IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 423/09
5142825

	BETWEEN	WINSTON IP Applicant
	AND	WAIKATO SNOOKER AND 8 BALL CLUB INCORPORATED Respondent

Member of Authority:	Robin Arthur
Representatives:	John Peebles for Applicant Amy Heinrich for Respondent
Investigation Meeting:	8 July 2009 in Hamilton
Submissions received:	14 July 2009 from Applicant 15 July 2009 from Respondent
Determination:	25 November 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 10 August 2008 the Waikato Snooker and 8 Ball Club Incorporated ("the Club") dismissed Winston Ip from his job as a team leader.

[2] His job involved customer service and cleaning duties at the Club's premises which provided snooker tables and gaming machines for use by members.

[3] Mr Ip's dismissal followed an investigation by the Club's president Bernie Endres of the circumstances in which a thief stole $9100 from an unlocked safe behind the customer service counter on 14 July 2008.

[4] Security camera footage established that at the time of the theft Mr Ip was

playing pool with a Club member. He did not see the thief go behind the counter and later he did not notice coins lying around the safe when he did go back to the counter.

[5] The theft was discovered the next morning during a routine cash count by the Club's manager Lindsay Weight. Mr Weight was present at the premises on the day of the robbery but was working in an upstairs office at the time.

[6] As a result of Mr Endres' investigation Mr Ip was called to a disciplinary meeting to answer an allegation of serious misconduct. The allegation was that he has left the counter unattended to play pool. Playing pool while on duty was contrary to Club policy. All staff, including Mr Ip, had been twice notified of the policy.

[7] In the disciplinary meeting that followed Mr Ip responded to allegations that he had:

(i) failed to abide by Club policy prohibiting staff playing pool during work hours; and

(ii) breached confidentiality by telling a Club member about the robbery after being instructed to keep the matter confidential; and

(iii) jeopardised the Club's gaming licence by his conduct.

[8] He also then provided a written outline of his replies. He admitted playing pool and knowing that a notice from Mr Endres sent to all employees late in the previous year had "*banned staff from playing pool*". He reported that Mr Weight played pool with him while on duty, including earlier on the day of the theft.

[9] He also argued that other duties required him to leave the counter and he was not responsible for the unlocked safe as Mr Weight was in charge of the Club at the time. He denied breaching confidentiality and that the theft had placed the Club's gaming licence at risk.

[10] Mr Endres then discussed the matter at a meeting of the Club's management committee attended by Mr Weight and four of the committee's six active members. Following that meeting Mr Ip was sent a letter of dismissal. The letter set out the procedure followed and allegations made in the disciplinary investigation of Mr Ip. It concluded with this description:

> *At the [management] committee meeting, the disciplinary meeting and your explanations were discussed by those committee members present (and prior to the meeting with those who could not attend). The written response provided by you was read and considered by all present. After much discussion, committee members' opinions as to what action to take were put to the club president. Taking these opinions, and those obtained from committee members unable to attend the meeting, it has been decided to terminate your employment effective immediately.* …

[11] No disciplinary investigation was made of Mr Weight's conduct on the day of the theft.

Issues

[12] The issues for investigation and determination by the Authority are

(i) whether the decision to dismiss Mr Ip was one a fair and reasonable employer would have made in all the circumstances at the time; and

(ii) whether Mr Ip was unjustifiably disadvantaged by being treated differently than Mr Weight over their conduct on the day of the theft;

(iii) if the Club's actions or how it acted were unjustified, what remedies are due to Mr Ip after considering what he has since done to mitigate his losses and whether he contributed to the situation giving rise to his grievance?

The investigation

[13] Written witness statements were provided by Mr Ip, Mr Endres and Mr Weight who each attended the investigation meeting and – under oath or affirmation – answered questions from the Authority and the parties' representatives. The representatives lodged written closing submissions on the application of the facts to relevant legal principles.

[14] While this determination need not set out all the evidence and submissions heard, I have closely reviewed all the written and oral evidence and submissions

provided before preparing this determination on the facts, issues and conclusions.[1] In doing so I note with regret that the preparation of this determination was delayed for a longer-than-desirable period by the demands of other Authority matters and acknowledge the patience of the parties and their representatives.

[15] In determining the facts I have relied on Mr Ip's admissions as to his conduct, and, where there has been a difference of recollection, I have preferred the evidence of Mr Endres and Mr Weight. What the latter two men said appeared more consistent with the documents made at the time and more likely.

Legal principles

[16] The Authority's role is initially to consider whether the employer has shown it conducted a full and fair investigation that disclosed conduct capable of being regarded as serious misconduct.

[17] Case law confirms the fullness and fairness of that investigation is not to be tested by pedantic scrutiny of individual elements of that process but, rather, broadly assessed in light of the seriousness of the allegation and its potential consequences.[2]

[18] Where, following that investigation, an employer concludes serious misconduct occurred, s103A of the Act requires the Authority to assess "*the employer's ultimate decision in the light of that finding*" – that is the level of disciplinary sanction decided upon.[3] That assessment is not of whether the Authority would have made the same decision but whether – applying an objective standard – it was a decision which a fair and reasonable employer would have made in all the circumstances at the time.

[19] In determining whether Mr Ip was unjustifiably treated more harshly than Mr Weight, the Authority must consider whether:[4]

(i) there was, in fact, disparate treatment; and

(ii) if so, was there an adequate explanation for the disparity; and

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[1] Employment Relations Act 2000 s174(b).
[2] *King v PPCS Richmond Limited* (EC, Auckland AC61/05, 19 October 2005, Colgan J) at [78]
[3] *Air New Zealand v V* (2009) 6 NZELR 582 (EC) at [36]
[4] *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] 1 ERNZ 767 at [45] (CA).

(iii) if not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[20] The third element of the test on disparity – put another way – is that a dismissal may still be justified, even if there is no adequate explanation for different treatment, provided the disparity is "*not of such magnitude as to call into question*" that justification. One such circumstance is where the gravity of the conduct deeply impairs the employer's trust in the worker.[5]

Justified finding of serious misconduct

[21] There can be no real hesitation in finding that a fair and reasonable employer would have concluded Mr Ip's conduct on 14 July 2008 was serious misconduct.

[22] His employment agreement included work rules which listed "*failure to abide by the employer's policies*" as serious misconduct and provided for summary dismissal for serious misconduct.

[23] He breached the Club's clear and known policy against playing pool during working hours. By doing so he was not carrying out duties for which he was being paid and created an opportunity for the theft to occur. The Club was justified in its conclusion, at least on the allegations of playing pool contrary to instructions and leaving the counter unattended, that Mr Ip's actions were serious misconduct.

[24] He admitted that he knew about the policy and his actions on 14 July so no further enquiry was necessary on the basic premise of what had taken place.[6] What was required was further investigation and consideration of the explanation Mr Ip gave for his actions – particularly that Mr Weight, as manager, was in charge of the Club at the time and had himself played pool with Mr Ip that day.

Mr Ip treated differently

[25] Mr Weight accepted in answer to questions during the Authority's

[5] *Buchanan*, above, at [70].
[6] *Murphy and Routhan v van Beek* [1998] 2 ERNZ 607at 621.

investigation that he played pool with Mr Ip despite knowing of the Club policy banning staff playing in work hours. He could not remember if he had done so on 14 July but accepted he probably did, and, if not on that particular morning, had done on previous days that week. He also could not remember if he knew on the day that Mr Ip was playing pool with a Club member. His upstairs office had a restricted view of the pool table area.

[26] Mr Weight was responsible as duty manager for checking the cash in the safe that morning. As was his usual practice he then left the safe behind the counter unlocked so that staff could get access to money needed for payouts to customers using the gaming machines. Mr Ip was the only other employee working on the day shift on 14 July.

[27] Mr Weight was the signatory to the Club's letter of 16 July calling Mr Ip to a disciplinary meeting on the allegation that:

> *"the counter was unattended as you were playing pool instead of ensuring the counter was attended; a direct violation of club policy and something which you have been warned against doing on a number of occasions".*

[28] Mr Endres did not know about Mr Weight himself playing pool during working hours with Mr Ip until hearing Mr Ip's response to the allegations in the disciplinary investigation. Mr Ip's written response delivered on 6 August – which was also provided to the Club's management committee meeting two days later – alleged that all staff ignored the ban on playing pool "*because the manager engages in playing pool, as he did with me on the day of the theft*".

[29] Mr Endres put this allegation to Mr Weight who admitted it was true. Mr Endres says he then gave Mr Weight "*a good ear bashing*" and warned him that he would not have a job if he did so again. No formal disciplinary steps were taken against Mr Weight who also then participated in the management committee meeting where a decision was made to dismiss Mr Ip.

[30] Mr Endres told the Authority investigation that the Club could not have dismissed Mr Weight because – apart from Mr Ip – he was the only other staff member with necessary knowledge of the Club's gaming processes and operations.

[31] The outcomes were plainly disparate. Both Mr Weight and Mr Ip were on the premises at the time of the theft. While it was Mr Ip's absence from the counter that provided the particular opportunity to the thief, Mr Weight knew that Mr Ip left the counter to play pool during work hours and had participated in the same forbidden practice himself with Mr Ip. Both men deliberately and knowingly breached the policy but Mr Weight had an additional responsibility as manager to ensure that staff obeyed the Club policy.

[32] How they were dealt with contrasts starkly with the actions of the employer in the well-known *Makatoa* case which had similar facts – involving robbery of an unlocked restaurant safe. In that case the manager was sacked while junior staff who had failed to follow procedures received less severe disciplinary consequences.[7]

[33] A fair and reasonable employer would, I find, consider Mr Weight's level of culpability – for complicity and participation in the breach of policy which had such negative consequences for the Club that day – at least as high as that of Mr Ip. The need to retain at least one of the two because of their gaming knowledge is not an adequate explanation for the disparity of treatment. It is a factor, fairly weighed, which could have favoured retaining Mr Ip as much as Mr Weight.

