

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 182
5371618

BETWEEN ETIMOA TALU FIFITA (aka
EDDIE BLOOMFIELD)
Applicant
A N D DUNEDIN CASINOS LIMITED
Respondent

Member of Authority: M B Loftus
Representatives: Len Andersen, Counsel for Applicant
Diana Hudson, Counsel for Respondent
Investigation Meeting: 8 and 9 August 2012 at Dunedin
Submissions Received: At the investigation meeting
Date of Determination: 27 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Etimoa Fifita (also known as Eddie Bloomfield), claims he was unjustifiably dismissed from his employment with the respondent, Dunedin Casinos Limited (the Casino) on 18 October 2011.

[2] The Casino accepts it dismissed Mr Fifita but claims it was justified. It contends Mr Fifita was guilty of a serious breach of policies and performance standards. It says the breach destroyed the trust and confidence required for the maintenance of an ongoing employment relationship and claims to have conducted a full and fair investigation.

Citation of the respondent

[3] The statement of problem identified the respondent as Dunedin Casinos Management Limited. Mr Fifita's individual employment agreement identified the

employer as Dunedin Casinos Limited. This was raised with the parties who agree the employer was Dunedin Casinos Limited and the citation be amended accordingly.

Background

[4] Mr Fifita was employed as a security officer at the Casino. He had been in the role for approximately ten years.

[5] At 11.08 on the morning of 11 October 2011 a plastic packet fell from the clothing of an employee of the Casino as he was moving about the premises. It contained cannabis.

[6] The bag was seen on the ground by another employee approximately twenty minutes later. She advised Mr Fifita, who retrieved it and returned to the staff entry office he was then working from and to which lost property was normally taken. On entering he sniffed the package and put it in his pocket.

[7] According to Mr Warren Smith, a security and surveillance shift manager:

One responsibility of the security department is to maintain a lost and found property system to ensure found property is returned to the rightful owner (where at all possible) or disposed of in accordance with the policy. This system is fully documented in the Dunedin Casino security procedures, section 7 - lost and found property... Found property is received by the staff entry officer and placed on the table in the staff entry where it is within view of the security camera. The staff entry officer must bag and label all found property. The find is logged in the found property register, and the relevant entry number from the book is put on the label. Each register entry must include a description of the property, details about the finder, the time/date/location of find, the identity of the receiving staff entry officer, etc. The staff entry officer notifies surveillance of a find so that surveillance can try and identify who the property belongs to.

[8] In the absence of a staff entry officer, a security officer occupies the staff entry office. That was the function Mr Fifita was performing at the time of these events.

[9] About four minutes later Mr Fifita telephoned the surveillance officer on duty. When questioned by management the surveillance officer advised he couldn't remember the call verbatim but stated Mr Fifita had told him someone had found a bag which had *green* or *weed* in it. The surveillance officer said that while Eddie was hard to understand, he *got the message*. When asked whether Mr Fifita was eluding to

drugs, the answer was yes – he said you can see who it was – I said yes and checked the footage and saw who dropped it.

[10] Mr Fifita says:

It was green and looked like rubbish. It did not occur to me that it might be drugs. I telephoned the Swift surveillance officer ... and showed him the item found by placing it on the desk so he could see it with the camera. I asked him what he wanted me to do with it and that he should look up to see who had dropped it. I was curious as to what was in the packet and looked at it and sniffed it but I did not know what it was. I did not ever form the opinion that the substance was drugs and I had never seen cannabis and would not know what it looks like.

[11] It should be noted security cameras recorded what Mr Fifita describes as his placing the package on the desk so the surveillance officer could view it. The kindest thing to say is the act was fleeting.

[12] Mr Fifita goes on to say the surveillance officer called him back about half an hour later and advised the identity of the employee who had dropped the package. Mr Fifita's written brief says:

I said oh shit. I asked him what he wanted me to do. He said it was rubbish and to destroy it. I told him I was intending to go to the toilet and I would chuck it out then. He said I should do that.

[13] When questioned during the employers investigation the surveillance officer's recollection of the conversation is that:

He called Eddie and told him it was someone we knew. He asked me who it was and I told him and he swore. I said get rid of it or I may have said, can you get rid of it – can't remember exactly.

[14] The surveillance officer went on to accept Mr Fifita may have asked what do you want me to do but he couldn't remember the question. He is adamant he said to get rid of it but there was no discussion about how.

[15] Oral evidence, as it came out during the investigation meeting, was slightly different. Mr Fifita says that having been told to get rid of the material by the surveillance officer the two had a third and subsequent telephone conversation. Mr Fifita says he advised the surveillance officer he was about to go to the toilet and

questioned whether he should flush the contents down it. He says the surveillance officer agreed with that course of action.

[16] Mr Fifita went to the toilet at midday. He was there three and a half minutes. He says:

I opened the plastic bag by ripping it and flushed all its contents down the toilet. I threw half the small empty plastic bag that had contained the substance into the rubbish tin in the toilets on my way out. When I got back to the staff entry I found I still had half of the empty plastic bag still in my pocket so I threw it out of the open window. There was nothing in it at that time.

[17] And there the matter may have rested had it not been for the fact the person who initially saw the package had told Mr Geoffrey Purdon (the Casino Security/Surveillance and Host Responsibility Manager) of the discovery and that she believed the package contained cannabis. Mr Purdon immediately went to the staff entry office but Mr Fifita was not there. Nor was there any evidence of any property having been found. Mr Purdon then went and spoke with Mr Smith who was, at the time, Mr Fifita's direct manager. Mr Purdon asked Mr Smith whether he had been approached about the package. The answer was no. Mr Purdon found Mr Fifita at 12.17. He says:

I asked him if he had been handed a package today. He replied that Pam had told him about it, he had rung surveillance and he was subsequently told to go and flush it down the toilet. I asked him if he believed it was cannabis and he replied "I think it is hash". I then went straight to the surveillance office in order to ascertain whether surveillance had in fact told him to do this. The answer was yes with the surveillance officer explaining that he had done so as he believed the packaged contained drugs and that he had identified the person whom had dropped it as a friend.

[18] The matter was immediately escalated to the general manager, Ms Karen Williams. The security footage was viewed and the surveillance officer's identification of who had dropped the package confirmed. That person was immediately spoken to and he was followed by Mr Fifita. The meeting, which occurred in Ms William's office, was attended by her, Mr Fifita, Mr Smith and Mr Purdon. Mr Purdon says:

I immediately told him of the reason for the meeting and that we wanted to get his version as to what had occurred with the package. He said that Pam had found a packet of "something". He stated that

he had picked it up and taken it to staff entry. He added that he believed it was "herbs or something like that". He said that he had rung surveillance and they told him to destroy it. He added that he took it up to the men's toilet and then flushed it down the first cubicle. I then asked him what he had first said to me when I spoke to him. He stated that he mentioned that it was "herbs or something like that". I told him that he had told me he believed it to be hash. He stated that I was wrong. I then advised Eddie that he was to be suspended on full pay.

[19] Mr Fifita essentially agrees with that evidence but he uses discussion about the meeting to reiterate his claim he never suggested to Mr Purdon he thought the package contained hash.

[20] A meeting with the surveillance officer followed, after which Mr Smith and Mr Purdon went to the toilet. They searched a rubbish bin therein and located a ripped plastic bag. Mr Purdon, who was once a police officer, smelt it and states he detected a whiff of cannabis. Mr Smith continued to search the rubbish bin and a short time later found some green material. That material was secured and subsequently forwarded to the police who confirmed it was cannabis.

[21] That evening Mr Fifita was sent a letter confirming his suspension pending Pending an investigation into an alleged serious incident where we believe you may have destroyed drugs at the instruction of a fellow employee. The letter goes on to refer Mr Fifita to the Code of Conduct, the fact his actions could be considered serious misconduct and advised of a meeting to discuss the matter further the following day. Mr Fifita subsequently sought an adjournment whilst he obtained legal advice and the meeting occurred on the 13th.

[22] In the meantime, the surveillance officer was spoken to. He immediately tendered a resignation which was accepted and he was subsequently given a reference by Mr Purdon.

[23] The meeting of 13 October was attended by Mr Fifita, Ms Williams and Mr Smith along with another employee who acted as note-taker. Mr Fifita stated he had picked up the package, phoned surveillance and told the officer *it looks like rubbish*. He said the surveillance officer called back twenty minutes to half an hour later and said:

Eddie get rid of it – it's rubbish. I said I'll do that. I tipped it out the window (ripped open packet) and put the packet in my pocket. I went

to the toilet and flushed it down the toilet. Went back to staff entry and chucked plastic bag out of the window (that was still in my pocket). Geoff asked me where it was – I flushed it in the toilet. I said to Geoff it was green or herbs. I didn't think anything of it.

[24] Mr Fifita was asked whether he had seen or spoken to either the surveillance officer or the person who had dropped the package after these events. The answer was no.

[25] The meeting was followed by a further letter entitled “Invite to formal disciplinary meeting”. It opens by advising:

After a thorough investigation, we believe you broke company protocol by colluding with the surveillance officer to destroy drugs brought onto the Dunedin Casino site by another employee. As a member of the security team, it is imperative that your integrity and that of Dunedin Casino is unquestionable. Please refer to the following Code of Conduct which outlines behaviour which could be considered to be serious misconduct:

Such other conduct at work or away from work which is destructive to the relationship or trust in confidence between the employer and the employee.

[26] The letter then goes on to advise a disciplinary meeting would occur on Monday 17 October. The Casino would be represented by Ms Williams, Mr Smith and a note-taker would be in attendance. It goes on to give a brief description of the process that would be followed and to suggest that Mr Fifita obtain representation.

[27] The meeting occurred, as scheduled, on 17 October. Mr Fifita was accompanied by counsel.

[28] The meeting was followed by a letter the following day, 18 October. Contained therein is advise that:

In today's meeting you admitted that anything you previously found you believed to be rubbish was disposed of in a rubbish bin. Therefore when you mentioned you tried to flush the packet down the toilet, this strongly leads us to believe you did not follow procedures for lost and found property that you clearly knew what you were disposing of was not “rubbish” but cannabis. You also commented that you had disposed of the packet out of a window, although you were constantly under CCTV footage. In a normal situation where you were disposing of “rubbish” one would not normally dispose of it by throwing it out a window. This again leads us to believe that you knew it was cannabis. You had the opportunity to change your version of events when we advised you that we had full coverage of your actions but you did not. It is critical that employment

relationships are built on trust and confidence, and at this point we no longer have this trust and confidence in you to conduct yourself in a way which is professionally acceptable. Eddie, we have lost faith that you are able to carry out your duties as security officer with the honesty and integrity we believe is essential to this role. After a thorough investigation and considering your response, we therefore believe you broke company protocol by colluding with a surveillance officer to destroy drugs brought into Dunedin Casino site by another employee. We have no other choice to terminate your employment, effective 18 October 2011.

[29] Mr Fifita subsequently challenged the dismissal. In his statement of problem he claims he did not get a fair hearing for five reasons. They are:

1. *I am aware of comments being made that some of the Casino management were not happy with the public image conveyed by having Islanders working in security;*
2. *Neither the person who brought the substance onto the premises nor the person who gave me the direction to destroy it were dismissed;*
3. *The allegation I acted in collusion which formed the basis of my dismissal was never put to me so I did not have an opportunity to comment and, in any event, the surveillance established there was no collusion but I acted on instructions;*
4. *In a letter dated 25 November 2011 it was wrongly claimed that there were three previous serious disciplinary matters involving me which is not true and I was never asked about that; and*
5. *Management did not like my questioning some activities at the Casino and the Head of Security, Judith Purdon told me to “go away” when I questioned a fundraising activity being held for the benefit of a staff member contrary to the rules in the Casino handbook.*

Determination

[30] As already said, the Casino accepts it dismissed Mr Fifita. That means it also accepts it is required to justify the dismissal.

[31] The letter advising dismissal emphasises various inconsistencies in Mr Fifita’s explanations which led the Casino to conclude he knew he was disposing of cannabis despite his denials. This had, in turn, led to a total loss of trust and confidence which, in the Casino’s view, justified dismissal.

[32] Mr Fifita originally gave five reasons why he thought his dismissal unjustified (29 above). That changed as the investigation progressed with the suggestion of a racist motive not being pursued in submission – the evidence simply did not support the claim. Similarly the argument regarding his history changed as it became clear there had been three previous incidents and two of them had resulted in warnings.

The claim changed to one of having taken account of Mr Fafita's history but not putting that to him. Finally the claim he had annoyed management by questioning issues was also dropped. It involved one event which was adequately explained by the Casino and the claim was not pursued in submissions.

[33] Now the thrust of Mr Fifita's argument is the Casino could not have reached the conclusion it did as it did not put crucial accusations to him; the key accusation was 'collusion' and that could not be proven; the outcome was preordained (predetermined) and there was disparity of treatment given the Casino allowed both the surveillance officer and the employee who had originally brought the drugs onto the premises to resign.

[34] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[35] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[36] I have considered the issue of resources. This is a significant employer with access to considerable resources, including external advice. It should be expected to get things right.

[37] That leads to a consideration of 35 (b) to (d) above. In essence the subsections summarise that which has long been required – an employer is required to put issues in its mind, allow an explanation and consider them.

[38] One of Mr Fifita's key complaints is significant issues were never put. With that I have to agree, though only because the Casino's witnesses were refreshingly honest. Underpinning the Casino's decision to dismiss was a conclusion Mr Fifita knew he was handling cannabis but, when answering questions, Mr Smith conceded the accusation was never put. Similarly Mr Smith conceded that a key factor was that there was doubt about the honesty with which Mr Fifita has answered questions. That influenced the outcome but was not directly discussed. There were other examples, with all of the Casinos witnesses conceding deficiencies when asked to specifically identify when a specific allegation was put.

[39] If for no other reason these answers must render the dismissal unjustified. If key questions were not put, as has been conceded by the Casino's witnesses, answers could not have been proffered, let alone considered. The requirements of s.103A(3)(b) to (d) could not have been met.

[40] There is then the argument about the definition of 'collusion'. The New Zealand Oxford dictionary defines collusion as a *secret understating*. That is somewhat more holistic than the definition Mr Andersen is asking me to apply and which would require something amounting to a considered conspiracy. When I consider answers Mr Fifita gave during the investigation with those of the surveillance officer (albeit reported second hand by the respondent), I consider the Casino could conclude the two conspired as alleged.

[41] There is also the accusation of predetermination. This revolves around a convoluted argument Mr Fifita's real failure was not as alleged. It was not a failure to adhere to the lost property procedure as is said to underpin the decision to dismiss, but a failure to report a significant drug related breach which requires a different response. The Casino's reply is (and this is a cruel summation) 'who cares – we've got you either way as you followed neither process'. That approach is, I suspect, correct but it does lead to a conclusion there is a substantive base to the allegation of predetermination. Given answers given by the Casino's witnesses I conclude answers Mr Fifita gave when first questioned had convinced them there was no viable

explanation and this influenced their approach to the formal investigation meeting of 17 October.

[42] Turning to the issue of disparity. The Casino argues there is a significant point that differentiates Mr Fafita from the other two. It was the other two who suggested resignation, though the evidence suggests the employee who brought the cannabis onto the premises only did so after he was told he was going to be dismissed. Mr Fafita never raised the possibility. I accept the differentiation, given the Casino's view it would never be the first to suggest resignation and then risk a constructive dismissal claim.

[43] Perhaps the one thing I would say is it was possibly unwise to give the surveillance officer a reference. That said, the Casino tendered a reason they considered valid and it is improper to criticise the decision and thereby undermine the principle employers should, when disciplining staff, consider mitigating factors and, as a result, may exercise some degree of leniency or mercy.

Remedies

[44] The conclusion the dismissal was unjustified (39 above) raises the question of remedies.

[45] Mr Fafita seeks, reinstatement, wages lost as a result of his dismissal and compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[46] It was apparent that despite claiming a range of remedies one is, in his mind, paramount – reinstatement. That was confirmed by Mr Andersen's submissions.

[47] Section 125 provides that reinstatement should, when sought, be considered when it is practicable and reasonable to do so.

