

Attention is drawn to the order at [1] and [2] prohibiting the publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 13  
5369753

BETWEEN MR X  
Applicant

A N D Independent Liquor (NZ)  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Peter van Keulen, Counsel for Applicant  
Clive Smith, representative for Respondent

Investigation meeting: 18 October 2012 at Christchurch

Submissions Received 25 October 2012 from Applicant  
25 October 2012 from Respondent

Date of Determination: 21 January 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr X was unjustifiably disadvantaged in his employment by being suspended.
- B. Mr X was unjustifiably dismissed by Independent Liquor (NZ) Ltd.
- C. Independent Liquor (NZ) Ltd did not breach its duty of good faith.
- D. Independent Liquor (NZ) Ltd is to pay Mr X \$58,118.70 in lost remuneration and bonuses.
- E. Independent Liquor (NZ) Ltd is to pay Mr X \$4000.00 in compensation for humiliation, loss of dignity and injury to feelings.
- F. Costs are reserved.

**Prohibition of publication of names**

[1] I confirm the order made at the investigation meeting under clause 10 Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting the publication of the name of the applicant or any information which may identify him. I have referred to him throughout this determination as Mr X. The letter X bears no relation to the applicant's real name. I note that the respondent had no objection to the application that Mr X not be publicly identified.

[2] I have also referred to two third parties without naming them. That is because of the nature of the evidence about alleged sexual harassment by Mr X and the fact that the people referred to did not give direct evidence at the investigation meeting. Under clause 10 Schedule 2 of the Employment Relations Act 2000 (the Act) I prohibit the publication of the name of the person who complained about sexual harassment and the name of the person who was allegedly sexually harassed.

**Employment relationship problem**

[3] Mr X was employed by Independent Liquor in a management position. On 3 December 2011 Mr X attended the Independent Liquor sponsored Woodstock Reserve Fight for Life in Auckland with customers and clients of Independent Liquor along with a number of staff of Independent Liquor. He also attended work-related functions before and after the Fight for Life.

[4] One of Mr X's guests, a client known as Smokey, was significantly intoxicated and because of that and his consequent behaviour was removed from the Fight for Life by two other Independent Liquor staff members.

[5] Mr X flew back to Christchurch on Sunday 4 December 2011 in the company of a number of Independent Liquor's clients who had attended the Fight for Life function the previous evening. He was in a bar in Christchurch with some of those clients when he received a telephone call from Andrew White, a National Sales Manager at Independent Liquor.

[6] Mr White told Mr X that Independent Liquor had suspended him on full pay because of issues of serious misconduct that had been raised against him. Mr White asked Mr X to attend a meeting at 1 p.m. the following day, Monday 5 December

2011. Mr White did not give Mr X any details of the allegations of serious misconduct.

[7] Sometime later that afternoon Mr X telephoned Mr White back seeking further information about what issues of serious misconduct had been raised against him. Mr White was unable to give any further information. Mr White told Mr X that the matters were currently being investigated. Mr X tried to call Brendan Smith, the National Sales Director, but Mr Smith did not answer his call.

[8] On Monday morning Mr Smith conducted an investigation into several different allegations made about Mr X's behaviour on the afternoon and evening of 3 December 2011. Mr Smith interviewed John Saunders, Peter Monga, Matt Mavor and Dave Yurak. These managers had also been at the Fight for Life and associated functions on 3 December 2011.

[9] Mr Smith also met with Mr White on the Monday morning. Mr White was present when some of the four managers interviewed by Mr Smith discussed the allegations they had made against Mr X.

[10] Mr White flew to Christchurch to conduct the meeting with Mr X at 1 p.m. At the meeting Mr X was given a document which outlined the allegations of misconduct that Independent Liquor wished to put to him. The document outlined four issues that related to his state of *gross intoxication* being his responsibility for Smokey's intoxication and behaviour, being verbally abusive of some Indian customers, his offensive language on a bus and harassment of the partner of a client from a South Island tavern.

[11] Greg Hoar, also a National Sales Manager, attended the meeting to take notes. After about 20 minutes the meeting ended and Mr White left the room to telephone Clive Smith, Independent Liquor's Human Resources Director based in Australia. For some part of that discussion Mr Brendan Smith was joined to the telephone conference from Auckland. Mr White did not have Mr Hoar's notes of the meeting with him and he summarised what had happened at the meeting with Mr X from his memory. The three men decided that Mr X's conduct was in breach of Independent Liquor's Code of Conduct Policy and constituted serious misconduct. They decided that he would be summarily dismissed.

[12] Before the decision to dismiss Mr X was made Mr Hoar came to speak to Mr White and told him that Mr X had just told him that *he could not remember half or more of the evening at the function and after it.*

[13] Mr X claims that Independent Liquor (NZ) Limited undertook an unjustified action in suspending him which caused him disadvantage, unjustifiably dismissed him and breached its duty of good faith to him. He claims remedies of a penalty payable to him, reimbursement of lost wages, compensation for humiliation, loss of dignity and injury to feelings and legal costs.

[14] Independent Liquor maintains that the dismissal was justified and the process adopted was fair and reasonable. Independent Liquor considers that its actions towards Mr X were what a fair and reasonable employer could have done in all the circumstances.

### **Issues**

[15] The issues the Authority needs to determine are:

- (a) Whether Independent Liquor's actions in suspending Mr X amounted to an unjustified action which disadvantaged him in his employment; and
- (b) Whether Independent Liquor unjustifiably dismissed Mr X;
- (c) Whether Independent Liquor breached its duty of good faith to Mr X;
- (d) What, if any, remedies are appropriate?

*Was Mr X's suspension an unjustified action?*

[16] Independent Liquor says Mr X's suspension was justified because the allegations were serious and *concerned conduct in the presence of customers* so it was appropriate that he had no further contact with customers until the investigation was complete.

[17] The test for whether an employer's action is justifiable is that contained in s.103A of the Employment Relations Act 2000: was the decision one which a fair and reasonable employer could have made in the particular circumstances at the time the decision to dismiss was made?

[18] In applying the justification test s.103A(3) of the Act requires the Authority to consider a number of factors in determining whether an action or dismissal has been implemented in a procedurally fair manner. Factors include whether the employer:

- Sufficiently investigated the allegations, having regard to available resources;
- Raised its concerns with the employee before dismissing or taking action against an employee;
- Gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against an employee; and
- Genuinely considered the employee's explanation before dismissing or taking action against an employee.

[19] Suspension of an employee must be based on a contractual or statutory right. The Independent Liquor Employees' Handbook which Mr X signed on 2 June 2010 states:

*The employee's supervisor or manager may suspend a worker prior to dismissal to enable an incident to be fully investigated; such suspension will be on pay.*

Therefore, Independent Liquor had a contractual right to suspend Mr X.

[20] However, when deciding whether to suspend an employee pending a disciplinary investigation an employer must comply with the rules of natural justice<sup>1</sup>. Natural justice requires that a person is given an opportunity to be heard before a decision is made about them. In *Tawhiwhirangi v Attorney General* Goddard CJ, in a matter relating to the opportunity of an employee to be heard prior to being suspended from employment held that:

*...the matter must be looked in a sensible, flexible, and reasonable way to ascertain what are the requirements of fairness on the particular occasion in the particular surrounding circumstances.*<sup>2</sup>

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<sup>1</sup> *Tawhiwhirangi v. Attorney-General* [1993] 2 ERNZ 546

<sup>2</sup> *Ibid*, at 559

[21] There may be genuine reasons for suspending an employee while an investigation is undertaken, such as a safety risk or a risk that the employee would tamper with evidence. However, an employer must usually consult an employee and involve him in the decision of whether or not to suspend him.

[22] Mr X submits that there was no genuine reason to suspend him from his duties. The allegations against him were of behaviour that occurred on the Saturday night, in Auckland, outside of the office and when he had been drinking alcohol. He submitted that he was highly unlikely to have been intoxicated at work on Monday morning. There had been no previous instances of him being intoxicated at work. Mr X says suspension was simply unnecessary.

[23] Mr X was not consulted about a proposed suspension. The decision to suspend him was made by Mr Brendan and Mr Clive Smith before he was made aware that there had been any allegations of misconduct made against him. Mr White was instructed to convey the fact of the suspension. Independent Liquor made the decision that it was very likely he had committed serious misconduct and that it needed to investigate the allegations before it spoke to him. Mr X was not involved in the decision making as to whether he should have been suspended or not. Independent Liquor did not comply with the rules of natural justice or with any of the requirements set out in s.103A of the Act.

[24] In *Angus and McLean v Ports of Auckland*<sup>3</sup> the full Court of the Employment Court held that failure to meet all four tests in s.103A of the Act would result in a dismissal being unjustified. The same principle applies to an employer's action which is to an employee's disadvantage. Therefore, the decision to suspend Mr X was not justified.

[25] In addition, there was no substantive reason why Mr X could not work on the Monday morning. He was unlikely to be able to interfere with the witnesses or any evidence. He did not know what the allegations against him were or who the people were who had complained about him. In any event, all the witnesses interviewed face-to-face by Mr Brendan Smith were in Auckland while Mr X was in Christchurch. Independent Liquor's concern about Mr X not being in contact with customers until it

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<sup>3</sup> [2011] NZEmpC 160, at ??

was clear about what happened could have been met by instructing him not to contact any customers before the scheduled meeting the next day at 1 p.m.

[26] Mr X's suspension disadvantaged him in his employment by making him feel 'on the back foot' without knowing what he was alleged to have done that his employer considered so serious.

[27] In all the circumstances, Independent Liquor's decision to suspend Mr X was not a decision a fair and reasonable employer could have made.

*Was Independent Liquor's decision to dismiss Mr X justifiable?*

[28] Mr Hoar's notes record that prior to the meeting *Andrew White asked if X was bringing anyone to the meeting in the form of a support person. X replied, No – he was coming alone.*

[29] At the beginning of the meeting Mr White handed Mr X some notes and read through the four allegations of misconduct. The allegations were all about Mr X's behaviour on the afternoon and night of 3 December 2011. They were:

- That Mr X initiated a pre-function lunch which included Smokey who was drinking at the lunch. *Smokey has a long history of unsavoury issues when at social events involving alcohol. Smokey came to the pre-function event already well under the influence of alcohol. At the event he continued to drink heavily and his behaviour deteriorated ...As [Mr X's] guest at the event ultimately he was responsible for the behaviour of his guest – [Mr X] did not make any effort to deal with this customer's behaviour ...*
- *...[Mr X]was verbally abusive to other ...staff members and some of our Indian customers within ear shot of other Independent Liquor customers ...his behaviour was obviously grossly inappropriate in the presence of Independent Liquor NZ staff and customers.*
- On the bus ride after the function *Mr X was grossly intoxicated and said F\*\*\*off you f\*\*\*ing c\*\*\* to a colleague who had asked him to sit down.*
- At the post-function event *Mr X was harassing the wife of a customer from [a South Island] tavern. To an extent that (1) her husband in a distressed state approached an Independent Liquor NZ employee and asked him to get Mr X*

*away from his wife. (2) the woman approached the Bar Manager requesting his assistance to get Mr X away from her.*

[30] Mr X denies that the notes of the meeting taken by Mr Hoar are accurate. Mr Hoar typed the notes up and signed them on 6 December 2011. I set out the notes here as some key points are undisputed:

AW: *Opened meeting explaining why the meeting had been called. Specifically:*

- *Complaints about X behaviour at the Woodstock Fight for Life Event (FFL). X now on suspension on full pay.*
- *AW explained that the meeting today was organised to discuss the issues and also hear X response.*

X: *What were the allegations?*

AW: *Handed out the notes and read through the allegations point by point.*

X: *Asked for more detail on what had been said and who had made comments.*

AW: *Sasha made comments that X was loud – together with others.*

X: *Who was the staff member that made a comment re: 'F\*\*\*ing c\*\*t'.*

AW: *We will come back to that.*

AW: *Finished reading typed allegations and also read the Independent Liquor NZ Code of Conduct, highlighting points 2, 3 and 5.*

X: *Has there been a formal complaint from staff and customer?*

AW: *Not staff at this stage, but from a customer's wife who made a complaint to a staff member on the night.*

X: *Is that hearsay?*

AW: *No as we have had numerous complaints from people at the event to our Sales Director Brendan Smith.*

AW: *Would you like to make any comments?*

- X:
1. *I think this is harsh.*
  2. *I had too much to drink and I am remorseful.*
  3. *All I want to do is to get back to work.*
  4. *I take responsibility for Smokey, in his defence:*

*(a) checked into hotel and nothing to eat.*



- (b) *Went to a restaurant had a meal and a few jugs of beer.*
- (c) *Smokey purchased 4-5 bottles of Chardonnay and despite telling him it was too much, Smokey was adamant it was not X's business.*
- (d) *Smokey and Webby (Paul Webster) were left at the restaurant when Carl and X went back to the hotel at 4.35pm. Smokey did not return to the hotel until 4.40pm.*

- 5. *I want to be open.*
- 6. *I realise I made a mistake.*
- 7. *I want to put it right.*
- 8. *I don't want to lose my job.*

AW: *Do you want to discuss any other issues?*

X: *Very surprised about the [couple from the South Island tavern] would like AW to talk to customer as he is a personal friend and seemed to be no issues as he was drinking with me on returning to Christchurch.*

AW: *Reiterated seriousness of the issues.*

X: *Made the following comments:*

- *Embarrassed*
- *Disgusted*
- *Don't know what to do except apologise and put things back on track*
- *Very sorry and embarrassed.*

AW: *Do you have anything else to add?*

X: *No.*

*1.20pm Meeting adjourned by AW*

*1.40pm Meeting re-commenced at 1.40pm.*

AW:

- *Accept that you want to continue with the company and are genuinely remorseful.*
- *The company views it as serious misconduct*
- *Sorry but decision has been to terminate employment effectively immediately.*
- *You will be paid until 5th January.*

X: *What can I do?*

AW: *Nothing*

X: *Surely something? What about a warning?*

AW: *No*

X: *I can't believe it ...*

*Meeting concluded at 1.40pm.*

[31] Mr X denies that he ever made any admissions of having undertaken any of the misconduct alleged against him. He acknowledges that he did offer an explanation about Smokey's behaviour at the event. He denies that he had told Mr Hoar that he had any gaps in his memory of the evening.

[32] Mr White sent Mr X formal notice of his dismissal on 5 December 2011 which listed the four allegations put to him at the meeting and added:

*The termination of your employment was wholly and solely because of your behaviour at the recent Fight For Life Event:*

*Such actions by you are clearly contrary to the behaviour we would expect from a Company Manager and which are contained in our employment Code of Practice. ...*

*[X] we are sorry that we have had to make this decision but your actions left us with no alternative.*

Mr X 4 was not required to work up until 5 January 2012 and finished work on 5 December 2011.

[33] The respondent submits that its processes including the investigation, the disciplinary meeting and the meeting in which the decision to dismiss was made were fair.

[34] The test for whether a dismissal is justifiable is the same as that for whether an employer's action is justifiable: was the decision one which a fair and reasonable employer could have made in the particular circumstances at the time the decision to dismiss was made?

[35] In considering that question I also need to examine the employer's decision to dismiss from a procedural perspective, as set out in s.103A(3) and(4).

[36] First, I need to consider whether the investigation was sufficient, having regard to the resources available to Independent Liquor. During the meeting Mr X asked Mr White to talk to the couple who had made the alleged sexual harassment complaints. Mr White did not do so. Mr White and Mr X were not aware that Mr Smith had spoken to the male partner of the couple who had said that he didn't *want to be the one to cause [X]trouble.*

[37] In formulating the second allegation against Mr X Independent Liquor relied on the fact that a customer, *Chris of Liquorland Rangiora*, had heard Mr X being verbally abusive to other Independent Liquor customers. However, neither Mr Brendan Smith who conducted the investigation nor Mr White who conducted the disciplinary meeting had spoke to Chris and it is unclear where that allegation came from. Mr White says that he was not sure whether Mr X was alleged to have verbally abused Sasha or to have been abusive about her to other staff. Nor was it clear whether Independent Liquor considered Mr X had actually been verbally abusive to Indian customers, *about* Indian customers or abusive about someone else within earshot of the Indian customers. None of the decision makers knew what it was that Mr X was alleged to have said that was verbally abusive towards other staff and/or some Indian customers. Those Indian customers were not spoken to.

[38] Independent Liquor is a well resourced company. I do not consider that it adequately investigated the allegations against Mr X before making the decision to dismiss him. The decision was made immediately after the meeting with Mr X. Independent Liquor could have taken more time to investigate the allegations. Further and more detailed investigation may have been able to ameliorate some of the other procedural defects identified below.

[39] Secondly, I need to consider whether Independent Liquor raised the allegations with Mr X before dismissing him. The allegations were raised with Mr X before the decision was made to dismiss him. However, I do not consider that they were adequately raised. They were raised for the first time at the meeting. Because of that Mr X had no opportunity to prepare for the meeting.

[40] During the meeting Mr X asked for more detail on who had who had made the complaints against him and what they had said. Mr White said that *Sasha made comments that [X] was loud – together with others*. However, no-one had interviewed Sasha as part of the investigation and no other details of the allegations were given to him. For example, he was not told that Mr Brendan Smith had spoken directly to Danny Halligan as part of the investigation that morning.

[41] Mr X asked who had complained of his alleged swearing on the bus and was told *we'll come back to that*. However, Mr White did not *come back to that* so Mr X was never told who had made that allegation.

[42] Thirdly, I need to assess whether Independent Liquor gave Mr X a reasonable opportunity to respond to Independent Liquor's concerns before dismissing him. I do not consider that it did so. That is in part because the lack of detail about the allegations, despite Mr X's requests for more details, means that he was not adequately informed about the allegations.

[43] In addition, I accept Mr X's evidence that he was not aware before the meeting that the outcome of the meeting could have been his summary dismissal. If he had been aware of that he may have sought advice before the meeting.

[44] At the start of the meeting Mr White told Mr X that the purpose of the meeting was *to discuss the issues and also hear [X's] response*. However, Mr X was not informed at that stage that an outcome of the meeting could be his summary dismissal. If he had been aware of that he may have requested that the meeting be adjourned so that he could seek advice and representation.

[45] Mr White says that Mr X had told him on the phone the previous evening that he would be bringing his legal representative. Mr X denies ever having intended to bring a lawyer to the meeting. However, he says he told Mr White that the situation felt like a *set-up and if that was the case [I'd] pursue legal options*.

[46] Mr White's evidence was that on the telephone on the Sunday he told Mr X that *the matter may result in termination of his employment. X was invited to have a representative present to assist him at the meeting*.

[47] However, I consider it more likely that Mr X was *not* aware that a possible outcome of the meeting would be his summary dismissal. Without that knowledge I do not consider that he had a reasonable opportunity to respond to the allegations before Independent Liquor made its decision to dismiss him.

[48] Mr X says he was not told that he had an option to bring a representative to the meeting with him. Even if that is not correct, Mr White told Mr X at the beginning of the meeting that purpose of the meeting was to put the allegations to him and to hear from him. He did not say that the purpose of the meeting was also to make a decision on whether or not to dismiss Mr X. A prudent employer would have made Mr X very aware how serious the outcome of the meeting might be for him and would have advised him that he had an opportunity to seek representation, even if it meant adjourning the meeting. That should have been done both prior to the meeting and at

the beginning of the meeting when it was clear Mr X did not intend to have a representative present.

[49] I also have another concern. Mr Hoar's report to Mr White that Mr X had admitted not being able to remember *half or more of the evening* was not put to Mr X for his comment. He was not told that was being taken into account by Independent Liquor in its decision to dismiss him. I consider that failure to tell Mr X about Mr Hoar's report was a failure to put an allegation (that he had admitted his behaviour) to Mr X and a failure to allow him a reasonable opportunity to respond.

[50] Fourthly, did Independent Liquor genuinely consider Mr X's explanations about the allegations before dismissing him? According to the minutes, the explanations made by Mr X about the allegations were in relation to Smokey's behaviour and the allegation of harassing a woman. Mr X then said that he wanted Independent Liquor to speak to couple from the South Island Tavern as they had *been drinking with me on returning to Christchurch*. He apparently gave no explanations about the other two allegations.

[51] I consider that the decision to dismiss Mr X was made by three people; Mr White and the two Mr Smiths. Neither of the Mr Smiths was at the meeting with Mr X and had not heard directly from him. It is not clear to me that during the discussion Mr White had with Mr Clive Smith and Mr Brendan Smith that he conveyed to them exactly what Mr X had said. He did not take his own notes of the 20 minute meeting and did not have Mr Hoar's notes available to him during the phone call. Because of that I do not consider that Independent Liquor, particularly Brendan and Clive Smith, could have genuinely considered Mr X's explanations.

[52] Section 103A(4) means I can take additional procedural issues in to account in considering whether the dismissal was justifiable.

[53] The respondent submits that the process followed by Independent Liquor in deciding whether or not to dismiss Mr X was reasonable as Mr White:

*...as the Applicant's direct manager made the recommendation that the Applicant be terminated as his misbehaviour had been proven to his satisfaction and it constituted serious misconduct in accordance with Company policy.*

*This process is fully in accord with Company policy which provides that, the direct manager of the employee concerned in a disciplinary process must make a recommendation to regarding the disciplinary action to his direct manager and the HR director for their approval to precede with the action he has recommended.*

[54] It is a problem that the decision to dismiss was made by a group of three but Mr X did not have a chance to address two of the decision makers. It is well established that an accused employee must be allowed to face the decision makers. A failure to allow this will render any subsequent dismissal unjust (*Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424). Therefore, the fact that the way the decision to dismiss was made was in accordance with Independent Liquor company policy does not make it procedurally fair because Mr X was not able to face all the decision makers.

[55] I have a further concern about whether all matters that Independent Liquor took in to account in making its decision were disclosed to Mr X.

[56] I note the following in the respondent's submissions about what Mr Brendan Smith had decided before the investigation began:

*[23] Mr Smith formed a preliminary view, given the verbal information provided to him by four responsible senior managers, that the Applicant was on the "balance of probability" guilty of:*

- *The harassment of a customer's wife*
- *The groping of a promotions girl*
- *The use of foul language and verbal abuse of a fellow Company female representative in front of Indian customers*
- *The use of foul language and a refusal to act properly on a bus taking customers and Company managers to the post function venue*

[57] In Mr Brendan Smith's *Investigation notes prepared ...on Monday am 5 December 2011* Mr Smith wrote that Mr Monga had told him that he had been:

*...approached by a Promotions Girl who complained to him that [X] had groped her by grabbing her behind which she asked him to stop without success. Peter immediately spoke to [X] and advised him to*

*stop any such actions [X] treated this as a joke and he continued to talk and joke about it to any customer who would listen.*<sup>4</sup>

[58] The allegation was repeated again in an unsworn statement dated 28 May 2012 by Mr Monga prepared for these proceedings. That allegation was not raised with Mr X prior to his dismissal.

[59] At the investigation meeting Mr Brendan Smith said the groping allegation was not relied on at all in making the decision to dismiss Mr X. However, I am left with a concern that even if that allegation was not directly relied on or at the forefront of his and Mr White's minds it formed part of their view of the evening in question. It was a type of behaviour similar to that in relation to the woman from the South Island tavern. It was a complaint that had been made to Brendan Smith on the same evening. Mr Smith's evidence was that he had told Mr White about that complaint on the Sunday afternoon. I consider that it was highly likely to have coloured their view, even if sub-consciously, of whether or not Mr X's behaviour was so serious as to require dismissal. However, that allegation was never put to Mr X.

[60] Independent Liquor failed to satisfy all four of the tests set out in s.103A(3), whether or not the Mr X's alleged misconduct was substantively proved. It follows that those procedural flaws in the process and the others identified by me mean that Independent Liquor's decision to dismiss Mr X was not one a fair and reasonable employer could have made in all the circumstances. Therefore, the dismissal was unjustified.

### **Procedural matter**

[61] At the end of the investigation meeting it was agreed that the applicant's submissions would be supplied by 24 October 2012 and the respondent's by 26 October 2012. I received the applicant's submissions on 25 October 2012 and the respondent's submissions later on the same day.

[62] On 2 November 2012 Mr van Keulen sent in further submissions from the applicant which he:

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<sup>4</sup> It is unclear whether Clive Smith was aware of the groping allegation before the decision to dismiss was made.

*...considered necessary because of the evidential matters raised by the Respondent's submissions. The reason for the submissions and purpose are evident from the submission but if the Authority requires further explanation please let me know.*

[63] Later on 2 November 2012 Mr Clive Smith responded:

*...these submissions are totally out of order given the directions of the Authority member.*

*In these circumstances I request that the Authority member properly dismiss them or alternatively provide opportunity for further submissions from the respondent.*

[64] Paragraphs 3-5 and paragraph 17 of the respondent's submissions contain statements about Independent Liquor's involvement in discussions with the New Zealand Government working towards Liquor Industry Voluntary Guidelines. They also refer to the fact that the Prime Minister, Mr John Key, was present at the Fight for Life and:

*...in these circumstances having a senior manager, through his behaviour, bringing the Company into disrepute in front of the leader of the Government during those highly delicate negotiations represents the ultimate risk – one which cannot be condoned going forward.*

*The behaviour has resulted in the Company suffering damage to its image as a responsible liquor organisation and certainly did not assist in its lobbying of government members in this liquor reform.*

[65] I note that if the matters relating to the liquor industry reform and the presence of Mr Key at the Fight for Life were factors taken into account by Independent Liquor in its decision to dismiss Mr X disclosing that at this late stage does not assist Independent Liquor in its task of proving the dismissal justified. That is because those matters, apparently seen by Independent Liquor as aggravating factors, were never put to Mr X by his employer and therefore he never had an opportunity to respond. If, indeed, those matters were taken into account they would point to a further breach of the s.103A(3) requirements.

[66] However, in making this determination I have disregarded any attempt by Mr Smith in his submissions to introduce further evidence, such as that quoted above, not



already heard and tested at the investigation meeting. I have also disregarded statements about what Independent Liquor says that Mr X would have known about, for example the Code of Conduct, from Sales Management meetings as no evidence was given on that point at the investigation meeting.

[67] I have not taken into account Mr van Keulen's second submissions.

*Did Independent Liquor breach its duty of good faith to Mr X?*

[68] The applicant invites me to conclude that the dismissal was both procedurally and substantively unjustified and that must also mean that Independent Liquor *has not acted in good faith*. However, I do not find that to be the case. I found Mr White and Mr Brendan Smith, the only two decision makers that gave evidence, to be genuine in their belief that Mr X's behaviour amounted to serious misconduct which justified dismissal. They also genuinely believed that the process of the investigation, the disciplinary meeting and the discussion leading to the decision to dismiss was full and fair. They were mistaken but I cannot conclude that Independent Liquor deliberately failed to act in good faith towards Mr X in a way that was serious and sustained. Therefore, I conclude that Independent Liquor did not breach its duty of good faith to Mr X and so does not need to pay any penalty to him.

### **Remedies**

[69] Because I have decided that Mr X's suspension and dismissal were unjustified I need to consider what remedies are appropriate.

[70] Section 128(2) of the Act means that I must award the lesser of the sum equal to lost remuneration as a result of the unjustified dismissal or 3 months' ordinary time remuneration.

[71] Section 123(1)(b) of the Act provides that I may award Mr X reimbursement for any of the wages or other money lost as a result of his dismissal. Section 128(3) gives the Authority discretion to order an employer to pay an employee lost remuneration for more than the period of 3 months.

[72] Mr X's evidence about his job search attempts, his earnings while at Independent Liquor and his subsequent earnings were not challenged in any way by Independent Liquor.

[73] Mr X says he applied for *at least 250 jobs* and only started a new job on 2 July 2012 as a National Sales Manager.

[74] I am satisfied that Mr X acted sufficiently to mitigate his loss. He now earns \$90,000 per annum. He says that is \$1,250 per month in salary less than he earned in his last eight months at Independent Liquor and he is not eligible for bonus payments.

[75] Mr X's monthly salary in his last eight months at Independent Liquor was \$8,750. He was eligible for bonus and incentive payments. He received an average of \$3,583 per month in bonuses in his last eight months with Independent Liquor.

### **Lost remuneration**

[76] Three months equates to 13 weeks or 91 days. Mr X was paid a month's wages, although the dismissal was a summary one, and so he does not need to be reimbursed for the month between 5 December 2011 and 5 January 2012. Mr X was paid by Independent Liquor for 31 days (6 December 2011 to 5 January 2011) therefore the balance of the period he lost remuneration for was 60 days. At \$8,750 per month Mr X was paid \$287.67 per day. Therefore he is entitled to the lesser lost remuneration of \$17,260.27 under section 128.

### **Lost wages beyond three months**

[77] Mr X says he was unemployed for eight months, although I calculate the period from early December to early July to be a period of seven months only. Mr X lost more remuneration than for a period of three months until he was re-employed on 2 July 2012. Therefore he lost remuneration for a period of 17 weeks over and above the first three months. He lost \$34,326.92 over that period. During that time he was paid \$1,019.82. Therefore, his actual lost remuneration was \$33,307.10. I consider it reasonable that Independent Liquor pay for Mr X's actual lost remuneration for the full period of seven months that he was unemployed after his dismissal.

### **Lost bonuses**

[78] Section 123(c)(ii) of the Act provides that the Authority may award compensation for the loss of any benefit that the employee might reasonably have been expected to obtain if the personal grievance had not arisen. Mr X says in his last eight months at Independent Liquor he received bonuses of an average of \$3,583 per

month. That figure has not been challenged by Independent Liquor. I consider it likely that Mr X would have received equivalent bonuses in the 7 months after his dismissal.

[79] It is reasonable to assess the lost bonuses over a seven-month period using the figures supplied by Mr X as an average for an eight month period in 2011. Therefore, Independent Liquor must pay Mr X \$22, 081.00.

### **Ongoing loss although in new employment**

[80] I accept that in his new employment that Mr X is earning less than he did while at Independent Liquor. However, I decline to exercise my discretion to award him any ongoing reimbursement after 2 July 2012.

### **Compensation**

[81] Under section 123(1)(c)(i) I can award compensation for humiliation, loss of dignity and injury to Mr X's feelings. He says that the dismissal affected his life:

*...in a very disturbing and shocking way. For days and weeks after that it was constantly on my mind. I struggled to sleep and couldn't concentrate on day-to-day activities. ...Looking back I can see that this impacted on my confidence and my enjoyment of life.*

[82] Mr X also says that the dismissal has affected his confidence in the workplace and that he no longer feels able to attend work functions. On a personal level he says his relationship with his partner has suffered and he has struggled emotionally since his dismissal.

[83] I consider that compensation of \$5000.00 is warranted.

### **Contribution**

[84] As part of my consideration of remedies s.124 of the Act requires me to consider the extent to which Mr X's behaviour contributed towards the situation that gave rise to the personal grievance. Independent Liquor did not present any evidence at the investigation meeting from witnesses who had directly witnessed Mr X's behaviour and/or who had complained about his behaviour. Mr X denied all of the allegations made against him. Mr X only gave a substantive explanation about the Smokey allegation. Given the lack of direct evidence about the other alleged

incidents and the fact that the written evidence was not sworn and has not been able to be tested at the investigation meeting I do not make a finding about whether the other incidents happened or not. In all the circumstances, including a paucity of evidence about three of the allegations, I do not find that Mr X contributed to the situation giving rise to his personal grievance in relation to those matters.

[85] I consider it likely that Mr X was intoxicated to a certain extent at the Fight for Life. However, I am less clear than Independent Liquor that Mr X was wholly responsible for controlling Smokey's state of intoxication and related behaviour. At the investigation meeting I heard evidence that Smokey had been involved in earlier incidents of out of control intoxication when in the company of Independent Liquor staff, yet no-one had been disciplined for, for example, the incident in which Smokey vomited outside a restaurant and bar where he had had lunch with Independent Liquor staff. I understand that Smokey is no longer invited to Independent Liquor functions.

[86] Although Smokey was Mr X's guest Mr X was not responsible for how much Smokey drank either before or at the event. I accept Mr X's evidence that Smokey was already *very drunk* when he arrived at the hotel. That, coupled with Mr X's knowledge of Smokey's propensity to over-indulge in alcohol, leads me to consider that Mr X should have been more vigilant about Smokey's behaviour at the Fight for Life. Mr X was working, rather than purely socialising. He did have a responsibility to ensure guests of Independent Liquor did not disrupt or become a nuisance to other invited guests. The evidence was that Smokey was considerably intoxicated and came back to Mr X's table with his shirt untucked and injured in some way as he had blood on him. I consider that Mr X contributed to the situation that gave rise to his personal grievance to an extent by not keeping a tighter control on Smokey and intervening when it was clear Smokey's level of intoxication was excessive. I therefore reduce the remedies by 20%.

### **Costs**

[87] Costs are reserved. The parties are invited to agree on the matter. If they are unable to do so Mr X has 28 days from the date of this determination in which to file and serve a memorandum on the matter. Independent Liquor has 14 days from the

date of receipt of Mr X's memorandum in which to file and serve a memorandum in reply

Christine Hickey  
Member of the Employment Relations Authority