[34] Neither is the Club assisted by its action some three months earlier of having dismissed another employee for playing pool – it was a factor that applied equally to Mr Weight and Mr Ip. Similarly no account should be taken of the Club's actions following Mr Ip's dismissal of monitoring security cameras more closely and dismissing three other employees for playing pool. That latter action was not part of the same events and process in which the Club decided to act on Mr Ip's transgressions but excuse those of Mr Weight.[8]

[35] Having found there was contemporaneous disparity, without adequate explanation, in the treatment of Mr Ip and Mr Weight over the same events, I find that the Club's actions also failed the third element of the legal test on disparity.

[36] The nature of the disparity is of such magnitude as to call into question the

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[7] *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 (EC).
[8] *Buchanan*, above, at [53].

justification of Mr Ip's dismissal. The Club would have been justified if its position were that the deliberate and knowing breach of policy was such grave misconduct that it could no longer trust either man but it cannot, on any commonsense measure, say that Mr Weight could still be trusted in those circumstances while Mr Ip could not.

[37] Accordingly I find that the dismissal of Mr Ip in those circumstances was not what a fair and reasonable employer would have done.

Dismissal decision not fairly made

[38] I am strengthened in my conclusion of this point because I also find that the manner of making the decision was also unfair and done in such a way that prevented a real opportunity for Mr Ip to seek a less severe outcome.

[39] The management committee meeting was the forum where the real decision on the dismissal was made and Mr Ip was not provided a complete opportunity to have his case considered by the members at that meeting.

[40] The Club's rules provided the management committee with the power to "*employ and dismiss paid individuals*" although employees are also described as "*solely answerable to the President*".

[41] I do not accept Mr Endres' evidence that he alone made the decision to dismiss after canvassing the opinions of committee members. The decision was clearly made by the committee members on the basis of a vote which Mr Endres reported was four to one in favour of dismissal.

[42] While Mr Ip's written submissions were provided to the committee and Mr Endres gave an account of Mr Ip's earlier oral responses, Mr Ip and his representative should have had an opportunity to speak to the meeting and plead his case.

[43] This is not an empty procedural point. There is a real prospect that Mr Ip might have persuaded the members to adopt a less severe sanction. At least one member at the meeting opposed dismissal. Another member who could not attend had written a letter to Mr Endres before the meeting questioning whether the events

were all Mr Ip's fault and saying he would prefer a final written warning to be issued.

[44] Mr Ip may also have been able to make more of the participation of Mr Weight – both in the events on 14 July and in the management committee meeting deciding on his future.

[45] Mr Weight says that he provided "*some facts*" to the meeting but did not express any opinion on what the outcome should be for Mr Ip's employment. However I find that Mr Weight's attendance, in light of his own known conduct in relation to the policy, calls into question the basic fairness of the meeting itself and whether any real consideration was given to the relative severity of outcomes for both. Mr Weight continued to work for the Club until he resigned four months later.

[46] Accordingly I find that how the Club went about making the decision to dismiss Mr Ip was not what a fair and reasonable employer would have done in all the circumstances at the time. How it acted was unjustified.

Remedies

[47] Mr Ip has a personal grievance which requires remedy.

Lost wages

[48] Mr Ip has not provided satisfactory evidence that he took sufficient steps to mitigate his loss and no award is made for lost wages. He has a post-graduate degree in computer sciences. He had not worked between his dismissal and the date of the investigation meeting. While he provided a medical certificate from his GP dated 8 August 2008 saying that he seemed "*very stressed and on the verge of depression*" about workplace issues, Mr Ip provided nothing to support a conclusion that he was subsequently disabled from seeking other work to mitigate his losses after his dismissal on 10 August. He says only that he did not look for work at all in the first four months following dismissal as he felt that he needed "*a mental break*". He provided no evidence of his job search since that time but said he had considered moving to Auckland or Hong Kong to seek work.

Compensation for hurt and humiliation

[49] Mr Ip gave evidence of feeling distressed and embarrassed by his dismissal. He had problems with sleeplessness and was prescribed anti-anxiety medication.

[50] Having regard to the general range of awards in cases of this type and the particular circumstances of this case, an award of $4000 under s123(1)(c)(i) of the Act would be appropriate to compensate Mr Ip for the distress caused as a result of the Club's unjustified actions.

Contribution

[51] Under s124 of the Act the Authority must consider the extent to which Mr Ip's actions contributed towards the situation giving rise to his grievance and, if those actions so require, reduce remedies he would otherwise have been awarded.

[52] I reject Mr Ip's submission that no contribution should be found as other staff, including his manager, also breached the policy against playing pool. Mr Ip was also in a responsible position, sometimes working as acting manager in Mr Weight's absence. His deliberate and repeated breach of the policy was blameworthy and is to be marked by a one-quarter reduction in the remedies awarded.

Costs

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. In the event they cannot, Mr Ip may lodge a memorandum as to costs within 28 days of the date of this determination. The Club will then have 14 days in which to lodge a reply memorandum before the Authority determines costs. No application will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority