

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 189/09
5137363

BETWEEN RENEE HEMANA
 Applicant

AND TAMAKI TOURS LIMITED
 First Respondent

 TAMAKI CHRISTCHURCH
 MAORI VILLAGE LIMITED
 Second Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, Counsel for Applicant
 Awatea Edwin and Mike Tamaki, Advocates for
 Respondents

Investigation Meeting: 4 June 2009

Determination: 3 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Renee Hemana was employed at the Tamaki Heritage Village at Ferrymead in Christchurch from in or about May 2007. Initially Ms Hemana thought that she had been transferred from Tamaki Tours Limited in Rotorua where she had previously worked for a combined period in excess of three years to Christchurch. Nothing turns on that in terms of her employment relationship problem lodged before the Authority except that Ms Hemana had a written individual employment agreement with Tamaki Tours Limited in Rotorua but did not have an employment agreement with the Tamaki Heritage Village in Christchurch. A clause from her employment agreement with Tamaki Tours Limited was relied on in her dismissal letter from Tamaki Heritage Village. This caused some issues in terms of identity of Ms Hemana's employer in Christchurch and the statement of problem named only Tamaki Tours Limited as the

respondent. Given the issues raised on behalf of the respondent on the day of the Authority investigation meeting about the correct identity of Ms Hemana's employer, it has been necessary to deal with that matter which I have in paragraph 5 of this determination.

[2] Ms Hemana was initially employed in Christchurch to assist in setting up the new venture and her role evolved into a supervisory role in which she supervised the bar, kitchen and restaurant areas and employees therein and assisted with matters, including ordering of food and alcohol. After about three months Ms Hemana was promoted to a managerial role as Manager of the bar, kitchen and restaurant.

[3] Ms Hemana says that she was unjustifiably dismissed from her employment on 2 November 2007 which dismissal was confirmed by letter to her dated 5 November 2007. Ms Hemana seeks reimbursement of lost wages and compensation in the sum of \$10,000 together with costs.

[4] Tamaki Heritage Village does not accept that Ms Hemana's dismissal was unjustified and/or that the remedies claimed are fair and reasonable in all the circumstances. They say that there were issues with Ms Hemana's performance culminating in a loss of money after an event at the Heritage Village over Labour Weekend 2007. They say that there were further problems discovered after Ms Hemana's employment had terminated in terms of the cleanliness and hygiene of the areas she managed.

The identity of the respondent

[5] On the day of the Authority's investigation meeting a Director of Tamaki Tours Limited and Tamaki Christchurch Maori Village Limited which trades as Tamaki Heritage Village Christchurch, Mike Tamaki, said that the correct identity of the respondent is Tamaki Christchurch Maori Village Limited and that the proceedings should be amended reflect that. There was no agreement to a change to the identity of the respondent on behalf of Ms Hemana and there was no reference in the statement in reply or statements of evidence provided on behalf of the respondent to Tamaki Tours Limited not being the correct respondent. In the circumstances I propose to deal with the matter by adding Tamaki Christchurch Maori Village Limited as a second respondent. If remedies are awarded then both the first and second respondents are jointly and severally liable, but naming the second respondent

will enable the respondents to elect, if there are awards in favour of Ms Hemana, which company is liable for payment of any award. I shall refer to the respondent from hereon in my determination as Tamaki Heritage Village.

The issue

[6] The Authority is required to consider the actions of Tamaki Heritage Village under s.103A of the Employment Relations Act 2000 as to whether the actions and the decision to dismiss were what a fair and reasonable employer would have done in all the circumstances at the time. In particular the Authority is required to consider:

- Was there a full and fair investigation carried out into the actions relied on by Tamaki Heritage Village as justification for the dismissal;
- Would a fair and reasonable employer have dismissed Ms Hemana in all the circumstances; and
- If Ms Hemana was unjustifiably dismissed are there issues of mitigation and contribution, and should issues as to the state of the kitchen/restaurant discovered after Ms Hemana's employment was terminated impact on remedies.