[48] I do not, given the evidence consider it remotely practical or reasonable to reinstate Mr Fafita. An underlying principle of the Act is the parties deal with each other in good faith and in doing so recognise the mutual obligation of trust and confidence (s.4(1A)(a)). Maintenance of trust and confidence is essential for the continuation of a viable employment relationship.

[49] Mr Fifita has undermined the employers trust by his actions. He offered varying and contradictory explanations for his actions. Those explanations ranged from the inexplicable to the implausible. I say implausible when I consider his evidence regarding the window and the contradictory video evidence. I say inexplicable when I consider the contradictory explanations.

[50] There was also considerable evidence about how Mr Fifita would treat a lost and half empty cigarette packet and its contents. He suggested that was valuable property which should be secured. The answers were at odds with those he used to explain his approach to this package which, with its care and attention to packaging, would at least suggest some sense of ownership. Frankly this evidence was implausible.

[51] I also note his claim, frequently reiterated, that he never considered what he was doing was wrong given previous precedent set by a long departed staff entry officer who occasionally ordered items disposed of. The policy permits the staff entry officer to make such decisions – not a security officer. Despite considerable contradictory documentary evidence he continued to adhere to the position the long departed staff entry officer's approach vindicated his approach in this instance. The attitude exhibited must, I conclude, undermine any confidence the Casino might have he can be rehabilitated.

[52] Given the evidence I concur with the Casinos view it could never trust Mr Fifita again. Without that crucial element required for the maintenance of an ongoing relationship I conclude reinstatement is neither practicable nor reasonable.

[53] In respect to wages, section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Here, the period of loss was considerably greater than three months and Mr Fifita seeks reimbursements accordingly. Such claims are often considered by the Authority but to be eligible for such an award a claimant must show they have tried to mitigate the loss.

[54] I have serious doubts about the effort Mr Fifita has put into mitigation. His written evidence was limited stating he had gone to a few interviews though any chance of success was removed when he told them of his dismissal. A few interviews over nine months does not indicate a strenuous attempt to mitigate. There is also

evidence MrFifita owns a security company he could have operated during the time of his alleged loss and through which he could have accrued some income. He stated in evidence he chose not to. Indeed, he went so far as to say he chose to do nothing until this claim has been resolved. I these circumstances I am far from convinced he made serious attempts to mitigate his loss and therefore limit the award to the three months stipulated by legislation. I further note the award could be further eroded by a finding of contribution.

[55] Next there is the issue of compensation. Mr Fifita seeks an unspecified amount as compensation pursuant to s.123(1)(c)(i). No evidence was offered in support of the claim though that is not perhaps surprising given the emphasis on reinstatement. I have no doubt some hurt must emanate from a dismissal, especially one found to be unjustified, but the lack of evidence means the award will be low.

[56] Having considered the circumstances, I conclude an award of \$5,000.00 appropriate.

[57] The conclusion remedies accrue means I must, as required by s.124 of the Act, address whether not Mr Fifita contributed to his demise in a significant way. The answer must, I conclude, be yes.

[58] It is clear he breached the policies of his employer. Notwithstanding his claims to the contrary those are policies he must have been aware of. He then aggravated the situation by both offering contradictory explanations which led to the employer reaching the conclusions it did. Finally there was a total lack of remorse and an unconvincing suggestion his actions were approved by precedent (see 50 and 51 above).

[59] When I consider these points and the evidence presented during the investigation, I conclude Mr Fifita contributed to the situation in which he found himself and reduce the remedies awarded by 50%.

Conclusion and Orders

[60] For the above reasons I conclude Mr Fifita has a personal grievance in that he was unjustifiably dismissed.

[61] As a result the respondent, Dunedin Casinos Limited, is ordered to pay the applicant, Mr Etimoa Fifita, the following:

- i. Three months wages as recompense for wages lost as a result of the dismissal. I do not know Mr Fifita's current hourly rate so leave it to the parties to calculate. If there are any difficulties they may return to the Authority for a computation. The amount is then to be halved as a reduction for contributory conduct and PAYE then deducted before payment; and
- ii. A further \$2,500.00 (two thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[62] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority