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IN THE EMPLOYMENT COURT
WELLINGTON REGISTRY

IN THE MATTER of an appeal against a decision of the Employment Tribunal

BETWEEN Christopher David Ashton

Appellant

AND the Shoreline Hotel

Respondent

Court: Goddard CJ

Hearing: Christchurch
4 March 1994

Appearances: Mr L A Anderson, Counsel for Appellant
Mr G A Fraser, Counsel for Respondent

Judgment: 12 April 1994

JUDGMENT OF THE CHIEF JUDGE

The appellant, Mr Christopher David Ashton, was for a part of 1992 the manager of Regines Nightclub in the respondent's hotel complex. In that capacity he was also in charge of an adjoining bar known as Zacs bar. On 22 September 1992, following a brief interview, he was dismissed from his employment by Mr R L Addie, the general manager of the respondent. He was dismissed not summarily, but by one month's notice. He was not, however, required or permitted to work out the period of his notice. Nevertheless, he was given a good reference. The respondent

later went so far as to give a certificate to the Department of Social Welfare that the appellant had resigned to pursue other interests. When challenged by an officer of the department, Mr Addie admitted that he had dismissed the appellant but said that this was for misconduct following two earlier written warnings. It is clear that this claim of having given written warnings was as false as the earlier assertion that the appellant had resigned. Mr Addie's statement to the officer contained other exaggerations as well, including some quite shocking allegations of misconduct which it is not now suggested ever took place. The respondent was under a statutory duty to answer all questions from the Department of Social Welfare concerning the appellant in his capacity as an applicant for an unemployment benefit: Social Security Act 1964 s12 (2). The motive for making these particular false statements knowingly could only have been to harm the appellant by giving the Director-General of Social Welfare grounds to decline the appellant a benefit for the first 26 weeks of his unemployment: Social Security Act 1964 s60H(2) and (3). The respondent may well have thought that if financially embarrassed, the appellant might be disabled from pursuing his personal grievance, or it may have been actuated by some antipathy towards the appellant. If that was the respondent's state of mind, the evidence of its witnesses before the Tribunal, especially Mr Addie's, was at risk of being equally deceitful. Armed with knowledge of this history of prevarication, it was in the Tribunal's power to reject the respondent's evidence, and its duty to do so except where that evidence was independently supported by other evidence or accepted by the appellant. Almost every allegation of suggested misconduct put to the appellant in cross-examination was denied by him. The Tribunal found him an honest witness. Yet in areas of conflict, despite contradictions that the Tribunal detected in Mr Addie's evidence, it preferred the respondent's evidence for no reason that the Court can find to be satisfactory. In short, the Tribunal failed to have regard to Mr Addie's history of untruthfulness upon this vital subject-matter in circumstances which called for scrupulous accuracy. I have no hesitation in saying that the Tribunal should not have done so, and the appellant's complaint in this respect is entitled to be upheld.

The Tribunal was disposed also to discount the evidence of the officer of the department, saying that the respondent had not had an opportunity to cross-examine her. It was not open to the Tribunal to say so. The officer's brief was admitted by consent without her being called upon to appear personally to present it. That means that the respondent had had an opportunity to cross-examine her but waived it. It also means that the respondent accepted her evidence as true. I have previously explained the effect of a failure to cross-examine: see *Z v A* [1993] 2 ERNZ 469, 487-9. In the instant case, there was more than a failure to cross-examine: there was a positive and express acceptance of the truth of what the

witness had to say. The Tribunal misdirected itself in its assessment of this important evidence. If it had not done so, it could only have come to a very different view of Mr Addie's credibility.

I return to the narrative. While giving the outside world the false impression that the parting of the ways between the appellant and the respondent had been amicable, Mr Addie left Mr Ashton under no illusions about the true position. He made it clear that he was dismissing the appellant for what he perceived to be serious misconduct. The very next day he complied with the appellant's request to be given reasons in writing for the dismissal. Mr Addie stated that the primary reason for the dismissal was what he called lack of professionalism displayed while the appellant was in attendance at a function in Regines, not in his capacity as an employee of the respondent, but in his capacity as one of its customers. He had in fact hired the nightclub for a private function. After setting out five matters of complaint about the appellant's behaviour on that occasion and one further matter Mr Addie mysteriously concluded:

> *If necessary, further documentation of other incidents can be furnished*

This seems less than satisfactory as part of a response to a request for reasons for the dismissal and reads very much as if written to deter any further questioning of or challenge to the dismissal. Two months later, in forwarding the employer's response to the personal grievance, the respondent did specify some additional incidents. These can be summarised as follows:

1. Failing to prevent staff from resorting to the practice known as tequila laybacks in the sight of customers.
2. The appellant's girlfriend being at the hotel in a state of intoxication.
3. Damage done to the hotel by a visiting rugby team at a time when the appellant was working as duty manager.
4. Just after Mr Addie's arrival at the hotel he discussed with Mr Ashton a situation that had occurred concerning events in Zacs Bar and made it plain to Mr Ashton that this situation was totally unacceptable.

The decision under appeal discloses that on 19 September 1992, when the nightclub would normally be closed, it was hired to the appellant for a private function on the respondent's usual terms of trade for such arrangements. It provided a disc jockey and bar staff, including a duty manager, and the first drink free. Thereafter those attending paid for their drinks and the profit to the respondent on the transaction came from its mark-up on the liquor. Mr Ashton by all accounts had

a good time at the party which was thrown to celebrate his girlfriend's 21st birthday and progressively became drunk. It was alleged that he became abusive, argued with the duty manager, and threatened the employment of the disc jockey. It seems that the party was a theme party and the disc jockey had been asked to play popular music from earlier decades of this century but either failed or refused to do so. It may well be that in this respect the appellant had every right to be dissatisfied with the service for which he and his guests were paying. Later, however, he may have had less justification and more exuberance on his side when he expostulated with the duty manager about the latter's proposal to close the nightclub. The appellant's argument was that people were still enjoying themselves and spending money and that it was not in the company's interests to close. At the end of the celebrations Mr Ashton occupied a room in the hotel. He allowed some friends of his to occupy another. They not only slept over, they overslept. As a result, they failed to check out at the standard time. This upset the house manager and in turn irritated Mr Addie to whom the situation was reported. The rooms have not been paid for. On the other hand, the appellant maintained that while he did not expect to be asked to pay for his room, he fully expected to pay for the room occupied by his friends and would have done so had he received a bill or other request for payment.

It is instructive now to set out the reasons given for dismissal given in the letter of 23 September 1992. These were:

> *The primary reason for dismissal was the lack of professionalism displayed while you were in attendance at a function in Regines, specific examples are as follows:*
>
> 1. *Argumentative with Duty Manager present.*
>
> 2. *Highly intoxicated.*
>
> 3. *Directing staff members and threatening their positions while in a state of intoxication.*
>
> 4. *Checking yourself and your friends into 2 hotel rooms without prior consent of myself or the House Manager.*
>
> 5. *The necessity to phone said rooms by Reception at 11.30am the next morning to request that you and your friends would check-out since check-out time is 10.00am.*
>
> 6. *A conversation was had with yourself and myself 2 weeks prior to this incident outlining concerns that you were treating your work as a party and not a job.*
>
> *If necessary, further documentation of other incidents can be furnished. I trust this will clarify any questions you may have had.*

The Tribunal held the dismissal to be justifiable. It is far from clear whether, in doing so, it took into account only the events listed in the letter of 23 September 1992 or also the earlier incidents. The conclusion that the earlier incidents had a profound influence on the Tribunal's decision seems, however, inescapable. In an early section of its decision the Tribunal states that it considers the justification for the dismissal in respect of the events of 19 September and immediately goes on to say that previous incidents which have caused concern are given only secondary consideration. Later the Tribunal mentions that while it concentrates on the justification in the initial letter setting out the reasons for the dismissal, evidence presented as to previous and wide-ranging problems with Mr Ashton's behaviour and job performance could not be totally ignored. A statement is made that it reflected directly on his character and credibility, apparently in the sense that if the previous events are judged to have taken place they reflect on the appellant's credibility in respect of the central allegations. At page 5 of its decision the Tribunal states:

> *Finally, the employer's response as required by the Regulations expands on the reasons set out in the dismissal letter, but as pointed out above, the dismissal letter indicates that such an expansion was possible. However, the reasons expanded upon are only given secondary weight, and are shown to be unnecessary to the ultimate conclusion of the Tribunal.*

The employer is under a statutory duty to state the reasons for dismissal. This means the true reasons and the whole of the reasons, not just some of them. Since the inquiry is into whether the dismissal was justifiable, it should be apparent to employers that the Tribunal will not be able to concern itself with matters that occurred to the employer later or which, although known, did not weigh with the employer at the time of the dismissal. It is therefore important for the employer, when asked, to state accurately and comprehensively the reasons for the dismissal. This is no imposition upon the employer for it must know why it dismissed the employee. There may nevertheless be occasions on which the true reasons have been misstated as a result of accident or inadvertence. The mistake could be a clerical error in transcribing the handwritten reasons or an accidental failure to include in the letter stating the reasons one of the grounds for dismissal as conveyed orally to the employee at the time. I see no difficulty about the employer correcting an error in its statement within the 14 day statutory period. But the Tribunal should expect in all cases to receive a credible explanation for the original omission. The only explanation that is credible is one that demonstrates:

- that the true reasons for dismissal were other than those stated; and
- how they came to be misstated.

Where the employer seeks to change the reasons for the first time much later and only after formal notice of a personal grievance, it will need to overcome the difficulty of persuading the Tribunal that its original reasons were other than those stated under s38 and of explaining how it came to state those reasons inaccurately. The greater the inaccuracy, the greater the credibility gap. Depending on the circumstances, it may be unfair to allow an employer to introduce new reasons for dismissal at a late stage even if they genuinely existed at the time of dismissal, but sometimes any unfairness can be cured by a generous order for costs, see *Finsec v AMP Society* [1991] 1 ERNZ 281.

It is not to the point that the employer could have relied on other reasons or additional reasons at the time of the dismissal if it did not in fact do so. Even, as the House of Lords explained in *Polkey v Dayton Services Ltd* [1987] IRLR 303, [1988] AC 344, if those other reasons could have justified a dismissal. The inquiry is always solely into what were the reasons in fact on which the dismissal was based and, while in theory the facts of the matter cannot be changed by a later inaccurate statement by the employer about them, the problem in acting on that theory is one of credibility. The safest course is to treat an apparently considered statement of the reasons for the dismissal as expressing the employer's true reasons and any attempt to discard them or add to them later as an unreliable afterthought.

There is every reason to hold the employer to the reasons stated, as otherwise the employer could state some of the reasons only at the time of dismissal and hold back others for use on later occasions. In this case the respondent, in evidence at the Tribunal hearing, went so far as to devote attention to an incident that was nowhere mentioned in either the reasons for dismissal or the response to the personal grievance. There is a risk that an employer, on receiving professional advice that the reasons relied upon were inadequate, might be tempted to supplement or embroider them. To allow reasons for dismissal to become so flexible could encourage perjury. The purpose of s38 is to extract from the employer all the reasons for the dismissal and to tie the employer to those reasons. It is not a compliance with the section to state that other reasons exist in addition to those stated. Those other reasons must be treated as if they did not exist. At best, the subsequent statement of additional reasons tends to show that the reasons originally stated were not the true reasons for dismissal and to undermine the credibility of the employer's position. The Tribunal ought not to have allowed itself to be distracted by evidence of these earlier incidents from considering justification in relation only to the stated reasons for dismissal.

The employer's assertion that it could give additional reasons or instances cannot avail it when it had chosen not to give them at the appropriate time, especially if it had not raised the other matters with the employee at the time of dismissal or investigated them adequately enough to be entitled to act on them. In the present case, the only correct analysis of the position is this, that Mr Addie either did not take these alleged incidents into account in which case they could not be available to the respondent later or he did take them into account but kept from the appellant the fact that he was doing so, in which case the dismissal falls down as being procedurally unfair. It is true that there may be and often are several facts and matters that prompt the dismissal but if they are serious enough to be put into the balance they should be readily capable of being put to the employee for explanation before being relied on even in part or as subsidiary grounds and equally capable of being included expressly in the statement of reasons. Mr Addie chose not to specify the additional alleged incidents and the respondent ought not, in the circumstances, to have been allowed to go into them as matters of justification. They were available, if at all, as evidence of contributory conduct, but only if proved to have taken place. In this respect as well, the appeal is entitled to succeed.

Also relevant to this issue as revealing the Tribunal's approach is the very last paragraph of the decision:

> *In conclusion the Tribunal would add that there are a number of secondary concerns of management which form part of the Tribunal's record of these proceedings. These secondary concerns would in themselves provide grounds for dismissal. The Tribunal refers to Mr Ashton's presence as duty manager, or manager of the nightclub, and inability to control, or to bring in further authorities to control riotous rugby teams, or to disperse patrons and staff involved in sexually inproprietous (sic) scenes at the night club bar. These matters were not formally addressed by Mr Addie who had only recently been appointed executive manager of the hotel. Had Mr Addie not been newly appointed, and had formally addressed these issues, Mr Ashton may not have been attending his girlfriend's 21st birthday party on September 20.*

It is not easy to know what to take out of this passage, particularly the last sentence. I take as an example the reference to *"patrons and staff involved in sexually inproprietous (sic) scenes at the night club bar"*. It was common ground that this was a reference to the incident at Zacs bar. It is something of an exaggeration to refer to this single incident as *"scenes"* and as to there being sexual improprieties involved, it seems reasonably clear that a female patron at around closing time

removed all her clothing. Little else is as transparent. There is no direct evidence about the appellant's complicity, if any, but I note that the only complaint against him upheld in the decision under appeal is that he failed to disperse those involved.

There are two principal difficulties about accepting the validity of the conclusion reached by the Tribunal. The first lies in the Tribunal's assumption that the respondent could have regard to this incident when, beyond receiving a second-hand report of a wild rumour, it had done nothing to investigate it fairly or at all. Mr Addie had no basis on which to form a view as to what had happened on this occasion. If he raised it with the appellant, it was by means of a veiled reference, the exact import of which may not have been clear to the appellant. Even when giving its response to the personal grievance the respondent was vague about the specifics of the occurrence. Unconfirmed rumours can never *"in themselves provide grounds for dismissal"*. The second difficulty lies in the fact that this incident, such as it was, occurred soon after Mr Addie's arrival and was reported to him but he not only decided to do nothing about it in the way of investigation or disciplinary action, but after a few weeks in his position as general manager invited all the employees, including the appellant, to sign a new employment contract, which the appellant duly did. In the absence of any reservation of position as to previous conduct, a precaution taken by the employer in *NZ Amalgamated Engineering IUOW v U-Bix Business Machines Ltd* [1990] 1 NZILR 935,944, the new contract wiped the slate clean. It was no longer open to the respondent from then onwards or to the Tribunal to rely on such conduct. Some of the other incidents relied on may also have preceded the contract which is dated early in September 1992, but it is enough that all of them had been passed over by the respondent without so much as an inquiry into the facts. It was too late to rely on them on 22 September 1992 and far too late in November. In any case the respondent was not entitled at any stage to take disciplinary action on the strength of unconfirmed rumours.

It is well established that an employer who discovers misconduct committed by its employee, yet overlooks that conduct and continues the employee's employment, must be taken to have affirmed the employment and cannot subsequently dismiss the employee in reliance on that conduct: *Horton v McMurtry* (1860) 5 H & N 667; *Phillips v Foxall* (1872) LR Vol VII, 666 (QB); *Federal Supply & Cold Storage Co of South Africa v Angehrn* (1910) 103 LT 152 and more recently and closer to home such cases as *L D & D J Kendall Ltd v Northern Hotel etc IUOW* [1990] 3 NZILR 256, *Thomas v Bournville Furniture Company Ltd* unreported, High Court Auckland, Robertson J, 26 October 1990, CP 2695/88; and *BFS Marketing Ltd v Field* [1992] 2 ERNZ 1105. *Thomas v Bournville Furniture Company Ltd* is an authority in the High Court for the proposition that the employer may be entitled to a modicum of

reasonable time to determine what to do. Of course, what amounts to a reasonable time in a particular case must depend on the facts and circumstances of the case including the extent of the employer's opportunity to acquire knowledge of the misconduct. In *Corry v Clouston & Co Ltd* (1904) 7 GLR 213 (CA) at 244-5 Edwards J said:

> *This was not dismissing the plaintiff upon the occasion, and it does not appear to me that it was competent to the defendant Company to dismiss the plaintiff for this cause when they did. It was incumbent upon the directors of the defendant Company to act promptly after the matter of which they complain came to their knowledge, and they could not treat the contract as subsisting while it suited them to do so, and rescind at their option when it no longer suited them. They could not put the plaintiff upon probation as to that matter against his will;*

This, however, should not be taken too far. Overlooking one act may not amount to more than an election to affirm the contract on the footing that the act in question is isolated and not the beginning of a course of unacceptable conduct. The same thinking applies when an employer commits a breach of a duty owed to an employee and the employee goes on working notwithstanding: the employee's conduct in so doing, especially if under protest, cannot be treated as a licence for the employer to repeat or continue the breach of duty.

Affirmation of the contract in this context has sometimes been spoken of as condonation of the offence giving rise to the right to dismiss. It has been suggested in some other jurisdictions, no doubt by analogy with the concept of condonation in ecclesiastical and matrimonial laws of the past and with the domestic origins of the contract of service in mind, that previous and waived misconduct may be taken into account in determining whether fresh misconduct, possibly of a less serious character, justifies dismissal. There is no warrant for importing this approach into the employment law of New Zealand. Indeed, I would venture to voice my agreement with the observation made by Lord Atkinson in *Federal Supply* at 152 that the term condonation in this context is less than felicitous. Rather, the point is that the employer had two mutually inconsistent courses of action available to it, elected to follow one of them to the exclusion of the other and cannot later resort to that other. If an employer has waived the right to react to misconduct, the instance of misconduct cannot later be revived to be taken into account if further offending occurs. That further incident must in general, and subject to what I have said about a course of conduct, stand on its own merits. That is why condonation is an inappropriate concept for it is almost by definition conditional upon future good behaviour and thus the past wrong behaviour is capable of being revived although forgiven.

Condonation is thus something less than a full forgiveness. This degree of uncertainty is undesirable as a permanent state in any commercial environment. It is particularly unacceptable in the employment environment because it serves to increase further the natural inequality of power as between employer and employee. A point must be reached at which the employee can safely assume that the sword of Damocles is no longer suspended overhead by a frail thread but has been taken down and returned to its sheath. The best and safest course is to speak in terms of election and affirmation and the other concepts relevant to the right to cancel contracts for breach (including anticipatory breach) provided by the Contractual Remedies Act 1979. Where the analysis of the facts depends on assessing the weight of matters of degree, the correct answer can be found by applying to the facts the usual test of what it is open to a fair and reasonable employer to do. Disciplinary action in reliance in whole or in part on the employee's historical misconduct will not ordinarily be reasonably open to an employer who, with knowledge of that misconduct, has chosen to overlook it or not to inquire further into it. An employer can be treated as having made that choice when it has either full knowledge of the misconduct or enough information to alert it to its likely existence and implications and to the consequent need to conduct a fair inquiry into the facts if they are ever safely to be relied upon as a ground for disciplinary action. An employer making such a choice must face the consequences set out in s7(5) of the Contractual Remedies Act 1979:

> *A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.*

In the present case Mr Addie had discussed the earlier incidents of misconduct with the appellant. He could easily have sought more information from him and others. He chose instead to pass the matter over on each occasion, even when pressed by his superior to dispense with the appellant's services. Further, and most importantly, Mr Addie knew of the rumours or suspicions of the appellant's supposed misbehaviour yet, without troubling to look further into these matters, took the significant step of committing the respondent to a new contract with the appellant. Clearly, by this step he had announced a decision to overlook the appellant's conduct and waived reliance on it for the future. He could not later change his mind and dismiss the appellant for, among other things, those earlier misdeeds, real or supposed. Of course, as s7(1) recognises, it is open to the parties to an employment contract to provide for a different regime, including a system of oral and written warnings. So far as concerns the respondent's act in speaking to the appellant early in September 1992 and cautioning him against treating his job as a party, this was not an effective way of indicating to an employee areas for

improvement and, in any case, the situation cannot be seen as having reached the stage by 19 September where it could reasonably be said that the appellant had had fair notice of some specific improvement in performance and an adequate opportunity to attain it, along with such training as might have been necessary. As a disciplinary caution, this conversation does not get off the ground and it is little wonder in the absence of explicit exposition that the appellant saw it as no more than an exhortation.

Because the Tribunal plainly attached considerable weight (however "secondary") to these other reasons and because of the Tribunal's incorrect assessment of credibility, its decision that the dismissal was justifiable cannot stand. On that basis, I do not find it necessary to canvas other aspects of the decision in the same detail in which I might otherwise have done so. However, a few observations need to be made.

It seems to me that there is another difficulty for the respondent arising from the way in which the Tribunal assessed disputed evidence. One witness for the respondent was an employee who was given the appellant's job two days after his dismissal from it. She deposed to fact and rumour concerning the incident in Zacs bar. It would be natural for her evidence to be coloured by feelings of gratitude towards her employer and apprehension for her future in the event of the appellant securing the remedy of reinstatement that he was then seeking (and would still be seeking but for the fact that the respondent has apparently sold its hotel). In acting upon the evidence of this witness, very great care and circumspection was required particularly where it was in conflict with the appellant's evidence and not separately supported. There is nothing in the decision to indicate that this evidence was approached with the necessary reservations about its reliability.

Possibly the strongest plank in the employer's case was the allegation that, when the disc jockey did not play the music that was expected of him, the appellant not only complained to him about it but went so far as to threaten, in his capacity as manager, to have him dismissed. This was denied by the appellant but I am putting the employer's case at its strongest and assuming, for the sake of argument, that some such threat was made by the appellant otherwise than as a dissatisfied customer saying that he would complain to management about the disc jockey's service. Putting the employer's case at its strongest in this way would show a significant misuse of power by the appellant. Now I ask myself, was the Tribunal entitled to view the case in this light? I do not think so. It is a most unsatisfactory feature that the disc jockey was not called to give evidence before the Tribunal, nor was his absence explained. That raises at once the suspicion that the disc jockey

was not prepared to confirm his original complaint to Mr Addie. The appellant in his evidence denied having threatened the disc jockey with loss of his employment and the Tribunal has not dealt satisfactorily with the unexplained failure to call the disc jockey or with the reasons for rejecting the appellant's uncontradicted denial.

The case was argued before the Tribunal, and indeed on appeal, as a contest between the competing claims of the employee's right to do as he or she pleases in his or her spare time and the employer's right to exercise some measure of control over the employee's conduct which may render that employee unfit for his or her employment. I do not think, however, that this is a case that centres upon that conflict. The features of the case that strike me are that the night club was hired to the appellant on the same terms on which any member of the public could have had it. It was hired to him for the purpose of his being convivial with his friends and acquaintances there. He was to achieve that conviviality by buying stimulants from the respondent which, it will be recalled, provided the first drink free and sold subsequent drinks at a profit. The respondent could not be heard to complain of the appellant becoming intoxicated, even "highly" so, at this time and in these circumstances. The respondent, of course, relied on other conduct as well but it relied also on intoxication as a separate reason for dismissal. The classic authority on drunkenness as a ground for dismissal is the judgment of the Privy Council in *Clouston and Co Ltd v Corry* (1905) NZPCC 336, at 341:

> *Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly, when the alleged misconduct consists of drunkenness, there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employers' business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts - and is a question of fact.*

That statement is as true today as it was when it was written almost 90 years ago. The language used is apt to cover the circumstances of the present case. Their Lordships drew a distinction between an isolated festive occasion such as took

place here and habitual intoxication. There are many states in between. There is some evidence in the present case of an occasion of suspected alcohol abuse falling short of insobriety during working hours but that is a quite different thing from the present. The evidence on this topic was not developed sufficiently to enable reliance to be placed upon it and no consideration was given to the responsibility that the employer might be under to protect persons like the appellant from the occupational hazard of socialisation with patrons, a measure of which was apparently expected of members of the management team. It is no solution to fall back upon some kind of vague duty of professionalism espoused by Mr Addie when exhorting his junior managers. He was perfectly entitled to urge them on to higher standards of what he regarded as professionalism, just as he was entitled to make use, as he did, of some rather idealistic verses written by Robert Browning for the same purpose, but to use this material in motivating staff is one thing and to say that it constituted thereafter an implied term of the employment contract is something altogether different. It is noteworthy that neither the employment contract nor the respondent's detailed house rules go so far. In my view it is unduly censorious to imply into the employment contract of a junior or middle manager of a business unit in the hospitality industry some kind of duty to behave in a way that is (in some person's subjective view) becoming to that position and to go from there to the corollary that conduct inconsistent with that standard is therefore unbecoming the particular position or occupation and thus a ground for dismissal. Many qualities are desirable in an employee especially at management level and their lack or absence deplorable. That is not to say however that all shortcomings can be visited with the ultimate sanction of dismissal. It depends, as the extract from the Privy Council judgment shows, on the impact of those shortcomings on the employee's ability to discharge his or her duties.

The suggestion in the Tribunal's decision is that the appellant was unfit to continue in his position because he behaved in a disorderly way towards his fellow employees, the duty manager, and the disc jockey. I would have thought that his behaviour, if established, may well have merited a rebuke of some kind, even a formal reprimand, but I cannot see how a dismissal could have been contemplated unless in conjunction with reliance on other events which it was not open to the employer to rely upon. One of these events calls for some mention because, as in the case of the streaker, the appellant was being held responsible for the conduct of others and for failing to prevent or control it rather than being called to account for any sins of personal commission. It seems that a visiting provincial representative rugby team celebrated victory or endeavoured to drown the memories of defeat in the hotel on a day on which the appellant was on duty as manager. In the process, they caused quite considerable damage, some of which was visible to and

apparently seen by the appellant and some of which was committed in the relative privacy of the rooms occupied by the team and may not have come to the appellant's notice until later. The only blame overtly attributed to the appellant in the decision was that he was at fault in failing to summon Mr Addie and the police. However, it is clear from Mr Addie's evidence that he harboured a suspicion, never substantiated, that the appellant was not present when he should have been, although this was not put to the appellant at the time or later when dismissal was in contemplation. It seems scarcely fair that the appellant's job should be lost even partly because he felt helpless to stem the tide of rugby players so drunk as to be out of control.

As it happens, the matter was not followed up and could not later be relied upon to support the dismissal, the contract having been effectively affirmed by the respondent, especially by the signing of the new employment contract .

Even if all these objections are put to one side, it is difficult to see how the conclusion was reached that the appellant's dismissal was justifiable. In *Halson v Kingsgate Hotel Corp* [1991] 3 ERNZ 906, the same Tribunal member reached the opposite conclusion in not dissimilar circumstances. It would have been helpful if the Tribunal had explained how, in its view, this case differed from *Halson.* Particularly apposite is the condemnation by the Tribunal in that case of an:

> *attitude carried into the enquiry by management ....encumbered by the assumption that its probable outcome would be dismissal.*

So also here, on Mr Addie's own admission, as will be seen. The Tribunal in *Halson* went on to say:

> *While management may never be able to achieve a lack of prejudice which characterises a Court of Law, nevertheless the enquiry into dismissal needs an actual possibility of alternative outcomes, rather than a highly improbable potential which borders on the theoretical.*

I cannot think of any way in which this fundamental point can be put better or more clearly. It is most germane to the present case. Mr Addie, in his brief of evidence, paragraph 23 said:

> *That day Chris Ashton arrived I said that I wanted to see him in my office and that I needed to talk to him about what had happened last night. I said to him that he would need a really good explanation otherwise I would have to let him go.*

At that point, he was asked by his counsel to supplement this statement. The following exchange is recorded at p65 of the transcript:

> *Now, where did you discuss that with Chris? ... Walking through the door of my office. Bringing Chris into the office. I said "You'd better have a good reason for what you did or you're going to be done."*

There is another aspect to this case. There was some little evidence that under its previous ownership the hotel had allowed lax practices to develop which Mr Addie wanted to see discontinued and, generally, a higher level of performance attained. Mr Addie was, it goes almost without saying, perfectly within his rights to ask for an improvement in standards of performance and service. For its part, the respondent was under a responsibility to define the level of the new standards, to provide training directed towards their attainment, and to allow employees a reasonably sufficient period of time in which to learn to deliver the enhanced service. It is not clear to me that such a period of time had elapsed by the time of the appellant's dismissal. However, I have decided this case not on that basis but on the footing that the Tribunal was not entitled to conclude that the respondent had discharged the burden of justifying the dismissal, either substantively or procedurally.

The appellant's appeal must be allowed. His counsel thought that the Court could and should deal with the case finally but, as I indicated at the hearing, I was unlikely to do so unless encouraged by both parties, and that kind of support for that process was not forthcoming from the respondent. Further reflection has not altered my view. Indeed, I am reinforced in it by the consideration that I do not know what remedies the Tribunal would have awarded if it had found the personal grievance made out, as it should have.

Accordingly, the appeal will be determined in this way. The Tribunal's decision that the dismissal was justified is set aside. It was not proved to be justifiable substantively and it was, in any event, seriously defective procedurally with the result that consideration of any possible substantive justification hardly arises. If a fair procedure had been followed, the respondent may not have reached a conclusion that grounds for dismissal were furnished by recent events or it may have decided not to dismiss although considering on reasonable grounds that it was entitled to do so. Little purpose is served by speculating about what the employer could have done following a fair inquiry when no such inquiry has taken place, and it is not possible to say what it would have turned up if it had and what the employer would have then done. Little or no weight can be attached to a later assertion by the employer that it would have dismissed in any event, because that merely confirms an

original unfair predetermination, since the fair inquiry may have demonstrated that there was no substance to any allegation against the employee. How can an employer credibly maintain that this result was not possible, no matter how fair or thorough the inquiry, when such an inquiry has not taken place? It is appropriate once again to recall the apt words of Megarry J in *John v Rees* [1970] Ch 345, at 402 and cited in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35, at 45:

> *It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.*

The defects in procedure in this case consisted of the announced predisposition to dismiss, earlier referred, to accompanied by a failure to put to the appellant specific allegations or to give him any real opportunity to answer them.

There was a general failure to carry out, otherwise than in a perfunctory or mechanical way, a genuine inquiry. By analogy with *FARSA v Air NZ Ltd (No 3)* [1991] 2 ERNZ 835, at 847, the Tribunal needed only to ask itself:

1. Was the procedure followed by Mr Addie a genuine inquiry into suspected misconduct or was he merely going through formalities?

2. Did he approach the matter with an open mind receptive to reasonable explanation or with a closed mind intent only on dismissing the appellant?

3. Did he honestly form an opinion on material sufficient to sustain it and which had been disclosed to the appellant in advance ?

The only conclusion that is reasonably available on the facts of this case is that no conscientious attempt was made by the respondent to carry out a fair and thorough investigation. No sufficient time was allowed for it nor was the appellant given any but a nominal opportunity to weigh up the material against him and refute it if he could. That is quite evident from Mr Addie's evidence-in-chief and even without having reference to his cross-examination or to the appellant's evidence to the contrary.

In addition to setting aside the Tribunal's decision on justification and substituting for it a decision to the contrary effect, the Court directs the Tribunal to reconsider the case in relation to remedies. By way of explanation I should make it clear that in approving the Tribunal's decision on justification in *Halson* I should not be taken as approving of it in its entirety. I take the precaution of saying this because, as I have already observed, it is not permissible for the Tribunal to say that but for the procedural irregularities the dismissal would have been justifiable.

The Tribunal is directed to address each of the remedies provided by the statute, that is to say, reinstatement, reimbursement of remuneration lost, and compensation, in each case in accordance with the principles already laid down by the Court.

I will now give specific directions in relation to each of these matters.

Reinstatement

No valid reason against reinstatement appears to have been advanced at the hearing before the Tribunal unless under the heading of contributory conduct with which I will deal separately. It does not escape me that the remedy of reinstatement in the Employment Tribunal has become something of an endangered species. To give an indication, statistics that were taken out for me at some stage late last year showed that reinstatements down to that time had been ordered by the Tribunal in only 11 out of some 250 successful cases of personal grievance. This can be compared with 64 reinstatement orders being made by the Labour Court out of 134 successful personal grievances during the life of that Court. These were of course additional to reinstatement orders made by grievance committees in cases that were not later referred to the Court. The Tribunal has a discretion to order reinstatement and that discretion, like every other discretion, should be exercised judicially. The important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish. That would be a proper exercise of a discretion conferred

on the Tribunal for the benefit of employees unless there are features in the case or indications pointing in a contrary direction that outweigh the employee's right to have his or her job back. Factors that produce that result ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ the employee whom, it will be recalled, it should never have dismissed in the first place. Such an assertion, if anything, aggravates the injury and renders reinstatement an even more compelling imperative. That is so notwithstanding the alteration in emphasis on reinstatement in the current statute. While each case must be determined on its own facts, the statistics given above indicate that the Tribunal is not mindful to an adequate degree that it is called upon to be the impartial referee in a playing field dominated by the goal of job protection.

That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals. Delays in the disposal of the personal grievance do not constitute a good reason for refusing reinstatement if the employer has had notice from an early stage that reinstatement is sought.

In the present case counsel for the respondent announced at the hearing of the appeal that the respondent had sold its hotel and that therefore reinstatement was now out of the question. Counsel was unable to say whether the respondent owns any other hotels. The appellant and his counsel were informed of this development the same morning and were not in a position to contradict this claim. The Tribunal can go into the facts of the matter. It will no doubt be satisfied by evidence that the hotel has in fact been sold. If that is the case, then it will be true that it is no longer possible to order reinstatement to the employee's former position. However, that is not an end of the matter because s40(1)(b) provides in the alternative for the placement of the employee in a position no less advantageous to the employee. This involves an inquiry into the question whether the respondent still conducts any establishments in which the appellant could be so placed. In the event that there are none, the inability to reinstate is a circumstance that goes to the level of the appellant's loss. If however, such a placement is possible, and there are no indications against it, it should ordinarily happen and, if it does, that would mitigate the loss. All this is subject to the presence or absence of contributory conduct to which I will return.

Reimbursement of wages lost

The Tribunal has to ask itself the question, what wages has the employee lost as a result of the grievance? That includes not only basic salary but the commission on earnings to which some reference was apparently made in evidence. It should be a simple matter to ascertain the duration and extent of the appellant's loss attributable to the grievance. If it exceeds three months' pay then, subject to contributory conduct, the Tribunal has to consider judicially whether and how to exercise the discretion under s41(2). The Tribunal should in general be guided by the principle that compensation means full compensation and reimbursement means full reimbursement.

Compensation

The Tribunal should consider under this heading the effect on the appellant's feelings of having been dismissed unjustifiably in the peremptory way he was and all that attended his dismissal, including the lies told by the respondent to the Department of Social Welfare out of a desire, which was realised up to a point, to delay and frustrate the appellant in securing an unemployment benefit. In addition to the items specifically mentioned in the statute, the Tribunal is bound to have regard to the fact that the appellant was entitled not to be dismissed unjustifiably but has been, and is entitled on that account to be compensated for the loss of his position.

Contributory conduct

Under both s40(2) and s41(3) the Tribunal is required in slightly different language to take into account the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance.

If it reaches a decision favourable to the employer on that issue, the Tribunal is then required to reduce the remedies that would otherwise have been awarded or the reimbursement of remuneration lost, as the case may be. For the purposes of this case, the first point for the Tribunal to note is that there must be a causative relationship between the employee's actions and the situation that gave rise to the personal grievance. In the present case, the situation that gave rise to the personal grievance can, in theory, be said to be made up of the dismissal, the events of 19 September 1992, and such earlier events as actually occurred and had not been passed over and were operating on the respondent's mind at the time of the dismissal. The Tribunal is obviously in some difficulty in coming to a conclusion that events that were not present to the employer's mind can be said to have contributed

towards the situation that gave rise to the personal grievance. In any case, the Tribunal has to be satisfied that the events took place, a difficult matter when they were not followed up close to the time of their alleged occurrence, and that there was some culpability in relation to them on the appellant's part. There is, for example, no sufficient direct evidence of that in relation to the incident at Zacs bar.

The incident referred to for the first time in evidence before the Tribunal consisting of the allegations that the appellant was sitting in a bar watching a game of football on television instead of working is too remote, as well as too trivial, to be taken into account. It was not mentioned in the letter stating the reasons for dismissal nor in the formal response to the personal grievance and should not be treated as a contributing factor. It is a matter for the Tribunal, which saw and heard the witness, to assess the situation and it should be guided in doing so by the principles laid down in the several recent cases decided by this Court involving contributory conduct and with which I expect the Tribunal is fully conversant. The Tribunal, in applying its common sense in a practical way to the facts of this case, will no doubt not fail to notice:

1. That the appellant did nothing to contribute to the respondent's failure to follow a fair procedure.
2. That in taking rooms in the hotel without making arrangements through the usual channels the appellant was, to some slight degree, not as careful of his own position as he might and should have been.
3. That otherwise the appellant was present in the hotel on that occasion as a customer and not as an employee.
4. That there is no acceptable evidence that the appellant threatened to have the disc jockey dismissed and the appellant denies having done so.
5. That disagreeing with the duty manager in the hearing of others would not have been a grave lapse even if the appellant had been on duty and was no lapse at all since he was not.
6. That it is unlikely that events that were not enumerated in the contemporaneous reasons for dismissal were real contributory factors, especially if they antedated the new contract - still more unlikely is the proposition that the employer was influenced by any event that was not even mentioned in the later response to the personal grievance, but came out for the first time at the hearing.
7. That the occasion on which the appellant was warned (if he was) not to treat his job as a party is not logically relevant to, or particularly helpful in, assessing the quality of his conduct when at a party and not on the job.
8. That disciplinary action under an employment contract is available only in respect of conduct that has a vital impact on the employee's performance of his or her

duties or upon the employee's ability to perform them. Conduct not having any bearing on the employee's performance cannot be treated as culpable. A reasonable degree of tolerance can be expected. Williams J in *Corry v Clouston* in the Court of Appeal at 232 of the report expected it of a jury in 1904. It is difficult to find culpability in the appellant's conduct of a kind which it could justly be said that he is indeed being deprived of his livelihood.

Further Hearing

The case should be accorded a degree of urgency by the Tribunal. Regard should be had for this purpose to the date of its original reference to the Tribunal and not to the date of the determination of this appeal or any later date. I understand that this is the standard practice of the Tribunal and articulate it only so that the parties will realise that a sense of urgency may be required to be demonstrated by them.

Costs

The Tribunal has a discretion to award the applicant the costs of the hearings before the Tribunal. The Tribunal has an established jurisprudence that properly follows the Court's practice and this is appropriate for the present case.

That concludes my directions to the Tribunal. Finally, there is the question of costs in this Court. The appellant having succeeded is entitled to an award of costs unless there are any indications to the contrary. The award of costs should also take account of and make provision for the fact that the appellant's counsel had to come from Dunedin to Christchurch. In case there are any special features either as to liability or amount of which I am not aware, I will reserve the question of costs for written submissions. The appellant's submissions are to be served on counsel for the respondent who is then to have 14 days in which to reply. When both sets of submissions have been filed I will deal with the question of costs on the papers.

I have come with some reluctance to the foregoing conclusions and only after careful consideration of all the evidence. I have weighed in the balance the factors that the Tribunal had the advantage that the Court has not had of having the witnesses before it, that the task of deciding personal grievances, including decisions on the credibility of witnesses, has been entrusted by law to the Tribunal, that it is in the public interest that there should be a speedy and inexpensive resolution of employment disputes, and that the Tribunal member who decided this case is one of very considerable experience in this field. I have therefore travelled

outside the decision into the evidence for the purpose of seeing whether there can be found any unexpressed reasons that might reasonably justify it. If anything, I have found the contrary to be the case. Finally, I want to make it plain that I have not formed an impression of what are the appropriate remedies, or even what the upper or lower limits should be. Nothing of that kind should be taken from what I have said.