Reason for the dismissal

[7] Ms Hemana was dismissed at a meeting on 2 November 2007 by Mr Tamaki. It was accepted in evidence that the decision to dismiss Ms Hemana had been made the previous day on 1 November 2007 and the meeting on 2 November 2007 was for that decision to be delivered to Ms Hemana.

[8] There was a dispute over whether Ms Hemana had failed to attend one or two earlier meetings requested by Mr Tamaki. Ms Hemana said that she had not attended one previous meeting that Mr Tamaki requested she attend prior to 2 November 2007 because she was unable to obtain transport to the meeting which was held in offices away from the Heritage Village and was unable to contact Mr Tamaki and advise that she would not be attending.

[9] I am satisfied from the evidence that there was one earlier meeting that Ms Hemana failed to attend.

[10] At the meeting on 2 November 2007 Mr Tamaki advised Ms Hemana that he had concerns about her work ethic and he raised the issue of missing money from hangi, food and beverages sold during a Labour Weekend event at the village. Ms Hemana advised Mr Tamaki that she did not steal any money and Mr Tamaki reassured Ms Hemana that he did not think she stole it personally but that someone had to be responsible for the missing money and that that person was Ms Hemana as Manager of the area.

[11] Ms Hemana asked if it was possible for her to undertake another role at the Tamaki Heritage Village but she was advised that this was not possible. Ms Hemana also asked Mr Tamaki if he could write a letter stating that she was redundant as this would have assisted her with her financial situation and her debts. Ms Hemana had insurance in the event she was made redundant for items on hire purchase. Mr Tamaki advised that he would discuss this with his office person but ultimately the decision was made to dismiss Ms Hemana in terms of missing money.

[12] On 5 November 2007 the following letter was delivered to Ms Hemana:

Dear Renee

Re Serious Misconduct

It has come to our attention that during the Labour Weekend period there is a huge discrepancy in regards to the Food & Beverage Department takings from this time, which at the time you were in charge of.

On the 25 of October 2007, Mike Tamaki gave you the opportunity to explain this discrepancy, however, you had just shrugged your shoulders. It is of great concern that this was your reply.

Therefore, due to the nature of the incident, you have today, being the 1st November 2007, been officially dismissed for Serious Misconduct under Schedule D of the Individual Employment Contract:

- 1. Unauthorised possession of property, money, or information, or intellectual property, belonging to or under the control of the employer.*

Renee, your final pay will be put into your account once we have received all property that you have in your possession that belongs to Tamaki Tours Limited. This must be given to Mike Tamaki.

[13] Unusually I find that the reason for Ms Hemana's dismissal was not that specified in the letter of 5 November 2007. This was accepted by Mr Tamaki in his

evidence. I do not find that Mr Tamaki intended to dismiss Ms Hemana for unauthorised possession of money, but rather for failing to make sure that the money received over the Labour Weekend was properly accounted for against the background of what Tamaki Heritage Village considered was otherwise poor performance.

[14] Ms Hemana accepted that Mr Tamaki did not maintain that she had stolen the money at the meeting on 2 November 2007, although after receiving the dismissal letter she quite understandably thought the reason for her dismissal was that she had taken the money.

Was there a full and fair investigation carried out into the actions relied on by Tamaki Heritage Village as justification for the dismissal

[15] The actions relied on as justification for the dismissal I find were that Ms Hemana had an overall responsibility as Manager to make sure money received in the kitchen, restaurant and bar area and items sold were properly accounted for over the Labour weekend. Further there was reference to poor performance/work ethic.

[16] There were significant procedural deficiencies in this matter and considered objectively an overlap between those deficiencies and a conclusion reached that there was serious misconduct.

[17] Ms Hemana was never formally advised of the allegations against her or advised to bring a representative to the meetings. She did not have a real opportunity to provide an explanation and have that taken into account. The only formal meeting that she attended was the meeting at which the decision to dismiss, a decision which had been made the previous day, was delivered. Although the implementation of the decision was delayed whilst some inquiries were made as to whether Tamaki Heritage Village could put in writing that Ms Hemana was redundant, she had no opportunity to properly influence the conclusion that there had been serious misconduct on her part.

[18] The background to the conduct is that over Labour Weekend 2007 there was an open day at Ferrymead and a promotion day for the Tamaki Heritage Village.

[19] Hayley Mahanga is the reservations and office manager. Ms Mahanga gave evidence about how the admission and hangi money was collected from customers over the weekend. Some hangi tickets were sold at the entrance to the village and

some at the bar and restaurant which Ms Hemana was managing. Ms Mahanga gave evidence that she was in the ticket box during the majority of the two days together with a Ferrymead staff representative who collected the Ferrymead entrance admission fees. Two other employees Crystal McLenaghan and Lisa Mete occasionally relieved her.

[20] The hangi were sold at \$10 per ticket and Ms Mahanga gave evidence that there were 400 pre-prepared meals made for the weekend. At the conclusion of the weekend all takings were locked in cash boxes. One cash box was for takings from the ticket booth and the other cash box was for takings from the kitchen/bar area. Ms Mahanga was asked to count and reconcile the amounts in the cash boxes and she gave evidence that she carried out this action twice and had on at least one occasion Ms McLenaghan as a witness.

[21] Ms Mahanga said that takings she received from Ms Hemana did not include documentation of what had been sold during the entire weekend unlike the taking received at the front entrance which were able to be reconciled. Ms Mahanga said that the amount in the cash box for Ms Hemana's area was EftPos \$462.00 and cash \$637.00 being a total of \$1,100.00 (rounded). Ms Mahanga said a stock take of the remaining hangi meals came to less than \$100 with 10 accounted for as staff meals. A total of 30 hangi were sold from the front entrance. The total hangi sold therefore were 300 parcels to the value of \$3,000 and what Ms Mahanga estimated to be \$800 worth of other products, such as fish and chips, fried bread and beverages both alcoholic and non-alcoholic.

[22] Ms Mahanga said that this left a discrepancy of \$2,700 about which she had no choice but to bring to the attention of Mr Tamaki.

[23] Mr Tamaki spoke to Ms Hemana on 25 October 2007 and advised her that there was a discrepancy and the amount of that discrepancy. Ms Hemana said in her evidence that she responded that the hangi tickets were with the cash although that was not the evidence of Ms Mahanga and Mr Tamaki said he could not recall seeing hangi tickets either. Ms Hemana said that she estimated that about 30 tickets had been sold at the kitchen area for hangi.

[24] Mr Tamaki and the Creative Director for Tamaki Heritage Village, Awatea Edwin, said that Ms Hemana when asked about the discrepancy by Mr Tamaki simply

shrugged her shoulders. I think it likely that in answer to a question about the discrepancy Ms Hemana may well have shrugged, but I find it unlikely that she failed to respond to any questioning at all. I do accept though that it would have appeared to Mr Tamaki and Ms Edwin that Ms Hemana was less than interested in what was for them, obviously a matter of considerable concern.

[25] Ms Hemana accepts that she was responsible for the takings in the restaurant and bar area. Over this Labour Weekend, this included the hangi meals as well as chips, fish, fried bread, hot dogs and beverages. Ms Hemana said that at the end of the first day she collected all the money and put it into the safe. She said that she repeated this at the end of the second day. Ms Hemana said that she recorded the extra food/drink purchased by people in addition to the \$10 hangi on the back of the ticket.

[26] There was an issue about whether or not a till was available to use. Mr Tamaki said that the till was available for use in the bar/restaurant and simply needed to be programmed and that it was Ms Hemana's responsibility to ensure that this was done, or it could not be programmed, to have asked for help. The evidence supports that even if the till was not used then Ms Hemana did understand that it was necessary for her and others in the area to record what was sold.

[27] The company faced with a difficult problem with respect to the shortfall. The investigation undertaken largely consisted of the report from Ms Mahanga of the funds collected, no doubt supported by Ms McLenaghan against what knowledge there was in terms of sales of hangi and other food and beverages against existing stock. A fair and reasonable employer would have wanted to be satisfied that the money in all likelihood had gone missing from the kitchen/bar area and Ms Hemana was entitled to be provided with the information that formed the basis of this conclusion. She was not.

