



Employment Court of New Zealand

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Hayashi v SkyCity Management Limited [2018] NZEmpC 14 (9 March 2018)

Last Updated: 13 March 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[\[2018\] NZEmpC 14](#)
EMPC 114/2017

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority
BETWEEN KEITH HAYASHI
Plaintiff
AND SKYCITY MANAGEMENT LIMITED
Defendant

Hearing: 25, 26 and 27 September 2017 (Heard at
Auckland)

Appearances: R M Harrison, counsel for plaintiff
K Dunn and E Peterson, counsel for
defendant

Judgment: 9 March 2018

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff, Keith Hayashi, was employed by the defendant, SkyCity Management Limited (SkyCity) on 4 September 1995. His first position was as a Table Games Trainer. SkyCity is a subsidiary of the company which operates the casino in Auckland.

[2] Mr Hayashi's employment was terminated by written notice dated 4 May 2016. He raised a personal grievance that his dismissal was unjustifiable. When this grievance could not be resolved, he commenced proceedings in the Employment Relations Authority (the Authority). In a determination dated 3 May 2017 Mr

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[9 March 2018]

Hayashi was held to be justifiably dismissed.¹ Costs were reserved. The issue of costs in the Authority has not subsequently been the subject of any determination.

[3] On 29 May 2017, Mr Hayashi filed a challenge to the determination. His election relates to the whole of the determination and he sought a hearing de novo.

[4] The Authority made a direction that the identity of the SkyCity customer involved in this matter not be published. The Court has been requested to continue that prohibition on publication by the defendant with the consent of the plaintiff. That request is granted. It is also appropriate that the names of SkyCity employees and managers not be published and throughout this judgment they are referred to by their position designation at the time of the dismissal.

Pleadings

[5] The statement of claim alleges that the dismissal was procedurally and substantively unjustified and that what SkyCity did and how it acted towards Mr Hayashi were not what a fair and reasonable employer could have done in all the circumstances.

[6] The following relief is sought by Mr Hayashi:

- (a) reinstatement;
- (b) an order for reimbursement of lost income because of the grievance between the date of dismissal and his reinstatement or as otherwise determined by the Court;
- (c) compensation for hurt and humiliation of \$25,000 pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act);
- (d) costs.

1 *Hayashi v SkyCity Management Ltd* [2017] NZERA Auckland 135.

[7] The defendant filed a statement of defence. The effect of the defendant's pleadings is that SkyCity denies the unjustifiable dismissal of Mr Hayashi and denies that it is liable for the remedies claimed.

Factual outline

[8] Mr Hayashi's dismissal from employment arises out of a sequence of events which occurred at SkyCity's casino on 17 February 2016. Mr Hayashi was at that time in the position of Table Games Operations (Shift) Manager. On the day in question he was supervising on the "Sunrise shift" which commenced at 3.30 am and concluded at 12 noon.

[9] SkyCity allocated separate gambling salons to individual high value customers. Such customers would then play baccarat against the casino in the individual salons. Mrs A, who was a foreign visitor to New Zealand, had been allocated salon 82 under such a system, and had been gambling at the casino for nine days before 17 February 2016. Mrs A had previously visited the casino and was regarded as a high value customer by SkyCity. I heard evidence that on this visit she lost a large sum of money through her gambling activities at the casino. The figures variously mentioned in evidence were either nine and a half million dollars or twelve million dollars.

[10] Without going too far into the technicalities of baccarat table betting limits at the casino, I note relevantly that table betting limits for each wager were required to be displayed on a screen beside the table. In the case of Mrs A in salon 82, the limits shown (and these had applied throughout her entire stay) were \$10,000 per player/banker pair being \$20,000 in total. The evidence and submissions given on behalf of SkyCity in this matter emphasised that wager limits are critical to SkyCity's business. It is required to comply with the Department of Internal Affairs' (DIA) rules regarding gambling. These require the notification of minimum and maximum wager limits at each gambling table, with such limits only able to be reduced in accordance with the DIA's rules. Against that background, what happened in the present case was, understandably, taken seriously by SkyCity.

[11] When the "Sunrise shift" commenced at 3.30 am on 17 February 2016, Mr Hayashi attended a briefing meeting along with other management staff. It is undisputed that at this meeting the outgoing roster Swing Shift Operations Manager passed onto the Sunrise Area Manager team, instructions received from the President of International Business (the PIB). These instructions, relating to the baccarat 'any pair' table limits, were to the effect that the maximum limits were reduced from

\$20,000 to \$10,000 per wager, meaning 'any pair' wagers were reduced from

\$10,000 to \$5,000. A misunderstanding occurred at this point in that the reduced limits were to only apply in salon 86 and not 82 where Mrs A was playing. During the morning's playing by Mrs A, the staff assigned to salon 82, including Mr Hayashi, mistakenly interpreted the instructions to apply in salon 82 as well. SkyCity has conceded that "information provided at the 3am briefing may well have lead to some confusion with respect to application of the instructions".²

[12] The effect of the reductions in betting limits, if they were correct, would be that Mrs A, in placing bets for the unreduced amounts, would be betting beyond her limits. Accordingly, under the playing rules, she would be entitled to a refund for any losses incurred on the "over the maximum" betting. Any wins she gained would be deducted from the calculation of reimbursement. In view of the error which had been made by the staff in interpreting the pre-shift briefing, the belief that the betting limits for Mrs A had been reduced was erroneous. This was confirmed by the fact that no alteration was made on the screen display beside the table. It appears, however, Mrs A was informed that her betting limits had been reduced and, for a period, she was wagering on the reduced limits. Mrs A was later informed that the lowering of limits was erroneous; this triggered the sequence of events then leading to Mr Hayashi's dismissal and surrounding the question of whether Mrs A should receive compensation for what had occurred. Even though the belief that the betting

limits had been reduced was erroneous, apparently there is a superstitious belief on the part of some gamblers that where unsettling circumstances occur such as arose in this case, the prospects of winning are believed to be reduced. In any event Mrs A, upon learning of the error, exploited the chance to claim compensation even though she was probably not entitled to any under the strict playing rules.

2 Email dated 18 April 2016, Employee Relations Manager to counsel for Mr Hayashi.

Some factual issues arising

[13] What transpired following Mrs A being informed of the reduction in her betting limits and subsequently that the reduction was erroneous because of a misunderstanding, was that the then claim and calculation of compensation became the subject of disputed evidence between the various employees of SkyCity who were involved. As the belief by staff that her betting limits were reduced was an erroneous belief and the limits that had been set for her gambling were correct throughout, Mrs A in fact never suffered any disadvantage. Perhaps for the short period when the limits were erroneously reduced by the salon 82 Table Games Area Manager she may have lost the opportunity to bet and win at a higher limit if she had chosen to do so. She was eventually paid compensation but this appears to have been paid on an ex gratia basis as a goodwill gesture to ensure as a valued client she did not become disaffected.

[14] The first area of dispute needing consideration relates to who informed Mrs A in the first place of the reduction in limits and the prospect of compensation. The disputed versions are between Mr Hayashi and another employee, the International Business Host on the one hand, and the Table Games Area Manager in salon 82 at the time on the other. Mr Hayashi's version of events is corroborated but SkyCity preferred the Table Games Area Manager's version. With the information and corroboration available, a fair and reasonable employer should have preferred his version or at the very least, if it was a matter of doubt, given him the benefit of that doubt. The second area of dispute relates to the nature of directions given to Mr Hayashi by his supervisor, the Table Games Manager, once the error had been ascertained and the prospect of compensation arose.

[15] A third contentious matter arising is a statement made by Mr Hayashi during the final stages of the disciplinary process where he concedes he instructed the Table Games Area Manager in salon 82 and another employee who was acting as a host in salon 82, to inform Mrs A of the quantum of the overpayment amount. He did not direct that Mrs A was to be informed that a refund would be made, but he conceded that he told the Table Games Area Manager (not Mrs A) that payment of the amount should be made from the table float.

[16] In respect of this third point, it transpired that Mr Hayashi and Mr Harrison, his legal counsel, had not been given all the documentary evidence that was available to SkyCity when it made its decision to dismiss Mr Hayashi. This included surveillance material and updated accounts from employees. When Mr Hayashi's memory was refreshed by the surveillance and other previously withheld material, he had a basis for modifying his pre-dismissal statement. The admission in the statement he made during the latter stages of the disciplinary process was one of the matters relied upon by SkyCity in establishing grounds for termination of Mr Hayashi's employment.

[17] There are two factors to be considered in relation to this part of the evidence. The first is whether the substantive decision to dismiss was undermined. If SkyCity had properly analysed the material it would have known that any direction Mr Hayashi gave must have been after statements already made to Mrs A by the Table Games Area Manager when she erroneously lowered the betting limits and raised the spectre of a refund. A proper analysis would have revealed that Mr Hayashi was trying to rectify a difficult situation not of his own making. His subsequent actions also confirmed that. The second factor, also to be considered, was whether the fact that material was withheld from Mr Hayashi and his legal advisors during the disciplinary process gives rise to a serious procedural deficiency.

[18] Another serious procedural issue which needs to be considered in this case, which relates to the conflict in evidence between Mr Hayashi and his supervisor, the Table Games Manager, is that the Table Games Manager participated on behalf of the employer in the dismissal process. Whilst she did not make the ultimate decision, she certainly had an influence upon it and was given responsibility in the preparation of some disciplinary process correspondence and participated in interviews with the employees SkyCity relied upon in making the decision to dismiss. One of the main points given for terminating Mr Hayashi's employment was that he did not comply early enough with a direction given by his supervisor to advise Mrs A that compensation would not be paid. Based on evidence, including contemporary documents, there was a sound basis for Mr Hayashi to dispute whether the direction was given to him at all at the time alleged by his supervisor. Those grounds of dispute should have been clear to a fair and reasonable employer properly

investigating the matter. Mr Hayashi denied the direction was given in the terms alleged, and in such circumstances the supervisor, while being available to give her version of events to those deciding, should not have participated as she did in the dismissal process and certainly not to the extent she did. In the determination of the Authority this issue, while being recognised as not ideal, was held to be a minor procedural defect. I do not agree with that assessment.

[19] In reviewing SkyCity's decision to terminate Mr Hayashi's employment, the decision needs to be assessed based on the

information which was available to SkyCity at the time the decision was made. If the dismissal decision was made by SkyCity based on correct information available to it, and if the measure of discipline was an appropriate response and the process was carried out in a procedurally fair manner, it is not then for the Court to set aside that decision and substitute its own. Where, however, the review discloses that SkyCity acted on erroneous information, failed to take account of properly analysed material available to it, or carried out the disciplinary process in such a procedurally deficient manner that a fair and reasonable inquiry was not conducted then the Court may choose to intervene.

[20] A further factor arising in this case is that when the initial notice that a disciplinary process would be commenced was given to Mr Hayashi, the grounds for doing so differed from those which were finally taken by SkyCity to terminate his employment.

Legal principles to be applied

[21] The defendant must establish that the dismissal of Mr Hayashi was justifiable. The statutory test of justification is contained in [s 103A](#) of the Act. That section states:

103A Test of justification

(1) For the purposes of [section 103\(1\)\(a\)](#) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

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

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

- (a) minor; and
- (b) did not result in the employee being treated unfairly.

[22] In *Angus v Ports of Auckland Ltd*³ a full Court considered the then recent amendments to [s 103A](#), and the ambit of the Court's enquiry in the light of its earlier decision in *Air New Zealand Ltd v V*,⁴ decided prior to the amendments. The Court stated in *Angus* as follows:

[22] The change from “would” in former [s 103A](#) to “could” in new [s 103A](#) is not dramatic but, contrary to the submission put to us by Mr Mitchell, it is neither ineffectual nor even insignificant. The Authority and the Court must continue to make an assessment of the conduct of a fair and reasonable employer in the circumstances of the parties and judge the employer's response to the situation that gave rise to the grievance against that standard. What new [s 103A](#) (“could”) contemplates is that the Authority or the Court is no longer to determine justification (what the employer did and how the employer did it) by a single standard of what a notional fair and reasonable employer in the circumstances would have done.

[23] The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those

³ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466.

⁴ *Air New Zealand Ltd v V* [2009] ERNZ 185 (EmpC).

responses or outcomes, the dismissal or disadvantage must be found to be justified. So, to use the present tense of “would” and “could”,

it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.

[24] There are substantial and significant parts of former [s 103A](#) that are unaltered. The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established, as was argued unsuccessfully for the employer in *V*. That has never been the position and is not so under the most recent amendments. The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer's response to those conducts.

[23] Nevertheless, in *Angus* the full Court, in analysing the section, emphasised that the role of the Court is not simply to substitute its view for that of the employer. It is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. In this regard, the Court stated as follows:

[58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[24] In *C v Air Nelson Ltd*, while dealing with the previous version of [s 103A](#), the Court considered and applied the full Court's decision in *V.5* This was for the purposes of deciding the extent to which the Court should review the reasoning of the employer for its decision to dismiss. The Court in *Air Nelson* stated that:

[48] ... It is clear ... that the focus of the Court's inquiry must be upon the employer's actions and how the employer acted. The Court must be satisfied that in reaching its decision to dismiss, the employer adopted a logical chain of reasoning, which is transparent and reasonable from the facts uncovered during its inquiry and presented to it. That is what the Court's review of "reasonable grounds to believe" requires. It is not for the Court ... to enter into a fact finding inquiry, of the kind which would be

5. *C v Air Nelson Ltd* [[2011](#)] NZEmpC 27; [[2011](#)] ERNZ 207 (EmpC). The approach adopted by the Court was approved on appeal in *Air Nelson Ltd v C* [[2011](#)] NZCA 488, (2011) 8 NZELR 453.

required for example, in a criminal proceeding. That is not the purpose of the question which the Court must answer under [s 103A](#) of the Act.

[49] It would, however, be illogical for the Court to not be able to consider the factual rationale for the employer's belief. The principles are, in my view, succinctly contained within the following statement by the Court of Appeal in the *Airline Stewards and Hostesses* case where at 993 the Court said:

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

And in the *Arthur D Riley* case this Court said at [52]:

[Section 103A](#) obliges the Court to take an objective approach to determining justification for dismissal. The process is essentially a review of the employer's decision to dismiss. ... The question is whether the employer was justified in his decision.

...

[51] Based on the legal principles applying, the Court can appropriately inquire into whether Mr Hambleton had clear evidence upon which any reasonable employer could safely rely and/or whether he conducted reasonable inquiries, which left him on the balance of probabilities with grounds for believing, and he did believe, that the employee was at fault. The Court is then entitled to make a further inquiry into whether, even if the evidence of the employer's inquiries reasonably led to a finding of misconduct, the ultimate decision to dismiss, as opposed to taking some other disciplinary action, was justifiable applying the test under [s 103A](#) of the Act.

[25] These principles came to be considered again in *Gazeley v Oceania Group (NZ) Ltd*.⁶ The Court in that case stated:

[46] These principles still apply despite the amendment to [s 103A](#) but with the consideration now needed of the wider scope of options available to the employer as established in *Angus*. It is the approach to be taken in this case.

[47] The test in [s 103A](#) of the Act therefore requires the Court to consider criteria, each of which informs the other. The test is not what an employer could have done but what a fair and reasonable employer could have done. The Court is then to inquire into what that fair and reasonable employer could have done in all of the circumstances as they presented themselves. Those circumstances must exist at the time of the decision to impose a

6 *Gazeley v Oceania Group (NZ) Ltd* [\[2013\] NZEmpC 234](#), [\[2013\] ERNZ 727](#).

disciplinary measure. In applying that criteria the Court must have regard to all of the matters set out in [s 103A\(3\)](#).

[48] A heavy onus rests upon an employer before a dismissal can be validly effected. The reasons for this are obvious. The right to be in employment and earn the means to support oneself and one's dependents is a substantial right requiring protection. There is a strong societal imperative behind this, supported by the economic need for full employment as founding a strong overall economy. A position of employment is a valuable asset. Employees are the most valuable asset of any business hoping to thrive. If the employment is to be terminated it is essential that it be justifiable and fair.

[49] Clearly it is not the Court's prerogative to substitute its own decision for that of the employer where as a result of meaningful adherence to the legal requirements, the action taken was an option which was open to the employer. Before reaching the point of sanctioning the actions of the employer in a given case, the Court (and for that matter the Authority) is entitled to review the factual basis upon which the employer's decision was made. This is for the purpose of deciding whether it was correct and that the criteria have been met such that the employer is entitled to say that the dismissal or other action was justifiable. If that is not the extent of its jurisdiction, then it would only be in rare cases, if at all, that the Court would ever be able to intervene.

[26] The case of *C v Air Nelson Ltd* was the subject of an application for leave to appeal to the Court of Appeal.⁷ In declining to grant leave to appeal and in analysing those passages from this Court's judgment, the Court stated:

[19] [Section 103A](#) requires the Court to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by ANL when carrying out its inquiry and of its decision to dismiss C. Within that inquiry into fairness and reasonableness the Court is empowered to determine whether ANL had a sufficient and reliable evidential basis for concluding that C had been guilty of misconduct.

[27] In summary, the principles and requirements applying to SkyCity's decisions in the present case and to be applied in the Court's inquiry pursuant to [s 103A](#) of the Act are:

- (a) There may be more than one fair and reasonable response applied by a fair and reasonable employer in all the circumstances at the time; if the employer's response is one of these, the dismissal (or disadvantage) must be found to be justified.
- (b) The Authority or the Court should assess, objectively and carefully, the conduct of both employee and employer, and the employer's response to the conduct.

⁷ *Air Nelson Ltd v C*, above n 5.

(c) Relevant circumstances which the Court may look into are those of the employer, the employee, the nature of the employer's enterprise and any other relevant circumstances.

(d) The focus of the Court's inquiry must be on the actions of the employer and how the employer acted. The Court must be satisfied that the employer adopted a logical chain of reasoning which was transparent and reasonable from the facts at the time of the inquiry.

(e) The inquiry includes considering the factual rationale for the employer's belief; and whether the employer had clear evidence it could safely rely on, whether it conducted reasonable enquiries, and whether the consequences for the employee were reasonable.

(f) The right to employment is a substantial right requiring protection. Therefore, the starting-point for a dismissal to be valid is that it must be justifiable and fair.

These statements of the law have been revisited in *Grace Team Accounting Ltd v Brake*, which concerned a redundancy but nevertheless dealt with interpreting the requirements of [s 103A](#).⁸ The Court of Appeal concluded that:⁹

...in the present context under [s 103A](#) of the Act [t]hat section requires the Employment Court to decide objectively whether the actions of the employer meet the "fair and reasonable employer" standard. The Employment Court cannot discharge that responsibility by saying if the employer considers it was reasonable, then it must be so.

The disciplinary process

[28] The disciplinary process proceeded on the usual basis of giving Mr Hayashi notice of the allegations against him and requesting that he attend a meeting. The first meeting took place on 26 February 2016, and on that occasion Mr Hayashi was supported by a member of SkyCity's Employee Support-Connect team. During that meeting Mr Hayashi gave responses to the allegations against him and the matter was then adjourned to enable SkyCity to consider those responses. The meeting was accordingly adjourned and reconvened on 4 March 2016. Again, on this occasion Mr Hayashi was accompanied by the same support person. This meeting was again adjourned this time to allow Mr Hayashi to then have the opportunity of seeking legal advice.

8 *Grace Team Accounting Ltd v Brake* [\[2014\] NZCA 541](#), [\[2014\] ERNZ 129](#), [\[2015\] 2 NZLR 494](#).

9 At [89].

[29] A third meeting took place on 4 May 2016. At this meeting SkyCity had its own lawyer present. Mr Hayashi's lawyer attended with him. Mr Hayashi provided SkyCity with a written statement summarising his response to the allegations and this was the subject of discussion. Several adjournments took place during this meeting which culminated in Mr Hayashi being informed that he was to be summarily dismissed. Mr Hayashi was then asked to leave the building with his lawyer and wait outside while SkyCity made inquiries about handing over his property. He and his lawyer waited in Federal Street until the General Manager – Gaming came and escorted them to the Operations Managers' office to collect his belongings. At that time, he had been an employee of SkyCity for over 20 years. Later, on 4 May 2016, SkyCity's Employee Relations Manager wrote to Mr Hayashi confirming the decision that his employment was to be terminated summarily for serious misconduct.

[30] There can be no criticism of the formal procedures adopted by SkyCity. Certainly, Mr Hayashi was presented with the allegations against him and given the opportunity to respond, and on each occasion when a meeting was convened, Mr Hayashi was accompanied by a support person or, at the final meeting, by his lawyer. There are, however, several issues of a procedural nature which are questionable. First, it was later ascertained during the Authority's investigation, that there were a number of documents in the possession of SkyCity which were not disclosed to either Mr Hayashi or his lawyer during the course of the disciplinary process. This information included the notes of a further statement from the Table Games Area Manager in salon 82 and correspondence between senior management which contained incorrect information. Secondly, there was clearly a dispute between Mr Hayashi and his supervisor the Table Games Manager, as to whether at the first meeting between them on the day in question, Mr Hayashi was directed to inform Mrs A that she would not be entitled to any compensation. This matter will be dealt with further in this decision, but in the circumstances where there was such a dispute and SkyCity relied upon the Table Games Manager's assertion, it was inappropriate for her to participate further in the disciplinary process in the way she did. Thirdly, there were material changes in the written grounds first notified and upon which Mr Hayashi was to be subject to a disciplinary inquiry, and the grounds upon which he was later dismissed. The grounds for his eventual dismissal were not those

contained in the initial letter which was sent to him. One of the grounds was raised late in the piece.

[31] These matters, particularly relating to the changing nature of the assertion of grounds against Mr Hayashi, and the fact that neither Mr Hayashi nor his lawyer had all of the documentation which was in the possession of SkyCity and upon which it relied, calls into question whether the disciplinary process, despite the formal way in which it was conducted, provided a fair process to Mr Hayashi.

[32] The Authority Member dismissed the clear defects in the process as minor and not resulting in Mr Hayashi being treated unfairly. I do not agree with that assessment. Failing to provide Mr Hayashi and his lawyer with relevant documentation is a serious defect. In this case, it led to Mr Hayashi having to respond, in his final written reply presented at the final meeting, to information which was not complete. The employer had the information relevant to its decision; Mr Hayashi did not. Allowing the supervisor to participate in the disciplinary process when she was a clear witness against Mr Hayashi on a matter of substantial dispute between them and which related specifically and directly to one of the grounds upon which Mr Hayashi was eventually dismissed, was similarly a serious defect in the procedure going to the fairness towards Mr Hayashi.

[33] One further defect which Mr Harrison, counsel for Mr Hayashi, raised was that Mr Hayashi had requested that other employees be interviewed. This request was declined by SkyCity and again the Authority Member dismissed it, having regarded it as a matter which probably would not have made any difference to the outcome. If the analysis of all the information available to SkyCity had been properly carried out, it is likely that other persons who could have had a material input would have been interviewed or re-interviewed, and again I do not regard this deficiency as minor. Those witnesses could have clarified what took place in salon 82 on 17 February 2016. Mr Hayashi lost the benefit of having that evidence available.

[34] The disciplinary process against Mr Hayashi was initiated by a letter from the General Manager – Gaming of SkyCity, dated 25 February 2016. The allegations which were made against Mr Hayashi in that letter are as follows:

The Company is considering disciplinary action being taken in relation to the alleged incident last Wednesday 17 February 2016 when

a VIP patron [Mrs A] was incorrectly informed that she was betting over the table maximum on the Pairs wagers and subsequently told her that her maximum going forward was \$5,000 on Player Pairs wager and \$5,000 on Banker Pairs wager.

[Mrs A] raised the fact that she had therefore been betting over the maximum for a period of time, and she was assured by you that we would refund any amount that was over the table maximum. The Table Games team calculated the amount and you conveyed the amount (\$310,400) to [Mrs A]. You authorised the refund from the float without seeking necessary approvals according to operational procedures and delegated financial authority guidelines.

Table Games Manager, ..., advised you when you met around 8.40am that there was no change to limits for [Mrs A] and you needed to explain this to her. Despite this instruction, you sent an email to surveillance at 10.46am requesting a review of one of [Mrs A's] tracking sheets. [The Table Games Manager] spoke to you at 11am puzzled as to why you had requested this when she had directed that you speak to [Mrs A] several hours earlier.

When [Mrs A] was advised that in fact she had not been betting over the maximum, and therefore no payment was due, she was extremely unhappy and indicated she would not honour her significant CCF (\$3 million) if SKYCITY did not honour the refund payment promised by you.

Following lengthy discussions and review of the situation, SKYCITY had no other option but to agree to honour the promised amount. Resulting in a significant loss to the business, amounting to over \$300,000.

...

[35] In the documents that were subsequently disclosed to Mr Hayashi and his legal advisors there was a draft letter prepared by human resource employees of SkyCity. Modifications to that draft show that initial, more direct, assertions against Mr Hayashi had been altered. The draft was prepared in the name of the Table Games Manager who was Mr Hayashi's immediate supervisor and as indicated earlier, she then participated in the disciplinary process. Inconsistencies in her evidence and her involvement in the matter will be discussed later in this judgment.

[36] When the disciplinary process had been completed, the Employee Relations Manager of SkyCity wrote a letter to Mr Hayashi dated 4 May 2016, confirming the

decision which had been made at the final disciplinary meeting that Mr Hayashi had been guilty of serious misconduct and he was dismissed. That letter is set out in full as follows:

Dear Keith

Termination of employment

I write following our disciplinary meeting today. At the conclusion of this meeting I indicated that I would confirm in writing our decision regarding serious misconduct, and advise of the outcome of the disciplinary process.

At our meeting you provided a written response, and you and Richard Harrison spoke to that response, as well as providing some additional detail. This was in addition to the responses you had provided at our previous meeting. I confirm that we have taken all of your responses into account in making our decision.

As I advised, [the General Manager – Gaming] and I decided that you authorised a refund of over \$300,000 to [Mrs A] from the float on 17 February 2016 without seeking necessary approvals according to operational procedures and delegated financial authority guidelines. We have also decided that ... (Table Games Manager) instructed you at 8:40am on 17 February to advise [Mrs A] that there would not be a refund, but you did not do this until after 10:40am.

We decided that these actions constituted serious misconduct as they were:

- Gross negligence in the performance or omission of your duties
- Refusal to obey a lawful and reasonable instruction from SKYCITY
- Breaching company policies, procedures or work practices
- Failing to pay due care and attention to duties while at work.

I advised that your conduct has caused us to lose trust and confidence in you.

I also advised that our preliminary decision was that taking into account your serious misconduct, your position and your service with the company, summary dismissal would be an appropriate outcome. I asked you if you had any response on this point or any other matter you would like us to take into account when making a decision regarding sanction. You said that you did not. [The General Manager – Gaming] and I have considered an appropriate sanction and I have decided that your employment is terminated summarily today, for serious misconduct.

Your accrued annual leave balance will be paid into your account in next week's pay-run.

Yours sincerely

...

[37] The two grounds found to have been established against Mr Hayashi and set out in the letter as constituting serious misconduct, were different in material respects from the matters that were set out in the initial letter of 25 February 2016. Particularly, the issue of whether at the first meeting with Mr Hayashi's supervisor he was directed to inform Mrs A that no refund would be made and failed to do so, is raised in the dismissal letter but not raised as a ground in the first letter initiating the process.

Consideration of material issues

[38] The grounds for dismissal were narrowed down to two reasons.

[39] The first reason can be broken down into two main considerations:

- (a) Was Mr Hayashi the one who told Mrs A that she was not betting in accordance with the set limits and she would be receiving a refund?
- (b) Did he act in accordance with the operational procedures/delegated financial authority guidelines?

[40] The second reason comes down to a determination as to exactly what were the Table Games Manager's instructions to Mr Hayashi at the earlier 8.40 am meeting. As indicated, it is not for the Court to substitute its own decision for one which SkyCity as a fair and reasonable employer could have made in all the circumstances. However, if it made the decision that it did based on findings which could clearly not be correct, or were not reasonable or were based on equivocal evidence before it and the dispute in evidence was not capable of being resolved, then clearly those could not be decisions which a fair and reasonable employer could make in all the circumstances. As stated earlier in this decision, in making the assessment pursuant to [s 103A](#) of the Act, the Court is entitled to undertake a review of the decisions and their reasoning.

[41] There are differing accounts as to who first informed Mrs A that she was betting above betting limits and raising the spectre of a refund. The Table Games

Area Manager in salon 82 had provided two statements and maintains that when she became uncertain of the actual limits, she contacted Mr Hayashi to clarify the position. She claims that he told her to inform Mrs A that she was betting above set limits and was entitled to a refund (Mr Hayashi could not speak Mandarin and Mrs A could not speak English and so Mandarin-speaking staff such as the Table Games Area Manager and one of the salon 82 international hosts, were used as intermediaries).

[42] Mr Hayashi, who was supported indirectly by Mrs A herself and one of the international hosts, disputes the assertions by the Table Games Area Manager. His evidence is that when he was contacted by the Table Games Area Manager, she had already told Mrs A she was betting above her limits and discussed with her the spectre of a refund. This evidence by Mr Hayashi was corroborated by the international host. The international host was not present throughout the entire period covered by the Table Games Area Manager in her statements, but when she arrived in salon 82 she says that she was informed at that stage by Mrs A herself that the Table Games Area Manager had already informed her that she was betting above the betting limits and the issue of a refund was discussed. The international host then goes on in the statements she made for the purposes of the disciplinary proceedings, to describe Mr Hayashi's involvement. Her statements largely corroborate Mr Hayashi's evidence and assertions presented during the disciplinary meetings. Her statements were given insufficient weight.

[43] Mr Hayashi was clearly faced with a difficult situation when he arrived in salon 82. He is accused of being the one who informed Mrs A that she was entitled to a refund and authorised that refund when the evidence available to the employer showed this was not the case, or at best was equivocal. Mr Hayashi clearly went into a recovery mode to see if the level of Mrs A's claim could be reduced. Obviously, he also knew that Mrs A was not going to be happy if compensation in some form was refused. Indeed, this proved to be the case as subsequent events showed that when she was aware she may not receive compensation she threatened to cancel her Cheque Cashing Facility (CCF).

[44] It needs to be remembered that this whole scenario arose through what the Employment Relations Manager, who was one of those who made the decision to dismiss Mr Hayashi, has conceded were confusing instructions at the briefing meeting which preceded the day's gambling. These instructions had come from a senior employee (being the PIB) and were relayed through another senior employee, who was the Swing Shift Operations Manager. The unsatisfactory nature of the briefing is confirmed by the number of employees who were clearly confused by it.

[45] When Mr Hayashi was faced with the position which had arisen in salon 82, while he conceded that his initial reaction was that a refund was necessary, he indicated that he would contact surveillance to see whether Mrs A had in fact had winnings while betting at the lower limits which would then need to be deducted from any refund. The Table Games Area Manager in salon 82 suggested to Mr Hayashi that handwritten tracking sheets were available and Mr Hayashi, even though he knew that the tracking sheets may not be strictly accurate, directed her to carry out a calculation using the tracking sheets. The effect of the information which was obtained from the tracking sheets meant that the original calculated

potential refund of \$420,400 was reduced by a total of \$110,000 leaving a final total of

\$310,400. Once this figure was ascertained, Mr Hayashi asked the Table Games Area Manager to begin the process of setting up a method of repayment. However, before authorising any payment, he contacted surveillance and received information that other similar problems had arisen and that he should contact his supervisor, the Table Games Manager, which he did. Any question of repayment was then put on hold by him.

[46] As to the allegation and the ground for dismissal that he authorised a refund of over \$300,000 without seeking necessary approval, he categorically denies this. The allegation that he breached operational procedures and delegated financial authority guidelines he also denies. An important point in the question of reviewing the employer's decisions as to Mr Hayashi's actions at this stage was that there was corroboration available to the employer which is now known to have been considered but disregarded by the General Manager – Gaming and the Employee Relations Manager, the two making the decision to dismiss.

[47] Before turning further to their decisions, it is necessary to consider whether the allegation that Mr Hayashi failed to act according to operational procedures and delegated authority guidelines was correct. Also, the second ground for terminating his employment, that he defied a direction from the Table Games Manager given at his first early meeting with her to go back and inform Mrs A that she was not to receive any compensation, needs to be considered. The issue of the guidelines is slightly moot because the evidence is clear, even with the conflict of evidence between Mr Hayashi and the Table Games Area Manager, that whilst some attempt was made to calculate a figure, Mr Hayashi never authorised any payment to Mrs A. I am also satisfied that Mr Hayashi's initial reaction, which is confirmed by his later conversation with the supervisor (the Table Games Manager), was that in the circumstances that occurred, Mrs A was going to demand compensation no matter what and be difficult on the point, but in the interests of good relations between the casino and Mrs A, who was a valued customer, consideration was going to be needed to appeasing her in some way. While Mr Hayashi conceded that he could have handled the matter better, his motivation was to first calculate what might be involved and then persuade senior management to consider some form of ex gratia payment. He appears to have conceded that he acquiesced in the indication to Mrs A of the initial calculation that had been reached, but was adamant that he did not authorise payment to her or agree to make any payment to her. Once again, I emphasise that this was a difficult situation which Mr Hayashi faced and with a highly valued but difficult customer of the casino it needed to be delicately handled. A fair and reasonable employer should have considered his actions in that light.

[48] Mr Hayashi maintained throughout his evidence and under cross-examination, that if, as he initially believed, he was right about Mrs A betting over the limit, he would not need to get permission from anyone in any event to authorise a payment to her. According to his evidence, bets that she made over the limit were void bets and therefore any money that she lost on those bets belonged to her, which would mean that the casino was obliged to give her a refund.

[49] The witnesses for SkyCity contested Mr Hayashi's views of this matter, arguing that he would need to seek approval from someone senior to him before authorising the payment. The evidence discloses that in any event he did that

although his primary objective, because the position arising from the mistaken interpretation of the earlier direction was murky, was to get agreement for some form of ex gratia goodwill payment to ensure SkyCity did not lose Mrs A's business.

[50] Under cross-examination, the General Manager – Gaming eventually conceded that the procedures and guidelines which Mr Hayashi was required to comply with were those contained in the SkyCity Table Games Minimum Operating Standards. In relying on this document to decide that Mr Hayashi had authorised a refund without seeking necessary approvals, SkyCity has considerable difficulty. SkyCity witnesses endeavoured to evade the primary issue which arises in Mr Hayashi's favour from this document by saying that there are other unwritten requirements which Mr Hayashi knew about and which required him to seek authority. However, as Mr Harrison submitted, SkyCity is endeavouring to rely upon strict technical requirements as a ground for dismissing Mr Hayashi. Independently of the fact that he never authorised payment in any event, the document on a strict reading fails to confirm Mr Hayashi's need to seek authority.

[51] The Table Games Minimum Operating Standards are set out as follows:

1. In the event the Dealer has made an over or under payment to the customer and the Dealer has discovered this, he/she will immediately inform the Games Supervisor and Casino Supervisor in charge of the table. The Games Supervisor will politely explain to the customer and try to retrieve the overpayment, or in the case of an underpayment will authorise the payment to the patron.
2. The Casino Supervisor will contact surveillance to confirm over-payment.
3. On any amount the Surveillance department will be notified by the Casino Supervisor in charge to ascertain the amount of overpayment. After verifying the amount of the overpayment the Casino Supervisor will politely try to retrieve the overpayment.
4. In any cases where the overpayment cannot be retrieved the surveillance department will be alerted by the Casino Supervisor to monitor the table and Patrons involved in the over-payment.
5. The Casino Shift Manager/Assistant Casino Shift Manager will be contacted by the Casino Supervisor on all over-

payments where retrieval was not accomplished.

6. The casino operator has the right to collect any over-payment subject to review by the Casino Shift Manager/Assistant Casino Shift Manager

and Surveillance and the patron may request a Government Inspector to review the tape on their behalf.

7. If the patron refuses to return the over-payment to the Casino Shift Manager/Assistant Casino Shift Manager, Security will be notified of the situation. The Casino Shift Manager/Assistant Casino Shift Manager on duty will determine what action is to be taken. Incident reports will be completed by the Games Supervisor, Casino Supervisor, Surveillance, Casino Shift Manager/Assistant Casino Shift Manager and Security and any other witnesses that come forward. The government inspectorate shall be advised of any overpayments that are not retrieved and copies of the incident reports shall be made available to them on request.
8. At the discretion of the Casino Shift Manager/Assistant Casino Shift Manager:
 - a. The player may be barred for the shift or for a longer period;
 - b. The police may be summoned;
 - c. The Cashier may be instructed to withhold the chips when the player is cashing out;
 - d. Arrangements will be made for future payment of amount owing.

[52] It is logically apparent that the two kinds of payment arising from these standards are overpayment and underpayment. The rules mainly refer to an overpayment. This is when the casino has paid too much to the player and needs to retrieve the money back. [Rules 2-8](#) pertain only to this. Only [Rule 1](#) deals with underpayments, which is the type of payment involved in the present case where the player has paid too much to the casino and needs to be paid that money in return. For overpayments, the rules are spelled out, but for underpayments the rules merely state that Game Supervisor "will authorise the payment to the patron". It is not in dispute that Mr Hayashi on this occasion was the Games Supervisor as defined for the purposes of the rules. However, there is no need for the Games Supervisor to ask permission from more senior employees, to call surveillance, to confirm the amount, or anything else. The authority is vested in the Games Supervisor to authorise the payments.

[53] While the witnesses for SkyCity endeavoured, having initially relied on this document, to suggest that Mr Hayashi was bound by other unwritten procedures, the company was not able to point out exactly what the other procedures are or how and when they have been promulgated. The written procedures included in the document

in the bundle upon which SkyCity confirmed it relies suggest that Mr Hayashi would not have done anything wrong if he had authorised the payment in any event, which I find he did not do. Even so, the situation which occurred in this case meant that Mrs A was probably not in fact entitled to a refund. Mr Hayashi, and the Table Games Area Manager, being confused by the inadequate way the 3 am briefing occurred, did not know that at the time. Mr Hayashi wisely chose to clarify the position after his consideration of the tracking sheets and his contact with surveillance.

[54] One final comment I make about the reliance of SkyCity on this document is that the situation which arose in this case could not be covered by the document in any event. It was an unusual set of circumstances which had arisen. Mrs A claimed compensation but the basis for that would have been difficult to assess. It arose from the fact that the reduced betting limits were mistaken. It was not a situation coming squarely within the provisions of the Table Games Minimum Operating Standards. It is unclear on what basis Mrs A claimed the payment or how the goodwill payment eventually approved and made to her was calculated. There were two possibilities. If Mrs A was betting below her actual set limits, then presumably by her thinking she could claim for lost opportunities. On the other hand, if she was also betting for a time above set limits (which was not in fact ever the position), then bets she outlaid she would regard as wasted.

[55] The remaining issue is that used as the second ground for the termination of Mr Hayashi's employment, namely that the Table Games Manager directed him at the early meeting at 8.40 am to go back to salon 82 and tell Mrs A that she would not be receiving any repayment and he failed to do so. This ground for termination was raised with Mr Hayashi late in the piece. Preceding the second disciplinary meeting on 4 March 2016, the Employee Relations Manager contacted the Table Games Manager to clarify exactly what direction had been given at the 8.40 am meeting. There were reasons why the Employee Relations Manager needed to clarify this and those reasons and the response she received at that time from the Table Games Manager should have alerted both her and the General Manager – Gaming that they may not have been on solid ground in later using this as a basis for the decision to dismiss. This is particularly so when Mr Hayashi consistently denied he had been

directed at the earlier meeting to inform Mrs A that she would not receive compensation.

[56] There is a substantial dispute between the information which the Table Games Manager gave to those conducting the disciplinary process, and Mr Hayashi's recollection of events. It was clear that at the 8.40 am meeting between the two of them, the issue of compensation was raised by Mr Hayashi and discussed. His emphasis was on the Table Games Manager approaching more senior managers to get approval to make a goodwill payment to Mrs A as he knew she was going to

create difficulties if compensation was not made. He said that he left that meeting with the understanding that the Table Games Manager would make enquiries into such a payment. The Table Games Manager, on the other hand, maintained that she informed Mr Hayashi that he was to go back and confirm that the screened betting limits in salon 82 were correct and that Mrs A was not going to receive compensation. However, she only clarified this point with the Employee Relations Manager preceding the final disciplinary meeting. She did not include it in her initial written report or correct omissions in subsequent contemporary documents when she had the opportunity to do so. Following the 8:40 am meeting, Mr Hayashi at that point did go back to salon 82 and arranged to have Mrs A informed that the betting limits had been correct all along. As predicted by Mr Hayashi, she was exploiting her position on compensation. At a subsequent meeting, later in the morning, the Table Games Manager did direct Mr Hayashi to tell Mrs A that she would not be receiving compensation and, in accordance with those instructions, Mr Hayashi did return to salon 82 and pass that information onto Mrs A. It was not long after that that he finished his shift and the Table Games Manager escalated the issue of a goodwill ex gratia payment to more senior managers in the face of Mrs A's agitation.

[57] At the hearing of this matter, my assessment of the Table Games Manager's evidence was that she was evasive and contradictory. She had to concede that the subsequent written report that she prepared of what had transpired on 17 February 2016 omitted any mention that at the 8.40 am meeting she had directed Mr Hayashi to inform Mrs A at that time that she would not be receiving compensation. Under cross-examination from Mr Harrison, she also had to concede that she had several

opportunities to correct her report but failed to do so. She had also had the opportunity to correct it by her involvement in the drafting of the initial letter commencing the disciplinary process, which failed to mention this ground for disciplinary action. She did not raise it in email correspondence with the Employee Relations Manager prior to the second disciplinary meeting on 4 March 2016. This email correspondence is also significant for another reason, which goes to the credibility of the Table Games Manager, to be discussed shortly.

[58] During the disciplinary process, Mr Hayashi, in his final written response, made a somewhat ambiguous statement which seemed to suggest that at the meeting at 8.40 am, the Table Games Manager had told him to inform Mrs A that there would not be any refund. I regard it as ambiguous because I ascertained during his giving evidence that Mr Hayashi in his language is particularly literal. As I said earlier, it was clear that the issue of compensation to Mrs A was discussed at the 8.40 am meeting. I regard his statement in the final response as being an indication of that conversation, but not confirmation that the Table Games Manager had told him to then advise Mrs A and it can be literally read that way. This interpretation is also confirmed by Mr Hayashi's elaboration of the position in the following paragraph of the final written response where he indicates that he left the meeting under the impression that the Table Games Manager would speak to senior managers about a goodwill payment. To read that part of the written response other than literally, in the way it was clearly intended by Mr Hayashi to mean, would result in the two paragraphs being totally inconsistent. Mr Hayashi, on my assessment, is a person careful about his use of language.

[59] As indicated, the Table Games Manager had several opportunities to correct what she had set out in her initial report, if she believed there had been an omission on this point. She failed to do so and this fact would have been apparent to the two managers conducting the disciplinary process; hence the need, very late in that process, for the Employee Relations Manager to contact the Table Games Manager to clarify whether she had directed Mr Hayashi, at that time, to advise Mrs A that no compensation would be made. The Table Games Manager used that opportunity to state that she had given Mr Hayashi that direction, hence the reason why it was then used as a ground for dismissal. The previous omissions by the Table Games

Manager and apparent inconsistencies in what she was saying, should have been a reason for the General Manager – Gaming and the Employee Relations Manager if they were fair and reasonable employers, to exercise some scepticism, step back and make a more careful analysis of the information which was before them.

[60] There was an exchange of emails between the casino's Chief Executive (the CEO) and the PIB, confirmed in contemporary documents, which in my view set the tone for the way Mr Hayashi was subsequently treated in the disciplinary process. This may also explain why employees who were providing reports and being interviewed for the purposes of the disciplinary process may not have presented the position as correctly as they should. These employees included the Table Games Manager and the Table Games Area Manager who was supervising the gambling in salon 82 when this problem first arose. During cross-examination by Mr Harrison, the Table Games Manager conceded that in view of what had been stated in the email from the casino's CEO, people were running for cover. In that cross-examination of the Table Games Manager the following exchange took place:

Q. I'll give you the opportunity to be fair Ms ..., I'm going to be making a submission that because of that very strong indication given by the CEO as to how he felt about Mr Hayashi's actions, which he described as appalling didn't he?

A. Mhm.

Q. That you all ran for cover and because someone was going to take the fall and it wasn't going to be you was it, is that fair?

A. It is fair.

[61] The indication given by the CEO which Mr Harrison refers to in that cross- examination arises from the email exchange between the PIB and the CEO. The PIB was likely to have received information from the Table Games Manager and had passed this on to the CEO. It is significant in respect of this correspondence, which had substantial relevance to the disciplinary process and subsequently Mr Hayashi's personal grievance, that the Employee Relations Manager chose not to disclose it to Mr Hayashi or his legal advisors because she considered it was not relevant. I found her decision even more surprising when I discovered, while questioning her, that she was legally qualified.

[62] From the correspondence, the tone was well and truly set; someone's head had to roll because Mrs A was eventually paid more than \$300,000 as a goodwill payment. That person selected to be disciplined was Mr Hayashi. Looked at objectively as the Court is required to do, the steps taken by SkyCity in these circumstances leading eventually to Mr Hayashi's dismissal, were not the actions which a fair and reasonable employer could have taken in all the circumstances.

[63] The email chain which took place, and from which the disciplinary process was commenced, is set out as follows:

On 19/02/2016, at 2:08 PM, [PIB] [email address] wrote:

Dear [CEO],

As discussed earlier we had an incident with [Mrs A] a couple of days ago that we have been investigating.

I can confirm the following:

- [Mrs A] was **incorrectly** told by an Ops Manager she had been betting over the table maximum on the Pairs Wager. She had been betting \$20k (being

\$10k on Player Pair and \$10k on Banker Pair) and was told her maximum was \$5k.

- [Mrs A] accepted this and complied with the Ops Managers request to bet

\$5k on each

- [Mrs A] raised that fact that she had been betting that amount since her trip started and asked if she would be given a refund
- The Ops Manager confirmed he would review her bets and refund any amount over the table maximum
- The Ops Manager/Pit Manager calculated the amount to be \$310k and conveyed that to [Mrs A]
- All of the above was done without my knowledge or without any communication to [Senior Managers of SkyCity]
- The Ops Manager authorised the refund but was stopped by the TG staff and questioned if the necessary approvals had been gotten
- At this time he called [the Table Games Manager] and was told the maximum was not exceeded and that no refund was due
- [Mrs A] was advised the same by the Ops Manager
- [Mrs A] is not happy and indic[a]ted she would not honour her CCF (\$3m) if we did not honour her refund as promised by the Ops Manager (I don't think she would do this)
- [Senior Managers of SkyCity] have started the disciplinary process for the Ops Manager who has been given his 'Your Rights Letter' and will be spoken to this afternoon. I'll leave it to ... to keep you posted with developments.

I have discussed this with [the Chief Financial Officer] (cop[i]ed on this email) and while we are not happy with the situation we agree we have to honour the promise made.

The historical value of [Mrs A] and the fact [s]he is losing \$12m this trip leaves us little choice.

I seek your approval under the approved DFA for pay \$310k in Bonus Play to [Mrs A].

If approved, I will speak to [Mrs A] personally to apologise and make the payment. She was scheduled to leave on 20th but has indic[a]ted she may [extend] her trip to 22nd.

Kind regards

[PIB] | **SKYCITY Entertainment Group Limited**

[Contact details]

From: [CEO]

Sent: Friday, 19 February 2016 2:13p.m.

To: [PIB]

CC: ...

Subject: Re: Incident – [Mrs A]

...

You have advised me that you and [the Chief Financial Officer] approve the 310 payment. Given this I also reluctantly approve.

This is an appalling breach of process and a thorough investigation needs to be conducted with appropriate disciplinary action.

Regards

...

Chief Executive

SKYCITY Entertainment Group DDI + [phone number] www.skycity.co.nz

[64] The email from the PIB is clearly wrong. The reference to “Ops Manager” in the initiating email is reference to Mr Hayashi. It is also significant that while it is likely that this information would have been provided to the PIB by the Table Games Manager, once again she did not, as she could have at this very early stage, raised the issue that Mr Hayashi delayed after the 8.40 am meeting in going back to Mrs A to inform her that no compensation would be paid. This information was being provided by the Table Games Manager, probably on the very day that the incident in salon 82 had occurred. The email exchange also indicates that the disciplinary

process had already commenced by that date when other contemporary correspondence shows this was not correct. If the Table Games Manager had informed the PIB that the disciplinary process had already started, then she clearly misled him. It does, however, indicate that Mr Hayashi was being lined up for disciplinary action before a proper inquiry could possibly have been completed.

[65] As I have indicated, I regard the Table Games Manager’s evidence as evasive and contradictory. She did make the fair concession during evidence that she, among others, were running for cover. There was, however, one further curious conflict between statements she made during the disciplinary process and her evidence in Court, which lead me to call her veracity into question. This conflict, whilst significant in assessing her credibility, nevertheless deals with what I regard as a relatively insignificant factual point. This is particularly so as I find that at the first meeting she did not instruct Mr Hayashi to inform Mrs A that no compensation would be paid. However, lack of credibility on the Table Games Manager’s part bolsters Mr Hayashi’s credibility and leads me more firmly to the view that his assertion that he was not told by her at the early meeting at 8.40 am to inform Mrs A that no compensation would be paid is correct.

[66] The conflict arises from the email correspondence in early March 2016 emanating from the Employee Relations Manager to the Table Games Manager. This is also correspondence not disclosed during the disciplinary process. As an aside, the correspondence appears to conflate the two issues of whether Mr Hayashi was directed to tell Mrs A both the position regarding the compensation and the fact that limits on betting had not been changed or whether just the latter. However, the conflict relates to one part of their exchange. During the first disciplinary meeting, Mr Hayashi had advised, although it was not clear in what context, that following the first meeting with the Table Games Manager at 8.40 am, he told her that he could not immediately go back to salon 82 to inform Mrs A that the set betting limits were correct as he had to do a “card run”. Prior to the second disciplinary meeting the Employee Relations Manager sent an email to the Table Games Manager asking about the issue of the “card run”. In her reply the Table Games Manager stated:

Keith did not mention to me about the card run at all. The discussion about the card run never took place between us. I insisted that Keith went immediately to apologise to [Mrs A] and advise her that there is no change to the limits and increase the limits back to what they were prior to the changes.

Once again, no mention by her that he was to also advise Mrs A that compensation would not be payable.

[67] When the Table Games Manager later came to give evidence, she stated in her brief of evidence:

I was aware that Mr Hayashi had to carry out the card run, which occurs at around the same time each morning. This is where the used cards are taken away and replaced by new playing cards. I specifically told Mr Hayashi not to waste time completing the card run and that that could wait while he spoke to [Mrs A].

[68] During cross-examination of the Table Games Manager the following exchange took place between her and Mr Harrison.

Q. Yes. I just want to ask you about your – in this section in your brief of evidence dealing with the first instruction, paragraph 39, at paragraph 39 of what you say occurred in your reflection, “I was aware that Mr Hayashi had to carry out the card run,” you see that?

A. Mhm.

Q. And you say at the third paragraph, “I specifically told Mr Hayashi not to waste time completing the card run and that could wait until he’d spoken to [Mrs A]”?

A. Mhm.

Q. Now at page 163, which is these responses that you gave to [the Employee Relations Manager] in answer to her questions during the investigation, I’ll take you back to the same section we were looking at before and your answer, do you see under point 1, your answer, “Keith did not mention to me about the card run at all”?

A. Mhm.

Q. “The discussion about the card run never took place between us.” So which one is it, is that true or is paragraph 39 true?

A. I don’t remember now exactly which is true, but definitely the card run takes place at that particular time and then we did not want to waste time.

Q. So do you want to make an election as to change your evidence given to this Court or do you say that this is not true, that what you said on 1 March, which one is it?

A. My evidence, I want to keep it with my evidence.

Q. So this isn’t, what you said here in response to your employer wasn’t true?

A. I can’t answer that question because it was quite some time now, I don’t remember exactly what happened during that particular time.

[69] It was following this exchange that Mr Harrison put to the Table Games Manager that she and other staff members were running for cover following the CEO’s rather pointed email requesting disciplinary action be taken. As indicated earlier, the Table Games Manager considered that the proposition being put to her by Mr Harrison was fair.

[70] I also consider that the evidence of the General Manager – Gaming and the Employee Relations Manager was, like the Table Games Manager, inconsistent and evasive. On occasion, Mr Harrison had to insist on their answering pertinent questions when clearly, they were attempting to evade giving obvious answers but which may not necessarily have been within the interests of SkyCity’s case.

Conclusion and disposition

[71] One surprising feature arising out of the disciplinary process and the analysis which the General Manager – Gaming and the Employee Relations Manager made of what was before them was how little weight appeared to be placed on Mr Hayashi’s version of what transpired. Material parts of his evidence were corroborated by one important first hand witness, the salon 82 international host, and the video surveillance tape evidence, which unfortunately for a large period was incomplete. The omissions in the Table Games Manager’s statements should also have been apparent. At the very least, the two managers who made their decision to dismiss Mr Hayashi failed to stand back objectively and, where they must have had doubts arising from the conflicting statements and all the surrounding circumstances, give Mr Hayashi the benefit of the doubt. In the overall circumstances which prevailed, their actions were not those which a fair and reasonable employer could take.

[72] This matter got off on the wrong foot from the outset. Initially, there was the lack of clarity in the information given to the management team concerning the betting limits and the confusion which emanated. SkyCity itself admits that confusion arose from the directions which were given at the meeting at the

commencement of the shift. When equivocation occurred in salon 82, where Mrs A was playing, Mr Hayashi came to be faced with a very difficult situation, particularly realising that the relationship between his employer and a valuable customer could be at stake. The events as they then transpired are set out earlier in this judgment. After Mr Hayashi finished his shift, the fears that he indicated to his supervisor in fact transpired, and a goodwill payment was apparently decided to be necessary. The payment made to Mrs A was in the form of bonus play chips which Mrs A was required to use for further gambling at the casino. Considering the previous history of her gambling, it would be a reasonable inference that the casino recovered the amount that it had given to Mrs A in gambling chips.

[73] At the point when the decision was made to make a goodwill payment, incorrect information had been given to the CEO. Acting on that information, he directed disciplinary action. That imprimatur meant the person incorrectly blamed for the situation was Mr Hayashi. That led to his dismissal, which on any assessment of the facts was not the action that a fair and reasonable employer could have taken in all the circumstances. In simple terms, it was unjust and unfair; it was an unreasonable response. Quite apart from that the process adopted, while having the trappings of a formally fair procedure, had underlying flaws. These flaws arose from the managers who made the decision failing to properly and accurately assess the information which was before them and give proper weight to what Mr Hayashi was saying, and the further

information which corroborated that.

[74] The reasons for the dismissal and the process were particularly undermined by incorrect information being given by the Table Games Manager and her then being allowed to participate in part in the disciplinary process. All of this was not helped by her admission before the Court that at the time she, along with others, were running for cover. Nor was the process assisted by the failure of SkyCity to make proper disclosure of documents to Mr Hayashi's legal advisors; that information was only uncovered during the grievance proceedings before the Authority.

[75] Mr Hayashi's dismissal was unjustifiable, both on substantive and procedural grounds. His challenge to the determination of the Authority succeeds. The

remedies which Mr Hayashi seeks are reinstatement, reimbursement of lost income and compensation for hurt and humiliation. Ms Dunn, counsel for SkyCity, submitted that if the Court came to be assessing remedies, Mr Hayashi's contribution is central to the Court's assessment of remedies in this case. In assessing remedies, I am required pursuant to [s 124](#) of the Act to consider whether any remedies should be reduced if there is contributing behaviour by the employee. Ms Dunn urges that in this case there was contributing behaviour by Mr Hayashi. This submission largely relies on a repetition of the grounds upon which Mr Hayashi was dismissed. However, for the reasons which I have enunciated in this judgment, I do not consider that there was any contributing behaviour on Mr Hayashi's part which should result in the reduction of any of the remedies which I intend to award. Despite the beliefs which the General Manager – Gaming and the Employee Relations Manager clearly harboured about Mr Hayashi's actions, I am of the view that he was motivated throughout by loyalty to SkyCity even if, as he conceded, he could have been more thorough in checking the appropriate actions in confused circumstances. This entire matter arose from earlier actions of other employees of SkyCity, not of Mr Hayashi's making; all his actions were taken in an effort to ensure that the customer did not become disaffected.

[76] Insofar as the remedy of reinstatement is concerned, [s 125\(2\)](#) of the Act requires the Authority and therefore the Court on a challenge, to consider reinstatement only if it is practicable and reasonable to do so. There is no specific onus applying either way on the issue. The Employment Court, sitting as a full Court in *Angus v Ports of Auckland (No 2)* stated that if reinstatement is claimed, and the employer opposes it, the employer "will need to provide the Court with evidence to support that claim".¹⁰ The Court, in its discussion, stated that the requirement of reasonableness "invokes a broad enquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned".¹¹ The Court added:¹²

... The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected

¹⁰ *Angus v Ports of Auckland (No 2)*, above n 3, at [66].

¹¹ At [65].

¹² At [68].

employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[77] In this case, Mr Hayashi has set out in his evidence strong grounds for reinstatement if he should succeed in his challenge. Those matters include the fact that he has reached an age where it is unlikely that he would be able to obtain a similar position within the industry with another employer; that the balance of his working life is now leading closely to his eventual retirement; that prior to his dismissal his performance evaluations were positive; and that he is popular with other members of staff with whom he worked. He considers that his relationship with the managers who participated in the disciplinary process can be restored.

[78] As would be expected, the evidence from the SkyCity witnesses was that he should not be reinstated. However, there was evidence that because of Mr Hayashi's good relationship with the other staff members and the likelihood that they would be upset by his dismissal, a managed exit was initially to be proposed for Mr Hayashi, rather than a dismissal. As Mr Harrison put to the General Manager – Gaming, this was a somewhat cynical approach to the matter. However, it does have relevance on the issue of reinstatement. I disregard SkyCity's attempt to denigrate Mr Hayashi by producing and referring to documents relating to previous very historic disciplinary matters including warnings which have long since expired. These were inappropriately put forward as mere makeweights.

[79] Each of the SkyCity witnesses spoke of their loss of trust and confidence in Mr Hayashi as a ground against reinstatement. However, those views were founded upon what I regard as false premises based on their views as to Mr Hayashi's actions. For instance, the General Manager – Gaming clearly had the view throughout that Mr Hayashi, during the incident which arose in salon 82 was bent on providing Mrs A with compensation and was only held back from doing so by the pleas of other staff members. He did not resile from this view, despite robust cross-examination, but his attitude on this issue was clearly incorrect. His refusal to resile from it even though he must have seen it was wrong was probably based on the other factors to which I have adverted during this judgment. There is no reason why Mr Hayashi should not be reinstated. It is practicable and reasonable and I order SkyCity to do so. Accordingly, it is ordered that he be reinstated to his

former

position or placed in a position no less advantageous to him. While [s 126](#) of the Act contemplates that reinstatement is to take effect immediately, in this case the order will have immediate effect so far as other financial remedies are concerned, but in order that the parties may properly plan for Mr Hayashi's return to employment his actual return date is to be 14 days from the date of this judgment. To make it clear, he is to be placed on the payroll immediately but the return to the work premises is deferred for the period of 14 days.

[80] Dealing with financial remedies, SkyCity is to reimburse Mr Hayashi for all wages or salary lost by him following the date of his summary dismissal to the date of this judgment. It is to immediately commence payment of wages or salary to him at the rate to which it would by now have been increased had he remained in employment. The increases in salary are to date back to the date when he would have received them had he remained in employment. I will leave it to the parties to calculate the amount of this award. It is not clear whether he received pay in lieu of notice, although with a summary dismissal, this may be unlikely. If there was any such payment, that is to be taken into account. Mr Hayashi is also to disclose fully to SkyCity any income he has earned from employment during the period when he has been away from employment with SkyCity. Presumably his tax records may be able to provide such information. Any such earnings are to be deducted from the reimbursement award. He is also to receive reimbursement of any other financial benefits he would have received during the period. This will include reinstatement of any KiwiSaver or other superannuation scheme and reimbursement of any employer subsidy to such scheme. Mr Hayashi will need to discuss how his own contributions are to be dealt with. Without limitation, he is also to receive reimbursement for any other financial benefits such as bonuses and the like, which he would have received had he remained in employment. In addition, Mr Hayashi is to receive interest pursuant to sch 3, cl 14 of the Act on the total amount calculated to be reimbursed to him. Such interest is to be calculated from the date of his dismissal and in respect of when benefits would have been received by him, the date of such accrual, to the date when payment is made. Leave is reserved to the parties to refer to the Court any dispute as to the calculation of such reimbursement and interest.

[81] Mr Hayashi has claimed compensation for hurt and humiliation of \$25,000 pursuant to s 123(1)(c)(i) of the Act. In the circumstances, I regard this as quite a modest claim. Mr Hayashi in his evidence has described the consequences to him and his family of the dismissal. Over 20 years ago, he and his family moved to New Zealand from the United States of America to take up his employment with SkyCity and its predecessor. He was highly qualified and experienced in the casino industry. He refers to the embarrassment he felt in having to advise his family members of what had occurred. They have all remained in New Zealand for a considerable period and are now New Zealand citizens. He also refers to the hurt and humiliation he felt because of his dismissal coming to the knowledge of fellow employees and colleagues.

[82] I consider that Mr Hayashi was not treated fairly or well by SkyCity on this occasion. The fact that he was summarily dismissed and the method by which he was immediately removed from the premises were in my view, also not appropriate. He has not claimed an excessive amount in compensation, unlike claims in many of the cases which come before the Court. In all the circumstances, I consider that compensation of \$25,000 is appropriate and SkyCity is ordered to pay Mr Hayashi that amount.

[83] In relation to costs, I noted earlier that no costs have been awarded by the Authority. Pursuant to s 183 of the Act, the determination of the Authority is set aside by this decision of the Court which now stands in place of the determination. Costs are reserved. Costs both in this Court and the Authority will now be considered. If the parties are unable to reach any agreement on the matter of costs, then submissions will need to be filed by way of memoranda. In that event, Mr Hayashi has 14 days from the date of this judgment to file any submissions in respect of costs. SkyCity will have 14 days thereafter to file any answer and I will then allow Mr Hayashi a further 7 days to file any submissions in reply. Once those submissions are received the Court will issue a further judgment on costs.

Judgment signed at 11.30 am on 9 March 2018

M E Perkins Judge