

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 306/07
5096343**

BETWEEN JOSEPHINE MARY HALL
 Applicant

AND FINLAY & ASSOCIATES LIMITED TRADING
 AS BOBBY'S
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 No attendance by Respondent

Investigation Meeting: 2 October 2007

Determination: 3 October 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Josephine Mary Hall ("Ms Hall") says she was unjustifiably dismissed by the respondent Finlay & Associates Limited ("Finlay"). Finlay trades as "Bobby's", a bar massage and strip club operation in Taupo ("Bobby's").

[2] Contrary to the prescribed regulations, Finlay did not lodge a statement in reply. I am satisfied that Ms Hall's statement of problem was served on it by courier on 21 August 2007. Despite advice to the support staff of its intention to take steps, no steps were taken by Finlay and so by a memorandum of 18 September 2007 I directed the matter proceed to an investigation meeting yesterday at Taupo and that Finlay be served with the memorandum and a Notice of Investigation Meeting. I am satisfied those documents were served on Finlay at its registered office and address for service. The memorandum particularly advised that Finlay could attend to seek the Authority's leave to defend Ms Hall's application.

[3] Finlay did not attend the investigation meeting yesterday to seek the Authority's leave. I telephoned Mr Shane Finlay ("Mr Finlay") to ascertain Finlay's intentions. Mr Finlay denied any knowledge of the investigation meeting today. I am satisfied from the Authority's records that

Finlay has been provided with notice of today's investigation meeting and that it was aware it could seek leave. I reject Mr Finlay's denial. Finlay fails to attend to seek leave. Accordingly, the matter remains undefended and Ms Hall's affirmed evidence is unchallenged.

The facts

[4] The following narrative is my finding of facts. It is based on Ms Hall's unchallenged evidence which I accept having seen and heard from her. She gives me no cause to question her evidence. Indeed she struck me as quite credible and forthright.

[5] Ms Hall has been employed at Bobby's by Finlay since Finlay took over Bobby's about two years ago. Ms Hall cannot recall her precise commencement date of service with Finlay. Before she was dismissed, Ms Hall was employed as the Massage Manager and Bar Manager and worked Monday and Tuesday evenings each week from 6.30pm through to 1.30am the following morning. Ms Hall worked to supplement her benefit income and was paid \$80.00 gross per week - the upper limit before her domestic purposes benefit would abate. She has sole care of two of her mokopuna.

9 July 2007

[6] On 9 July 2007 Ms Hall noticed that one of three floats held in the safe was deficient by \$50.00. There is video surveillance footage showing Ms Hall counting the floats and discovering a shortfall, as well as another staff member confirming the shortfall. Ms Hall noted the shortfall in a written record held for that purpose.

14 July 2007

[7] On Saturday 14 July 2007 Mr Finlay turned up unannounced and uninvited at Ms Hall's home where she was with her young mokopuna. Mr Finlay told Ms Hall he had come to see her about missing funds. Ms Hall explained to him what had occurred when she had counted the funds on 9 July 2007. Ms Hall confirms to the Authority that Mr Finlay declared that the security camera footage shows Ms Hall putting the money under a box to the left of the safe or in her pocket. He told Ms Hall that as a result of this Ms Hall was being dismissed.

[8] Ms Hall was not pleased and did not accept what Mr Finlay had said. She was visibly angry and made this clear to Mr Finlay. She denied taking any money and said she needed the job to support her mokopuna and that she had no need to steal. She asked Mr Finlay if she was fired for stealing \$50.00 and Mr Finlay told her "Yes".

[9] Mr Finlay offered to permit Ms Hall to view the security video footage, I infer by way of persuading Ms Hall of his decision to dismiss and not by way of investigation. Ms Hall said she would view the footage and asked that if it did not show her taking money whether she could have her job back. Mr Finlay told her "No". Ms Hall said "So I'm sacked for stealing?" and Mr Finlay said "Yes."

16 July 2007

[10] Ms Hall and her daughter met Mr Finlay at 1.00pm on Monday 16 July 2007 to view the security video footage. Ms Hall tells the Authority the footage shows her opening the safe and taking out the cash box. It shows her removing the bar float from the cash, opening the bar float bag and removing a bundle of \$5 notes and placing it the left of the cash box. At this point in the viewing Mr Finlay remarked "there that's the money!" However, as the footage proceeds, Ms Hall is shown to place the bundle of \$5 notes into the backup float. Ms Hall further says that at all stages both of her hands are visible and further, that it does not show her removing cash at any stage.

[11] Once viewed, Ms Hall told Mr Finlay that she had not taken any money. Ms Finlay said that although Ms Hall could not be seen taking any money, there was still money missing and she was still dismissed.

[12] Ms Hall then asked Mr Finlay if he was going to the Police. Mr Finlay asked whether she wished him too. She responded it was up to him. Mr Finlay then asked Ms Hall for her work keys and she gave them to him. She also asked Mr Finlay to provide her with a letter confirming the reason for her dismissal and a copy of the video footage. Mr Finlay agreed to both requests and said he preferred to keep the matter "in-house".

[13] Ms Hall then handed Mr Finlay a letter she had prepared dated that same date as follows:-

16-7-07

To Shane Finlay

I am raising a personal grievance for unjustifiable dismissal

The reasons being

- 1. I didn't do it*
- 2. Due to the situation in which my dismissal was handled*
- 3. I feel I should have been invited into work to view the tapes + the findings discussed with you personally afterwards*
- 4. Other people had been in the safe*
- 5. I need the job as I am raising 2 Grandchildren on my own.*

6. *Slander against my character professionally and personally.*

The outcome I would like to accomplish

1. *An apology*

2. *Reinstatement*

3. *Reimbursement for loss of earning*

I am writing to invite you to a mediation meeting with the labour department. Please reply in writing within 7 working days from the date of this letter

J M Hall

19 July 2007

[14] When she had not heard from Mr Finlay, Ms Hall sent a sms text message to Mr Finlay at 2.15pm on 19 July 2007:-

*Hi shane when will you have the letter as to why I was dismissed and a copy of the tape thanks
josie*

[15] There was a response at 2.29pm that same day from Mr Finlay's phone (although Ms Hall says it was constructed by Mr Finlay's partner as only she referred to Ms Hall as "Joss"). The reply stated:-

*Joss it is no longer in my hands I gave you a chance to discuss the matter you were never
dismissed as such we needed to sort it out you will here soon shane*

[16] Ms Hall responded at 3.35pm that same day:-

Well if I'm not dismissed as such am I back to work on Monday and Tuesday nights josie

[17] Mr Finlay (or his partner) responded at 4.23pm that same day:-

I'll be dropping you a letter tomorrow

[18] Ms Hall subsequently asked if Mr Finlay could leave the letter in her mail box as a result of her daughter's fears that she not be alone with Mr Finlay in her home.

24 July 2007

[19] On Tuesday 24 July 2007, Mr Finlay arrived at Ms Hall's home at 3.00pm. He handed Ms Hall a cheque for \$320.00 drawn on Finlay's account together with a letter dated 16 July 2007 which stated:-

16/07/07

Finlay & Associates Limited trading as Bobby's

To Josephine Mary Hall

On the 9/07/07 you as Manager claimed that there was only \$50 dollars in the bar float at the beginning of your shift at Bobby's Taupo. But camra evidence shows there was \$100 dollars \$50 in \$5 dollar notes and a bag of \$50 in other change & notes. With no phone call or text from you. After I viewed Camra evidence I went to see you on 14/07/07 and told you what I had seen on Camra evidence. On Monday the 16/07/07 you and your daughter were shown Camra footage at Bobby's Taupo. After viewing footage you still denied the money was there. You handed me a letter and keys for Bobby's Taupo. The letter regarding grievance for unjustifiable dismissal. Nothing was said to you about dismissal but now I've suspended you for two weeks with pay from 16/07/07 to 30/07/07 and two weeks notice for dismissal with pay from 30/07/07 to 14/08/07 this is paid without working from 30/07/07 to 14/08/07 you have no reason or access to be in the premises of 161 Ruapehu Street "Bobby's" Taupo. I enclose a cheque for \$320.00 for four weeks pay.

[D Finlay]

Finlay & Associates Limited

Trading as Bobby's 161 Ruapehu Street, Taupo

[20] Ms Hall told Mr Finlay vehemently that she had not taken any money. She said she did not understand the letter, and that it was the first time she had heard any reference to suspension. She also asked why the cheque and letter were dated 16 July 2007. Mr Finlay said the letter explained everything. Ms Hall continue to deny stealing any money. Mr Finlay then left.

The merits

[21] I find that Ms Hall was dismissed on Saturday 14 July 2007 when Mr Finlay appeared at her home uninvited. I accept Ms Hall's evidence because there is no other explanation why she was not at work the following Monday and Tuesday. As well, she was asked for her keys. Those two matters particularly persuade me that it was more likely than not that she was actually dismissed that day. That dismissal was a summary one.

[22] I also consider the letter curiously dated 16 July 2007 but not handed to Ms Hall until 24 July 2007, is an attempt to revise history. I accept Ms Finlay's evidence that there had been no mention of suspension prior to that letter. I rather consider Mr Finlay attempts to construct a process because there had been none prior.

[23] The courts through decisions over the years, have established standards of fairness which are applied in investigations by employers. An employer is required to give an employee notice of the specific allegation of misconduct and any likely consequences, a real opportunity to attempt to refute the allegation or explain or mitigate his or her behaviour, and also to an unbiased consideration of their explanation free from pre-determination and uninfluenced by irrelevant considerations. The good faith provisions of the *Employment Relations Act 2000* ("the Act") are

also relevant in fashioning an employer's actions, appropriate responses and standards of investigation.

[24] Having found that Ms Hall was summarily dismissed on 14 July 2007, I find that there was a complete absence of any process and more than that, a complete absence of any fair process. Mr Finlay dismissed Ms Hall without warning her what was in his mind, of the serious consequences that would likely befall her and without permitting her to see the video footage. Once he heard from her as to what had happened on 9 July 2007, he simply declared she was dismissed. But she did not know that he was considering dismissing her and she did not know he was accusing her of stealing.

[25] Nor does his letter handed to Ms Hall on 24 July 2007 but dated 16 July 2007 retrieve the situation for Finlay. I regard that advice very suspiciously. Far from curing the blatant unfairness of the summary dismissal I have found, the advice is no more a justified dismissal than that which had already occurred. The purported dismissal by that letter was also completely devoid of any type of fair process or minimum standards of fairness.

[26] For all the above reasons, I find that Ms Hall was treated very unfairly when she was dismissed on 14 July 2007. A person at peril of suffering penalty is entitled to be heard in their defence. Ms Hall never was, either on 14 July 2007 or by Mr Finlay's letter handed over on 24 July 2007 or at any time between. The way that she was dismissed was so completely unfair, that I consider Finlay is not entitled to honestly believe that she had stolen money from it.

The determination

[27] Mr Finlay's actions in summarily dismissing Ms Hall on 14 July 2007 fell a long way short of any standards of fairness. I am satisfied there was no fair process of investigation prior to Mr Finlay's dismissal of Ms Hall. **Accordingly, I find Ms Hall's dismissal was not the actions of a fair and reasonable employer and therefore the dismissal does not meet the test of justification prescribed at section 103A of the Act. I find that Ms Hall has a personal grievance for unjustifiable dismissal. She is entitled to resolution of that grievance by way of settlement of it.**

The resolution

[28] Having made those findings and in considering both the nature and the extent of the remedies

to be provided, I am bound by section 124 of the Act to consider the extent to which Ms Hall's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find that Ms Hall did not contribute to the situation that led to her personal grievance and there is no basis to reduce either the nature or the extent of any remedies to be awarded to her.

[29] After she was dismissed Ms Hall obtained housekeeping work. She has been discouraged from applications for certain positions because prospective employees must disclose whether they have been dismissed for dishonesty. But I am satisfied that she has taken steps to find other supplementary income. I am also satisfied that she has lost income as a result of her unjustifiable dismissal. **I order Finlay & Associates Limited to pay to Josephine Mary Hall the gross sum of \$800.00 as reimbursement (being ten weeks since her dismissal).**

[30] I accept Ms Hall has suffered hurt and humiliation as a result of her personal grievance. Ms Hall gives evidence that her dismissal has caused her much stress and anxiety. She has found it difficult in a small town and fears that people in Taupo are talking about her when she goes out. She says her confidence and self-esteem have been shattered. She says her doctor has diagnosed her with depression subsequent to her dismissal and she now takes medication for this and to help her sleep. Having regard to her evidence, the nature of the personal grievance and her length of service, I award her \$8,000.00 compensation. **I order Finlay & Associates Limited to pay to Josephine Mary Hall the sum of \$8,000.00 as compensation.**

Costs

[31] As Ms Hall was not represented by professional advocate, there will be no order for those costs. However, Ms Hall is entitled to have her lodgement fee reimbursed. **I order Finlay & Associates Limited to pay to Josephine Mary Hall the sum of \$70.00 being the lodgement fee on this application.**

Summary Of Orders

Finlay & Associates Limited trading as Bobby's is ordered to pay to Josephine Mary Hall:-

- (i) the gross sum of \$800.00 as reimbursement; &**
- (ii) the sum of \$8,000.00 as compensation; &**
- (iii) the sum of \$70.00 being the lodgement fee on this application.**