[28] A fair and reasonable employer would have compared as best it could the records of existing stock at the time of the Labour Weekend with remaining stock. There was some evidence given that there had previously been concerns about stock takes for food and alcohol, or lack of, in the kitchen/bar area. Nevertheless, in determining whether there was a shortfall and the amount of that shortfall, it was necessary to undergo such an assessment.

[29] In a situation like this where several employees worked in the kitchen/bar area, a full and fair investigation would also have involved talking to them in reaching some conclusion about what was done by each one in terms of receiving money and recording sales. One of the employees, Dean, for example, had recorded on a piece of paper some of the items sold but apparently not all. If for example Ms Hemana had instructed employees she managed to properly record sales of food and beverages and they failed to do so, then that may well have reduced the seriousness of her own conduct. Ms Hemana in her evidence at the investigation meeting said that of the other employees, Dean was on the till, Chico and Riana were cooking and she was *floating* around assisting with orders, cleaning and waiting.

[30] It was certainly Ms Hemana's position at the Authority investigation meeting that she had recorded sales. If a full and fair investigation had established there was a likelihood that someone had taken the money then there would have had to be a conclusion as to whether Ms Hemana had or had not taken reasonable steps in terms of the area she managed to avoid that.

[31] A fair and reasonable employer would look to the Manager in the first instance as having the responsibility for ensuring proper procedures and policies existed for recording money received and items sold regardless of a working till or not. A fair and reasonable employer would also expect a Manager to do everything he or she could to help the employer in its inquiries in this regard if money could not be accounted for against product sold. A fair and reasonable employer would not simply hold a manager accountable for a discrepancy of money received against product sold without a full and fair investigation.

[32] I do not find in this case that an investigation was undertaken to the standard where I am satisfied, considered objectively, that a finding of serious misconduct in terms of Ms Hemana's conduct can be established.

[33] In terms of previous performance concerns I do not find that these were put in a way that it would have been apparent to Ms Hemana that failure to improve meant her employment would be at risk. By that I mean that there was no evidence of any formal warnings in that regard although the evidence of Mr Tamaki was that there were concerns about Ms Hemana's performance from quite early on and I accept these were in all likelihood put to Ms Hemana informally.

[34] It could perhaps then be seen as somewhat surprising given those issues that Ms Hemana's position changed from a supervisor to manager. Mr Edwin gave evidence that I accept that he invited Ms Hemana to Managers meetings to see if she could be assisted in her role. There were other concerns raised in terms of Ms Hemana and some out of work matters but I do not find that they are material to the issues I am required to determine.

[35] In conclusion I do not find that there was a fair and full investigation into the conduct of Ms Hemana that enabled Tamaki Heritage Village to conclude that her conduct was such that it amounted to serious misconduct and that she was accountable for and responsible for the money going missing.

Would a fair and reasonable employer have dismissed Ms Hemana in all the circumstances

[36] I have not found that Tamaki Heritage Village has justified its decision that there was serious misconduct on Ms Hemana's part. In those circumstances I do not find that the decision to dismiss her was justified because it was not what a fair and reasonable employer would have done in all the circumstances at the time. Ms Hemana has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

After discovered misconduct

[37] I heard evidence from Ms McLenaghan and Ms Mahanga that after Ms Hemana's employment was terminated they inspected the kitchen and restaurant and were very concerned with what they found. I do not intend to go into any particular detail at this point, however I accept that there would have been a need to talk to Ms Hemana about this.

[38] I accept that in light of this evidence it is appropriate to limit any possible reimbursement of lost wages for three months but I am not persuaded otherwise that the state of kitchen should impact on remedies I go on to award under s.123 of the Employment Relations Act 2000.

