known as the pokie till). This till is used to pay out monies to pokie machine winners and for other transactions not connected with the bar till. It is also used to store money which has been unclaimed by patrons. Ms Herd's evidence is that she put the bag in the gaming till in case the customer returned to collect their money. Failing that, she would have followed the Gaming Moneys procedure and banked it into the Pub Charity's bank account as unclaimed gaming money. (Pub Charity is a charitable trust which donates funds raised by gaming machines in hotels and taverns to communities in New Zealand).

[7] Ms Herd's evidence is that she checked the following morning (Wednesday, 7 December 2011) to see if the money had been claimed and found that it had gone. She assumed that the customer had returned to claim it. She says that it was the following day that the front office supervisor (Ms Henry) brought to her attention that \$12 had been left out for Ms Spooncer. Upon contacting Ms Spooncer to discuss where the money had come from, Ms Spooncer informed Ms Herd that the money was part of the unclaimed \$24 but that she had felt uncomfortable taking it due to her own experience and training.

[8] Ms Hammond's evidence is that, when she returned to work on 6 December 2011, she found that the bag containing the note and the money had been put into the pokie till and that it had not been collected. Her evidence is that, at the end of her shift that day, believing that the money could be treated as a tip, she followed what she believed to be the correct practice in such a case; namely dividing the money between herself and Ms Spooncer who had been working with her on the evening of 5 December. As Ms Spooncer was not on duty at that point, she left the money (\$12) in a bag for her.

[9] Ms Herd's evidence is that she carried out an investigation and wrote a letter to Ms Hammond dated 13 December 2011 saying the following:

Dear Jamie

Serious employment issue

During your evening shift on Tuesday, 6 December 2011, you removed \$24.00 that was placed in the gaming machine till earlier that day. This money was an unclaimed prize left behind by a patron, which was clearly noted.

Legally in circumstances such as this, the Venue Manager fills out an unclaimed prize form, banks the money and reports it to the venues representative for Pub Charity. As this money has disappeared from the premise [sic] not all of these steps can be carried out, therefore putting both the Venue Manager and Venue Operator's position at risk.

19.3 of your Individual Employment Agreement states:

Notwithstanding any other provision in this agreement, the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:

- (i) Theft;*
- (ii) Dishonest [sic];*
- (iii) Harassment of a work colleague or customer;*

- (iv) *Serious or repeated failure to follow a reasonable instruction;*
- (v) *Deliberate destruction of any property belonging to the employer;*
- (vi) *Actions which seriously damage the employer's reputation.*

You are required to attend a meeting on Thursday, 15 December 2011 at 10.30am to discuss this matter. You are entitled to bring a support person with you and should be aware that your actions have placed your employment at The Grosvenor in serious jeopardy.

Yours sincerely

*Charlotte Herd
Administrator*

[10] Ms Herd's evidence is that the reason she chose to bring Ms Hammond in for a meeting is that, during her investigation, she had discovered that Ms Hammond had removed the money from the gaming money till and left it behind the bar for her entire shift. It is her position that it is not acceptable for a staff member to remove anything from the till unjustifiably.

[11] Ms Herd's evidence is that, on 15 December 2011, she met with Ms Hammond and, by asking her questions relating to items left behind by customers and left in the till, was satisfied that Ms Hammond understood the respondent's procedures.

[12] Ms Herd says in her written brief of evidence that, when she asked Ms Hammond about the \$24 that Ms Herd had placed in the gaming till, Ms Hammond repetitively denied that it was in the gaming till while she was on shift. She claimed, Ms Herd says in her statement, that it was in a bag behind the bar and therefore Ms Hammond classified it as a tip. During her oral evidence before the Authority, Ms Herd stated that she decided to dismiss Ms Hammond because she would not take responsibility for having taken money out of the till.

[13] Ms Herd's evidence is that she adjourned the meeting to look at the CCTV footage to determine whether what Ms Hammond was claiming was correct. When she did so, she found that Ms Hammond was incorrect and that the money had been in the gaming till until Ms Hammond had removed it. She states that she called Ms Hammond back into the office and showed her the footage which disputed

Ms Hammond's explanation and informed her that she was dismissed. She says that Ms Hammond did not say anything when she showed her the footage.

[14] Ms Herd's evidence is that, by Ms Hammond refusing to acknowledge that the money had been in the gaming till, Ms Herd considered that her trust in Ms Hammond had been lost. She regarded that Ms Hammond had no right to appropriate the money the way that she did or assume that the money was a tip.

[15] Ms Hammond's evidence is that she did not believe that the \$24 was unpaid Pub Charity winnings and therefore that the compliance procedures in relation to such money did not come into play. She states that it was her view that the procedures concern money left in or on the gaming machine only and that, once a customer has collected their winnings, the money is no longer unpaid or unclaimed as the customer is then free to take their winnings in coin form and leave the premises. She states it is her view that the fact that the customer chose to take their winnings to the bar to be exchanged for notes has no bearing on the status of the money which, by that point, was no longer *unpaid* or *unclaimed*.

[16] Ms Hammond's oral evidence to the Authority was that she knew the bag containing the \$24 was in the gaming till but that she had not taken money from the till, as it did not come out of the float that was part of the till.

[17] Evidence was taken from Ms Spooner by telephone (as she was in Australia). Her evidence was that she had been wary about keeping the money that Ms Hammond had given her, as she did not view it as a tip. She felt that Ms Hammond should have checked with the manager what should happen to the money.

[18] Evidence was also heard from Ms Craig, who worked for the respondent as a receptionist and waitress/bar person at the same time as Ms Hammond. Ms Craig confirmed that, when she worked under the supervision of the manager called Ms X, and another manager called Ms Henry, any monies that had been left by customers, including pokie winnings left on the bar, would be split between the staff at the end of the night.

[19] Ms Craig described one occasion when she had been working for only two weeks, before she had received her Pub Charity training, when a customer had not claimed winnings of \$320. (Any winnings of over \$200 were paid out by the staff, rather than being discharged in coins from the machine, after the winner signed a

book). On this occasion, Ms Craig said, the winner did not approach the bar and so the winning amount had been split between the staff at the end of the night. This was instigated by Ms X Ms, Craig said. Clearly, this would have been in breach of the Pub Charity rules, although Ms Craig had not known that at the time. Ms X did not hear this evidence relating to the \$320 and was not asked to comment upon it when she herself gave evidence later because of the rules on privilege against self incrimination set out in s 60 of the Evidence Act 2006.

[20] Ms X's evidence was that, when she was the bar manager, she would not have filled out a Pub Charity form, nor informed Ms Herd in respect of a sum as small as \$24, but that she would have simply divided it amongst the staff on duty at the time it was left after waiting a few hours to see whether it would be claimed. Ms X said that she had learned about splitting money left behind by customers from staff when she had started her employment at the hotel, and she also confirmed that she had trained Ms Hammond.

The issues

[21] The Authority must determine whether Ms Hammond's dismissal was justified in accordance with s.103A of the Employment Relations Act 2000. This states as follows:

- (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) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (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.*

[22] In considering whether the respondent satisfies the test set out in s.103A of the Act, in this particular case it is necessary to consider the following issues:

- (a) Whether, having regard to the resources available to the respondent, it sufficiently investigated the allegations against Ms Hammond before dismissing her;
- (b) Whether the respondent genuinely considered Ms Hammond's explanation in relation to the allegation against her before dismissing her;
- (c) Whether it was reasonable for the respondent to have concluded that Ms Hammond had been dishonest in taking the \$24 and splitting it between her and Ms Spooncer; and
- (d) Whether dismissal was the appropriate sanction to take against Ms Hammond.

Did the respondent sufficiently investigate the allegations?

[23] Where a serious charge is the basis of the justification for a dismissal the evidence in support of it must be as convincing in its nature as the charge is grave. (*Honda NZ Ltd v NZ Shipwrights Union* [1991] 1 NZLR 392 (CA)).

[24] Ms Herd's evidence was that Ms Hammond did not say much during the disciplinary meeting. In particular, Ms Herd says that Ms Hammond did not explain that she had done only what she had been told to do in such circumstances by Ms X. Ms Herd also said that Ms Hammond's support person had said nothing at all during the disciplinary meeting.

[25] During the giving of evidence before the Authority it also emerged that Ms Hammond and Ms Herd had been at cross purposes when Ms Hammond had said she had not taken money out of the gaming till. Ms Hammond said that she meant that she had not taken money out of the float. Ms Herd's understanding was that Ms Hammond was denying uplifting the \$24 from the till at all.

[26] The Authority saw a number of written statements, from a Mr. Lim, Ms Spooncer, the Chief Executive of Pub Charity, and from various current and former staff members. All of these were written, it seems, after Ms Hammond's dismissal, apparently in response to her raising of her personal grievance or for the benefit of the Authority's investigation. These statements were not all on point, but at least one, from Ms X, supported the position that Ms Hammond was taking; namely that money left behind on the bar would be divided amongst the staff if it was not claimed by the customer.

[27] Whilst in many situations an employee not saying much to explain themselves, and seemingly denying the undeniable, would entitle an employer reasonably to conclude that the employee had committed the misconduct in question, I feel that this case demanded a more thorough investigation. I say this for two reasons; first, Ms Hammond was very young and inexperienced, was facing a very serious allegation, and did not have a representative who was willing or able to play an active part.

[28] Second, the procedures which Ms Hammond was accused of breaching were, in my view, confused. For example, the Pub Charity Rules on unpaid and unclaimed winnings were not relevant to the issue under investigation in my view, as the winnings were not unclaimed, but had been collected by the customer; yet, these rules were referred to by Ms Herd in her letter to Ms Hammond dated 13 December 2011. There was clearly confusion between managerial staff (as between Ms X and Ms Kendall, for example) about how monies accidentally left behind on the bar should be treated. This confusion was revealed after a only short period of investigation by the Authority. If Ms Herd had spoken to staff members about their understanding of the rules, it is likely she would have discovered this confusion.

[29] I also believe that Ms Herd should have dug deeper when Ms Hammond was denying that she had taken money from the gaming till, when she had clearly done so but had not attempted to hide having done so (because she left \$12 of the \$24 out for

Ms Spooncer). Where such a denial makes no sense, I believe that Ms Herd should have considered whether the denial stemmed from a misunderstanding. The Authority soon established this to be the case when Ms Hammond gave her evidence.

[30] All in all, I do not believe that, having regard to the resources available to the respondent, it sufficiently investigated the allegations against Ms Hammond before dismissing her, and so believe that the dismissal was unjustified.

Did the respondent genuinely consider Ms Hammond's explanation in relation to the allegation against her before dismissing her?

[31] Ms Herd said that Ms Hammond did not say much in her defence. I have already found that Ms Herd should have investigated more thoroughly, which may have elicited a more detailed explanation. However, I accept that Ms Herd genuinely considered what she was told by Ms Hammond. I do not believe that Ms Herd acted in bad faith towards Ms Hammond.

Was it reasonable for the respondent to have concluded that Ms Hammond had been dishonest in taking the \$24 and splitting it between her and Ms Spooncer?

[32] During her evidence Ms Herd told the Authority that she had not considered Ms Hammond to have committed theft but did believe Ms Hammond had been dishonest by not admitting that she had taken the money out of the gaming till. As stated above, Ms Herd and Ms Hammond had actually been at cross purposes about that issue.

[33] Given that Ms Hammond's denial of having taken money from the till did not make sense, and further given that Ms Hammond had made no attempt to hide what she had done with the money, I do not believe that a fair and reasonable employer could have concluded that Ms Hammond had been dishonest.

Was dismissal the appropriate sanction to take against Ms Hammond?

[34] It appears clear that Ms Hammond, who was effectively tutored by Ms X, would have learned the approach she took regarding money which had been left behind the bar during her on the job training, which explains why she decided to split the \$24 left by the customer on 6 December 2011. If Ms Herd had carried out a more thorough investigation, it is very likely that she would have uncovered this fact.

That, in turn, should have convinced a fair and reasonable employer not to have dismissed Ms Hammond, but rather to have instituted training for the staff if the approach Ms Hammond had learned from Ms X was viewed as wrong.

[35] Ms Herd's evidence was that she dismissed Ms Hammond because she refused to accept that she had taken money out of the till, which she saw as dishonesty. As I have found above, I do not believe it was reasonable for Ms Herd to have concluded that Ms Hammond's denial was based on dishonesty. Therefore, I do not believe that dismissal was the action that a fair and reasonable employer could have taken in all the circumstances at the time the dismissal occurred. Those circumstances included Ms Hammond's age, the lack of clarity about how money left behind at the bar should be treated, and the fact that Ms Hammond had been trained to split such money with her colleague.

Remedies

[36] Having concluded that Ms Hammond was unjustifiably dismissed, I must now consider what remedies she is entitled to.

[37] Evidence from the respondent shows that Ms Hammond's remuneration fluctuated significantly from week to week. I accept the general method of calculating her loss of wages suggested by her counsel; namely to take the gross earnings over the three months immediately preceding her dismissal, and to deduct from that sum earnings received by her in her subsequent employment during the three months following her dismissal, pursuant to s 128 of the Act.

[38] Thirteen weeks' gross pay at ordinary time remuneration up to her dismissal amounts to \$7,104.38; (126.25 hours worked at \$13.50 an hour). Dismissal took place on 15 December 2011 and, during the period of thirteen weeks from that date Ms Hammond earned a gross income of \$887.25. This results in a total loss of gross income in the sum of \$6,217.13.

[39] Turning to s. 123(1)(c)(i) of the Act, Ms Hammond seeks compensation for humiliation, loss of dignity and injury to her feelings arising out her personal grievance. Ms Hammond gave evidence that she was *gutted* by being dismissed. She says she was also dismissed from her new job at Coffee Culture because of the allegations that she had been dishonest in her former job, and that she fell out with her

father as a result of being dismissed by the respondent, and that he did not speak to her for five months.

[40] I cannot take into account the actions of her new employer, nor her father, in assessing compensation. However, I accept that she did suffer humiliation, loss of dignity and injury to her feelings by having been dismissed from her first full time permanent job for dishonesty. Apart from saying she was *gutted*, though, Ms Hammond did not give much detailed evidence of the nature and extent of her reaction, and so I cannot assess these accurately. All in all, I believe that an award of \$7,500 is an appropriate amount.

[41] I must now consider, pursuant to s. 124 of the Act, the extent to which Ms Hammond's actions contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. The situation giving rise to the personal grievance was Ms Hammond taking the \$24 and dividing it between her and Ms Spooncer. I accept her evidence that she did this only because she had been told that this was how money left behind on the bar by customers was to be treated. A more experienced, mature and cautious person may have paused to check with her manager that this was acceptable, but I believe that Ms Hammond did not act in bad faith in relying on what she had been told by Ms X. Therefore, I see no blameworthy conduct by Ms Hammond.

[42] Accordingly, I do not believe that it would be just to reduce the remedies awarded to her in this determination.

Orders

[43] I order the respondent to pay to Ms Hammond:

- a. The gross sum of \$6,217.13. in respect of lost wages; and
- b. The sum of \$7,500 in respect of compensation pursuant to s. 123(1)(c)(i) of the Act.

Costs

[44] The parties are to try to agree how costs are to be dealt with but, in the absence of agreement within 28 days of the date of this determination, Ms Hammond's

counsel is to serve and lodge a memorandum and the respondent will have 14 days within which to serve and lodge a memorandum in reply.

David Appleton

Member of the Employment Relations Authority