

**Note: this determination includes
an order prohibiting publication
of certain evidence.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 135
5627256

BETWEEN

KEITH HAYASHI
Applicant

AND

SKYCITY MANAGEMENT
LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Richard Harrison, Counsel for the Applicant
Kylie Dunn and Emma Peterson, Counsel for the
Respondent

Investigation Meeting: 26 August 2016 at Auckland

Submissions Received 25 October 2016 and 8 November 2016 for the
Applicant and 2 November 2016 for the Respondent.

Determination: 3 May 2017

DETERMINATION OF THE AUTHORITY

- A. Keith Hayashi was not unjustifiably dismissed by SkyCity Management Limited.**

- B. Costs are reserved**

Prohibition from publication

[1] Under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibited from publication the evidence lodged in these proceedings about the identity of Ms A.

Employment Relationship Problem

[2] Keith Hayashi was employed by SkyCity Management Limited (SkyCity) as an Operations Manager. SkyCity is a subsidiary of SkyCity Auckland Limited, which operates the SkyCity Casino in central Auckland.

[3] Mr Hayashi commenced his employment at the casino in September 1995 and held a variety of other senior positions. In all, Mr Hayashi had 37 years' experience in the casino industry in the United States and New Zealand.

[4] On 17 February 2016, Mr Hayashi was rostered on the "sunrise" shift (worked between 0330hrs and 1200 hours). During a briefing at the commencement of the shift, an advisory was made by the outgoing manager that the "Any Pair Bet" (that is, the "player" wager and the "banker" wager) in Salon 86 – understood to be a gaming area for significant international players – was a combined total of \$25,000.

[5] Ms A, who had been playing Baccarat at Sky City for nine days in Salon 82 was not mentioned as part of the briefing. Mr Hayashi and, it seems, several other employees (mistakenly) believed that the advisory also applied to Salon 82 and, so it follows, Ms A.

[6] Table betting limits are displayed on a screen beside the table. SkyCity say Ms A's table limit was displayed on such a screen throughout her stay as \$10,000 per player/bank pair (\$20,000 in total).

[7] Ms A commenced play in Salon 82 at or about 6.50am. At about 7.00am, Mr Hayashi entered Salon 82. The table area manager, Shirley Wu sought clarification from him about what the table maximum for pair wagers for Ms A should be (\$5,000 per player/banker pair (\$10,000 in total) and not \$10,000 per player/bank pair (\$20,000 in total).

[8] Mr Hayashi then advised Ms A that the table limit had changed (by reduction) and that the table limits on the display screen were wrong. Mr Hayashi would suggest Ms A had already been advised this by the time he became involved by Ms Wu. Ms Wu did not give evidence at the investigation meeting. Mr Hayashi said he made an assumption about the limits in Salon 82 based on the briefing which had taken place in Salon 86. SkyCity accepted during its investigation that Mr Hayashi was not responsible for the confusion about the application of the advisory to Salon 82.

[9] Mr Hayashi then advised Ms A that SkyCity would investigate the maximum bet situation. He took the view this should apply retrospectively to her entire nine days of play at SkyCity. Mr Hayashi did not consult with or advise more senior managers about this. SkyCity said Mr Hayashi acted without authority and there was no basis for the retrospective application of the revised limits.

[10] Mr Hayashi then asked two other employees of SkyCity to calculate the amount owing to Ms A using the tracking sheets (a written record of each hand played). SkyCity said the procedure for checking previous hands played was to contact “surveillance” and have them calculate the amount using CCTV footage. Reference was made to SkyCity’s Minimum Operating Standards relating to the treatment of over/under payments and SkyCity said this applied in the circumstances.

[11] The amount calculated was \$310,400. SkyCity said Mr Hayashi had delegated authority to authorise a payment up to \$5,000 for an under or over payment if the hand was played “live” in front of him. SkyCity also said a payment of \$310,400 would require authorisation by the Chief Executive Officer (CEO).

[12] Mr Hayashi advised Ms A she would receive a reimbursement of \$310,400 and the payment would be made from the table float. At this stage, Mr Hayashi had still not discussed the table limits for Salon 82 and whether any payment to Ms A should be retrospective or, indeed, made at all with more senior managers.

[13] Prior to any overpayment being made to Ms A, Mr Hayashi contacted “surveillance” to tell them what was happening. He was advised by surveillance to consult with his manager, Radna Vellanki before making the payment to Ms A.

[14] At or about 8.40am, Ms Vellanki saw Mr Hayashi in his office. During a discussion between the pair, Mr Hayashi asked Ms Vellanki to confirm that there had been a change to Ms A's limits resulting in her playing over the table maximum. Mr Hayashi also advised Ms Vellanki that he had told Ms A she would be receiving an overpayment. Ms Vellanki advised Mr Hayashi there had been no over table limits bets and there was no basis for an overpayment.

[15] Mr Hayashi said he did not agree with Ms Vellanki, proposed a "goodwill" payment to Ms A and suggested Ms Vellanki escalate the matter to higher managers. Mr Hayashi did not advise Ms Vellanki that Ms A had already been provided with an overpayment figure of \$310,400.

[16] Ms Vellanki, on her evidence, said she then instructed Mr Hayashi to apologise to Ms A, advise her there had been no change to the limits and that no overpayment was due to her. Mr Hayashi conceded this direction was given but suggested it may have been subsequently (impliedly or otherwise) revoked by Ms Vellanki.

[17] Mr Hayashi said he went to Salon 82 at 9.10am and advised Ms A that her limits had not changed. He said he did not address the issue of the overpayment at that time. SkyCity said surveillance records show that Mr Hayashi did not speak to Ms A between 7.10am and 10.53am.

[18] At about 10.15am, Ms Vellanki sent the email to a more senior manager, who was responsible for setting the table limits for international players, confirming Ms A's limits had not been changed.

[19] At 10.46am, Ms Vellanki was copied into an email from Mr Hayashi to Surveillance requesting a review of one of the tracking sheets from Ms A's play. Ms Vellanki went to see Mr Hayashi to ask him why he was still investigating the overpayment. Mr Hayashi told her that he was seeking clarity over the amount that would have been payable as an overpayment, with a view to possibly reducing it (despite already having advised Ms A what the amount was). It became apparent to Ms Vellanki during this conversation that Mr Hayashi had not advised Ms A that there would be no overpayment.

[20] On Ms Vellanki's account, Mr Hayashi continued to dispute whether a refund was payable to Ms A and that Ms Vellanki should seek advice from more senior managers (including the CEO). Ms Vellanki then reiterated her instructions to Mr Hayashi to urgently advise Ms A that no overpayment was payable.

[21] Mr Hayashi attended Salon 82 at 10.53am and advised Ms A there had been no change to the limits in Salon 82 and there would be no overpayment. Mr Vali said Ms A subsequently demanded SkyCity honour the overpayment stated by Mr Hayashi. The CEO of SkyCity eventually authorised payment to Ms A in the amount of \$310,400.

[22] Mr Hayashi was dismissed for serious misconduct on 4 May 2016 following a disciplinary investigation which found: (1) he authorised an overpayment to Ms A contrary to SkyCity's procedures and the limits of its financial authority and (2) failed to follow the lawful and reasonable instruction of Ms Vellanki for a period of two hours to advise Ms A that there was no change to the limits in Salon 82 and no overpayment would be forthcoming

[23] Mr Hayashi claimed his dismissal was procedurally and substantively unjustified. A personal grievance was raised on his behalf and subsequently a statement of problem was lodged in the Authority.

[24] In settlement of his personal grievance, Mr Hayashi sought reinstatement, an award of lost wages and compensation for hurt, humiliation and injury to feelings. SkyCity opposed Mr Hayashi's application and the remedies he sought.

Issues

[25] The issues for determination are:

- (i) Was Mr Hayashi's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?
- (ii) If Sky City's actions were not justified what remedies should be awarded, considering:
 - (a) Reinstatement;

- (b) compensation for humiliation, loss of dignity and injury to feelings;
- (c) compensation for lost wages?
- (iii) In any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Hayashi that contributed to the situation giving rise to his grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[26] During the investigation meeting, I heard evidence from Mr Hayashi and from SkyCity's General Manager Gaming, Robbie Vail, Employee Relations Manager, Brooke Campbell and Table Games General Manager. Ms Vellanki.

[27] This determination, reserved at the conclusion of a one day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[28] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. While I have not explicitly referred to all the submissions of the parties in this determination, I have fully considered them.

SkyCity's Disciplinary Investigation

[29] After receiving incident reports from several staff members, SkyCity commenced a disciplinary investigation against Mr Hayashi. He was issued with a "Your Rights" letter which set out allegations to be subject of an investigation on 25 February 2016.

[30] In summary, it was alleged by SkyCity that Mr Hayashi had authorised a refund to a player without the necessary approval and he failed to follow the instruction of Ms Vellanki for a period of two hours to advise Ms A that no refund

would be forthcoming. Such conduct, the letter stated, could constitute serious misconduct for breaching SkyCity's Disciplinary and Dismissal Policy.

[31] The letter also invited Mr Hayashi to attend a "disciplinary" meeting on 26 February 2016. The meeting was attended by Mr Vali and Ms Campbell. During that meeting Mr Hayashi, at his request, was supported by Christine Hackshaw, an internal SkyCity employee advocate.

[32] SkyCity said at the meeting the allegations in the letter of 25 February 2016 were put to Mr Hayashi and he was asked for a response. SkyCity said in response to the first allegation, Mr Hayashi said he did not need to check the overpayment with Ms Vellanki because he was following casino regulations. In response to the second, SkyCity said Mr Hayashi stated he had to do his "card run" – the process of replacing used cards with new cards in the various playing areas – and did not wish to antagonise Ms A in the event an overpayment was due to her. SkyCity said it then adjourned the meeting to further investigate Mr Hayashi's responses.

[33] On 2 March 2016, SkyCity wrote to Mr Hayashi advising him there remained a "case for you to answer" and asked him to attend a meeting on 4 March 2016. The letter put Mr Hayashi on notice that the outcome of this meeting may be disciplinary action, up to and including dismissal.

[34] During the meeting on 4 March 2016, SkyCity say that Mr Hayashi accepted that he had made a mistake in assuming that limits applying in Salon 82 also applied in Salon 86. The meeting was adjourned so Mr Hayashi could obtain legal advice.

[35] After Mr Hayashi instructed counsel (Richard Harrison), the parties eventually agreed to reconvene the disciplinary meeting on 4 May 2016. During the meeting, Mr Hayashi spoke to a written statement. Also in attendance, in addition to Mr Vali and Ms Campbell, was SkyCity's counsel, Kylie Dunn, who took notes.

[36] During the meeting three adjournments were taken so Mr Hayashi could consult with Mr Harrison and SkyCity could confirm a matter with Ms Vellanki.

[37] SkyCity says it was concerned that elements of Mr Hayashi's story had changed including when he had spoken to Ms A on 19 February 2016 to advise her of the correct limits for Salon 82 and the reason why he had contacted surveillance via

email. SkyCity said Mr Hayashi sought an adjournment to discuss the latter with Mr Harrison.

Decision to dismiss

[38] During a final adjournment of the meeting of 4 May 2016, SkyCity said that Mr Vali and Ms Campbell considered the additional information provided and, on its case, inconsistencies in Mr Hayashi's responses to the allegations. Mr Vali and Ms Campbell then decided that Mr Hayashi had authorised the payment of \$310,400 to Ms A and had failed to promptly follow Ms Vellanki instruction to tell Ms A that no such payment would be forthcoming.

[39] Mr Vali and Ms Campbell then jointly decided that SkyCity had lost trust and confidence in Mr Hayashi, his actions amounted to serious misconduct and that their preliminary decision was that he should be summarily dismissed.

[40] When the meeting reconvened, the joint decision about serious misconduct and the proposed sanction of dismissal were communicated to Mr Hayashi. Mr Hayashi was asked if he wished to make any submissions about SkyCity's proposal to dismiss him. He declined to do so. Mr Hayashi was then dismissed, which was subsequently confirmed in writing, and he was asked to leave the premises.

Discussion

[41] SkyCity said the decision to summarily dismiss Mr Hayashi was procedurally fair and substantively justified. In the alternative, SkyCity said if there had been defects in the process used, they were minor and did not cause unfairness to Mr Hayashi.

[42] Mr Hayashi, through counsel, identified several procedural defects in the process used by SkyCity to dismiss him. In addition, Mr Hayashi argued that his dismissal was substantively unjustified. He would claim that he had what was, in effect, an innocent explanation or honest excuse for his actions giving rise to the alleged serious misconduct and this meant his summary dismissal was substantially unjustified. As an alternative, Mr Hayashi argued his summary dismissal was not within a reach of reasonable responses by SkyCity and alternatives to dismissal should have been considered.

[43] The role of the Authority in applying the test of justification set in s 103A of the Act is to consider the substantial fairness and reasonableness of the employer's actions and not subject the procedure followed to minute and pedantic scrutiny to identify any failing.¹ In many ways, Mr Hayashi's submissions were directed at the latter, not the former.

Procedure

[44] Mr Hayashi procedural criticisms included a suggested failure by SkyCity to interview relevant witnesses, the multi-faceted involvement of Ms Vellanki – said to be complainant, prosecutor and “behind the scenes” informant – the non-disclosure of information and documentation said to be relevant and a lack of transparency, and potential bias, by the decision-makers. Suffice to say, SkyCity rejected all of Mr Hayashi's criticisms about its procedure.

[45] SkyCity submitted, in effect, there was little factual dispute between the parties over the two allegations made against Mr Hayashi. It said, the first allegation was that Mr Hayashi authorised an overpayment to Ms A without appropriate authority and without complying with SkyCity's procedures with the contest between the parties being that authority was needed and that procedures applied. SkyCity said the second allegation was that Ms Vellanki gave Mr Hayashi an instruction to advise Ms A there had been no change in the limits in Salon 82 and that a refund would not be forthcoming and he failed to comply with it. SkyCity said the only dispute between the parties was whether Ms Vellanki withdrew the direction (impliedly or otherwise) during the discussion.

[46] Addressing the particular criticisms by Mr Hayashi of SkyCity's procedures, in terms of the failure to interview relevant witnesses, I accept the submission of SkyCity that the sufficiency of its investigation had to be assessed “in all circumstances” under s 103A of the Act and the identical treatment of witnesses was not required.² It is not clear, having heard and considered the evidence during the investigation meeting, what interviewing the people suggested by Mr Hayashi would have achieved in circumstances of the case. Consequently, I do not accept Mr Hayashi's submission the investigation process was not sufficient because relevant

¹ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

² *A Ltd v H* [2016] NZCA 419 at [36]

people, in his view, were not interviewed. Even if I am wrong about that, the defects in SkyCity's process in this regard were minor and did not result in Mr Hayashi being treated unfairly.

[47] Mr Hayashi submitted the involvement of Ms Vellanki, as a witness, in compiling information for the investigation meeting and being present at, at least, one of the witness interviews meant she was not an independent witness. I accept this is not ideal. Mr Vali and Ms Campbell should have created more distance between Ms Vellanki and their investigation process. However, in circumstances of the case, I find this was a minor defect in process which did not result in Mr Hayashi being treated unfairly.

[48] Mr Hayashi submitted that the non-disclosure by SkyCity of certain information and documentation, some of which was provided during the Authority's investigation meeting, gave rise to an appearance of bias and not considering the facts objectively. The disclosure of all relevant information in a timely manner is an important element of a procedurally fair employment investigation. However, in circumstances of the case, and after considering the information that was disclosed during the investigation meeting, I find this was a minor defect in process which did not result in Mr Hayashi being treated unfairly.

[49] Mr Hayashi's submission about the lack of transparency, and potential bias, by the decision-makers is, in my view, speculative or, at best, founded on a series of inferences and unsupported by direct evidence.

[50] SkyCity's investigation into Mr Hayashi alleged serious misconduct was not a textbook example – however, it was capable of achieving a fair and reasonable result.³ SkyCity wrote to Mr Hayashi inviting him to a meeting and told him he could bring a support person. SkyCity advised Mr Hayashi the matter was serious and could result in his dismissal. SkyCity provided Mr Hayashi with details of the allegations including written statements from relevant employees. SkyCity investigated the allegations including the responses Mr Hayashi provided to them. SkyCity gave Mr Hayashi an opportunity to seek legal advice and representation and facilitated a delay in the process to accommodate the legal representative of his choosing. SkyCity give Mr Hayashi and his legal representative an opportunity to respond to the allegations

³ Ibid at [46]

and make submissions directly to the decision-makers. SkyCity considered these responses before making a preliminary decision to summarily dismiss Mr Hayashi. SkyCity put the proposed sanction to Mr Hayashi for comment and he declined to provide any. SkyCity then confirmed its decision.

Substantive justification

[51] Mr Hayashi said he made an assumption about the limits in Salon 82 based on the briefing which had taken place in Salon 86. He could not properly explain why this assumption was made. Ultimately, Mr Hayashi was not disciplined for this. SkyCity said the betting limits for one player do not relate to another player, the relevant limits for each player are set in advance of play by the manager of international business in writing and are only changed during play if requested by the player. If such a request is made, SkyCity said it had procedures regulating this. Given Mr Hayashi's extensive experience, he ought to have been aware of these.

[52] However, Mr Hayashi should have, at least, sought clarification about the limits in Salon 82 from a more senior manager, including the manager of international business, before proceeding down the path he did. This remained the case regardless of whether Mr Hayashi, on his evidence, was the first SkyCity employee to advise Ms A about the change in limits or not. Unfortunately, the actions he took in response to the situation saw Ms A advised she would receive an overpayment, contrary to SkyCity's Minimum Operating Standards relating to the treatment of over/under payments and Mr Hayashi's financial delegation. The subsequent failure to follow Ms Vellanki's instruction for a reasonably significant period, within context, not only put Mr Hayashi at risk for not following it, but it also exacerbated the situation in terms of Ms A's expected payment.

[53] Even if Mr Hayashi and the others who shared the (mis)understanding that a change to the limits in Salon 82 had occurred, Ms A had only been playing for a short-time, a matter of minutes, under these changed conditions. Consequently, her putative overpayment would have been relatively small. It was not clear, and unsatisfactorily so, why Mr Hayashi believed, as the senior manager responsible for Salon 82 at the time, that any such overpayment should be backdated nine days to the commencement of Ms A's play (increasing exponentially as a consequence).

[54] It is an established principle that the failure to follow a lawful and reasonable instruction by an employer can give rise to a finding of serious misconduct.⁴ SkyCity, relying on principles set out in *Asure New Zealand Limited v New Zealand Public Service Association*⁵, submitted that Mr Hayashi was given a lawful and reasonable instruction by Ms Vellanki and his failure to follow it constituted serious misconduct. Mr Hayashi disputed that such a direction was given.

[55] In his evidence, and his written response to the allegation presented to the disciplinary meeting on 4 May 2016, Mr Hayashi drew a distinction between the calculated “overpayment” of \$310,400 and a “goodwill payment”. He claimed that as a result of the discussion with Ms Vellanki at 8.40am on 17 February 2016, she was to revert to him about a possible goodwill payment to Ms A after discussing it with more senior managers. Mr Hayashi claimed that this impliedly or otherwise revoked the direction to advise Ms A there had been no change in Salon 82’s limits and there would be no overpayment.

[56] Ms Vellanki denied there had been such an implied revocation. She also said the instruction was reiterated to Mr Hayashi shortly before 11.00am when it became apparent he had not complied with it. In Mr Hayashi’s written response to the allegation presented to the disciplinary meeting on 4 May 2016, he stated:

Radha said that I should inform [Ms A] that her Any Pair Maximum was \$10,000 *and* that there would not be a \$310,000 overpayment since we followed the correct procedure” (emphasis added)

...

I suggested to her [Radha] that she talk with Robbie, Matt or even Nigel (I offered to talk to Nigel) about a goodwill type of compensation.

[57] It is clear from this statement that Mr Hayashi accepted that he was required to inform Ms A the limits in Salon 82 were correct and no overpayment would be made to her. It is also clear that the suggestion of a goodwill payment to Ms A was made to Ms Vellanki by Mr Hayashi. Having given Mr Hayashi an instruction to tell Ms A that there was no change to the limits in Salon 82 and there would be no overpayment, it is simply not logical that Ms Vellanki would then immediately agree with Mr Hayashi to pursue an alternative payment with her managers on Ms A’s behalf. In any event, Ms Vellanki denied that she did.

⁴ See, for example, *Sky Network Ltd v Duncan* [1998] 3 ERNZ 917 (CA).

⁵ [2005] ERNZ 789.

[58] Further, Mr Hayashi's explanation for the email to Surveillance at 10.46am on 17 February 2016 requesting a review of the tracking sheets appears to undermine any belief that he had that Ms Vellanki's instruction had been impliedly or otherwise revoked. Mr Hayashi's explanation in his written response to the allegation was that a review of the tracking sheets by Surveillance might show the original amount of overpayment was incorrect and "lessen the blow of the mistake". This suggests that the overpayment, and not a goodwill payment, was very much Mr Hayashi's focus some two hours after being issued with the instruction by Ms Vellanki.

[59] Of concern, Mr Hayashi could not properly explain his actions between 8.40am and 10.53am. Mr Hayashi said he went to Salon 82 at 9.10am and advised Ms A the limits had not changed. However, on his own evidence, he did not address the issue of the overpayment. SkyCity said surveillance records contradicted this account and show that Mr Hayashi did not speak to Ms A between 7.10am and 10.53am.

[60] SkyCity said Mr Hayashi failed to comply with Ms Vellanki's instruction in a timely manner and, in fact, did not do so until the instruction was reiterated approximately two hours later. SkyCity submitted delay, before ultimate compliance, could still give rise to a failure to follow a lawful and reasonable instruction.⁶ I accept this submission but the question of delay must turn on an objective assessment of the circumstances. In this case, I am satisfied that Mr Hayashi cannot justify the delay. This is particularly so in circumstances where Ms Vellanki told Mr Hayashi not to waste his time undertaking his usual duty of performing a card run until he had notified Ms A of her instruction.

Conclusion about Mr Hayashi's dismissal

[61] Drawing all the factors detailed, discussed and analysed above and applying the test in s 103(A) of the Act, I find the process adopted by SkyCity to dismiss Mr Hayashi, subject to minor defects, where identified, did not result in him being treated unfairly and the outcome was substantively justified and within the range of reasonable responses by SkyCity to the determined serious misconduct.

[62] Mr Hayashi may have had the employer's best interests at heart, but SkyCity did not see it that way. Unfortunately, what became, in effect, a personal crusade by

⁶ See, *Belsham v Ports of Auckland Ltd* [2013] NZEmpC 190

Mr Hayashi to ensure that Ms A, a significant client of the casino, was not disadvantaged by a highly unusual situation – a situation he substantially contributed to – has meant Mr Hayashi has lost his long career at SkyCity. This is, indeed, very unfortunate.

Remedies

[63] Having found Mr Hayashi was justifiably dismissed by SkyCity, it was not necessary to undertake an assessment of remedies to settle his personal grievance.

Costs

[64] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, \$3500 for a matter such as this commenced before 1 August 2016, and adjusted upwards or downwards for relevant factors.⁷

Andrew Dallas
Member of the Employment Relations Authority

⁷*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].