Remedies

[39] The Authority is required to consider under s.124 of the Employment Relations Act 2000 whether Ms Hemana contributed to her grievance. If the

Authority considers that Ms Hemana did contribute to her grievance then it is required to reduce the remedies that it may otherwise have awarded accordingly once it considers the extent to which her actions contributed.

[40] I find that there was blameworthy conduct on the part of Ms Hemana in that in her role as Manager her attitude when questioned about the discrepancy in terms of takings was not constructive to properly investigating the discrepancy following the Labour weekend event. Ms Hemana failed to attend a meeting and I accept that Mr Tamaki and Mr Edwin spent some time sitting and waiting for Ms Hemana to turn up. Even if there was a good reason for Ms Hemana not to attend then she should have contacted her employer to advise of this reason. There was also shrugging of shoulders in response to a question from Mr Tamaki. Given the seriousness of the matter, that was simply not appropriate from the Manager. Ms Hemana should have been more forthcoming and constructive in helping establish what had happened in terms of the missing funds.

[41] Ms Hemana says in her written statement of evidence that the cash procedures were sloppy and she was used as a scape goat for those sloppy procedures. I am not satisfied that the record taking from the areas that Ms Hemana was responsible for was up to the required standard that one may expect and I find that there is some blameworthy conduct in that regard.

[42] I am not satisfied that the reason for the dismissal was that Ms Hemana took the money herself and there can no issue of contribution about that.

[43] In all the circumstances I assess an appropriate level of contribution at 30%.

Lost wages

[44] Ms Hemana gave evidence that she starting looking for another position immediately her employment was terminated. She had to leave the flat that she was living in because she could no longer pay the rent and shifted in with her mother in law Ruby. Ms Hemana after a period of some weeks returned to Rotorua and obtained some part time work in Tauranga in mid January 2008 which eventually turned into full time work. Ms Hemana said that she thought she had applied for about 15 roles, but was not successful until mid January 2008 in obtaining a role. Ms Hemana put this down to a loss of confidence and that she could not use Tamaki Heritage Village as a referee.

[45] I find that Ms Hemana did attempt to mitigate her loss by applying for positions. Ms Hemana had shifted to Christchurch from Rotorua and I accept that she was not familiar with the city and that this may well have impacted on her lack of success obtaining another position in Christchurch. I find that Ms Hemana is entitled to reimbursement for lost wages for a period of three months from 5 November 2007 to 31 January 2008 which is a period of 13 weeks.

[46] Ms Hemana said that she usually worked 40 hours per week at \$18 per hour. That is a weekly sum of \$720 per week, which multiplied by 13 is the sum of \$9,360.00 gross. During the three month period Ms Hemana earned \$276 gross from her position at Tauranga which deducted from \$9,360 leaves a balance of \$9,084 gross.

[47] Taking contribution into account I order Tamaki Tours Limited and/or Tamaki Christchurch Maori Village Limited to pay to Ms Renee Hemana the sum of \$6,358.80 gross being lost wages under s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[48] Ms Hemana said that she was shocked to be dismissed. She said she felt trapped in Christchurch and she felt a sense of shame about what had happened and did not talk to family in Rotorua about the situation. Ms Hemana thought that she had been dismissed for theft because of the dismissal letter. Ms Hemana, and this was confirmed by her mother in law, became withdrawn and upset and lost confidence notwithstanding her mother in law said she was somebody who prided herself on a positive outlook.

[49] When Ms Hemana returned to Rotorua her mother took her to a doctor who prescribed anti depressants for her and a medical certificate was provided in that regard.

[50] I find that a fair award of compensation in terms of this matter is the sum of \$8,000.

[51] Taking contribution into account I order Tamaki Tours Limited and/or Tamaki Christchurch Maori Village Limited to pay to Ms Renee Hemana the sum of \$5,600 being compensation under s.123(1)(c) of the Employment Relations Act 2000.

Costs

[52] I would encourage the parties to attempt to reach a resolution as to costs. If agreement cannot be reached then I reserve the issue of costs. Mr McKenzie has until 18 November 2009 to lodge and serve submissions as to costs and Mr Edwin has until 9 December 2009 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority