IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 123/07
5077657

	BETWEEN	JANINE MURRAY Applicant
	AND	LUMSDEN ACCOMMODATION LIMITED Respondent

Member of Authority: Helen Doyle

Representatives: Mary-Jane Thomas, Counsel for Applicant
Grant Walker, Counsel for Respondent

Investigation Meeting: 31 July 2007 at Invercargill

Determination: 23 October 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Janine Murray, was employed by the respondent as Hotel Manager at the Royal Mail Hotel in Lumsden from 1 August 2006. She was party to an individual employment agreement with the respondent dated 1 August 2006.

[2] On 3 October 2006 Ms Murray was suspended from her employment. At the time of her suspension Ms Murray was given a letter dated 3 October 2006.

[3] The letter stated that Ms Murray was to attend a disciplinary meeting scheduled for the following day, 4 October 2006 at 2.00pm to explain a number of allegations. There was an allegation that Ms Murray had not charged customers for products on 28 and 29 September 2006. The letter stated that video records showed drinks being served to customers and customers not paying or being billed for these. The letter stated that the video records also showed Ms Murray handing over a company tee shirt to a customer. An explanation was also sought for over staffing

in quiet periods and bringing in staff at unreasonable hours, ie to cook breakfast at 4.30am. The letter also provided that Ms Murray should bring a support person with her for the meeting and that disciplinary action could include dismissal.

[4] Ms Murray attended two disciplinary meetings on 4 October 2006.

[5] On 5 October 2006 Ms Murray was summarily dismissed from her position as Hotel Manager at the Royal Mail Hotel.

[6] Ms Murray says her suspension and summary dismissal are unjustified.

[7] The respondent, Lumsden Accommodation Limited (Lumsden Accommodation) is a duly incorporated company that was formed for the purpose of purchasing and operating the Royal Mail Hotel (the Royal Mail) in Lumsden. The Royal Mail is a rural hotel and comprises a public bar, restaurant and accommodation.

[8] Lumsden Accommodation says that Ms Murray's dismissal was substantively justified and undertaken in a procedurally robust manner. It says that with the allegation of loss of property suspension on full pay was appropriate and necessary.

The test for justification

[9] The test for justification is set out in s.103A of the Employment Relations Act 2000. The test as to whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The issues

[10] The issues to be determined in this matter are as follows:

- Was Ms Murray unjustifiably disadvantaged in her employment by her suspension from her position as Hotel Manager on 3 October 2005?
- What were the reasons for Ms Murray's dismissal?
- Was the investigation into Ms Murray's actions fair and reasonable?

- Was Lumsden Accommodation justified as a result of the investigation into Ms Murray's actions in concluding that her actions amounted to serious misconduct?

- Was the decision to dismiss Ms Murray justifiable in all the circumstances?

- If the dismissal was unjustified, then what remedies should be awarded and is there an issue of contribution?

The individual employment agreement

[11] Ms Murray's annual salary under her individual employment agreement with Lumsden Accommodation was $43,640. It was agreed that rent was to be deducted from that sum at the rate of $70 per week.

[12] Clause 13 in Ms Murray's employment agreement dealt with disciplinary procedures. There was a procedure to be followed where the matters causing concern were not of sufficient seriousness to warrant summary dismissal and a procedure in the event that the matter or matters were deemed to be serious misconduct. Under both levels of misconduct there was provision for an employee to be suspended, on pay, to allow a full investigation to take place.

The job description

[13] Ms Murray's job description was attached as Schedule C to her employment agreement. Schedule C provided that Ms Murray in her role as Hotel Manager set and monitored the budget, paid the accounts and undertook the banking. She was also, as set out in the Schedule, fully responsible for staff employment, setting of rosters, duties and remuneration, staff training, bookings, ordering, promotions, advertising, asset maintenance, setting and monitoring high service standards.

[14] Ms Murray reported directly to the owners of the business.

Discussion about Royal Mail products

[15] Ms Murray commenced her employment on 1 August 2006, but the hotel did not open to the public until 17 August 2006. There was a pre-opening function on 12 August 2006 which shareholders attended.

[16] The shareholders and directors of Lumsden Accommodation were involved in the dairy industry and did not have any experience in the hotel industry. A director and shareholder of

Lumsden Accommodation, Anthony Cleland gave evidence that there was some concern by the shareholders about the volume of cash that went through the hotel and they ease that it and product could go missing. Mr Cleland said it was not like the dairy industry where most transactions are undertaken by cheque. Mr Cleland was asked by the other shareholders to work through this matter with Ms Murray.

[17] Mr Cleland and his wife, Alison Cleland, who is both a shareholder and employee of Lumsden Accommodation, made some notes about the matter. Ms Murray accepted that there had been a discussion about document 2 which refers to products and is attached to the statement in reply shortly after 12 August 2006.

[18] Mr Cleland discussed with Ms Murray that staff were allowed one meal provided by the kitchen if they were working a full 8 hour shift. All other products were to be purchased with a 15% discount (not including specials). Any change to the policy had to be approved by the owners and the rules applied to all staff and shareholders. It was discussed that any breach to the policy would be treated as theft.

The video and the till tapes

[19] Mr and Mrs Cleland said that they were advised by the technician who had installed equipment at the hotel, that the video and till records had been automatically recorded over again. The records therefore were no longer available when a request was made for them by Ms Thomas on behalf of Ms Murray after the dismissal.

[20] The Authority has not viewed the video footage or seen the till tapes that Lumsden Accommodation say showed that Ms Murray gave away drinks and that the drinks were not charged for. Mrs Cleland said in her evidence during the Authority investigation meeting that she had printed out a copy of the till tape records for the relevant period. That printout could not be found either.

What led to the disciplinary investigation

[21] Ms Murray was on leave from 29 September 2006 until 3 October 2006. On Friday 29 September another employee at the Royal Mail, Rosalie Knowles, arrived at work and found that the alarm was not on. She found that the bar had not been cleaned and was quite upset about this.

[22] Mrs Cleland had been away on holiday but returned to work on 29 September 2006. She could see that Ms Knowles was upset and asked her what was wrong. Ms Knowles told Mrs

Cleland that the hotel had not been left in a clean state and that the alarm had not been put on. Mrs Cleland also heard that there had been some customers staying at the hotel and that Ms Murray had gone to the other hotel in Lumsden with them, drinking, and had come back before breakfast.

[23] Mrs Cleland decided to watch the records from the video surveillance from the night of Thursday 28 September 2006 and the morning of 29 September 2006. The video cameras are motion sensitive and only record when there is activity. The cameras cover the bar area, office area and hotel guest entrance.

[24] Mrs Cleland was concerned that the records showed Ms Murray supplying drinks to people in the bar and not charging for them. Mrs Cleland said that the footage showed Ms Murray locking up the hotel at 12.31am and then a few minutes later returning and re-setting the alarm. At about 4.30am on the morning of 29 September 2006 Ms Murray was seen returning to the hotel with a male customer who had been drinking earlier at the bar. He was seen removing his shirt. Ms Murray gave the man a hotel tee shirt from the stock of tee shirts for sale at the Royal Mail, which he put on.

[25] Another employee who cooked lunch and dinner at the hotel, Annabel, was also seen arriving at work at or about 4.30am on 29 September 2006. Annabel explained to Mrs Cleland, when asked about her unexpected appearance at the hotel, that she had been asked to attend at the hotel by Ms Murray to cook breakfast and that she was upset about being asked to do so at the early hour.

[26] Mrs Cleland talked to Mr Cleland about the video footage. Mrs Cleland had said in her evidence at the Authority meeting that she had printed off a copy of the till tape for the evening of 28 September 2006 and the morning of 29 September 2006. She had then prepared a written note that showed several drinks served but the transactions not processed through the till or charged to an account. The time the drinks were served was also put down on the note.

Suspension

[27] Mr Cleland had the letter of 3 October 2006 prepared. Ms Murray returned from her holiday on that same day and was at the accommodation provided to her at the Royal Mail. Ms Murray said that she was simply handed the letter which provided that she was stood down on full pay until the investigation had been completed. Ms Murray was also required to hand over all keys and company property. She says she was given no opportunity to discuss her suspension.

[28] Mr Cleland said that he went through the letter with Ms Murray and when asked, she did not have any questions.

[29] Ms Murray's employment agreement provided that an employee may be suspended, on pay, to allow a full investigation to take place although there was no process set out as to how the suspension should take place.

[30] I think it unlikely Mr Cleland simply handed Ms Murray the letter and said nothing about its contents. I find there was some discussion about the letter, but Ms Murray did not have an opportunity to have a say or input into her suspension. The decision, in my view, has clearly been made as set out in the letter to stand Ms Murray down and for her to hand in her keys.

Was Ms Murray unjustifiably disadvantaged in her employment by her suspension from her position as Hotel Manager on 3 October 2006?

[31] In *Graham v. Airways Corp of NZ* [2005] ERNZ 587 (para.[104]) it was held that there was no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. *Tawhiwhirangi v. Attorney-General in respect of Chief Executive Department of Justice* [1993] 2 ERNZ 546, was referred to in *Graham* as confirming a case by case, flexible and sensible approach. It was held in *Graham* that the test in each case was the fairness and reasonableness of the employer's conduct.

[32] The test in s.103A requires an objective inquiry into what a fair and reasonable employer would have done in all the circumstances at the time Ms Murray was suspended.

[33] I find that a fair and reasonable employer, knowing Ms Murray had just returned from holiday and would be completely unaware of her employer's concerns, would have had some discussion with her about the justification for the suspension. This would have enabled her to have been heard on that matter rather than simply handing her a letter and at most talking through the allegations therein. Ms Murray gave evidence that she was upset at that time to be handed a letter advising that she was to be stood down.

Determination as to the suspension

[34] I find that the manner in which Ms Murray was advised about her suspension, but not the suspension itself, was unjustified. I find that she was disadvantaged as a result.

[35] I shall deal with remedies with respect to this matter at the conclusion of this determination.

What were the reasons for Ms Murray's dismissal?

[36] The letter of dismissal dated 5 October 2006 provided:

> *Dear Janine,*
>
> *After the disciplinary meeting held with you yesterday, we note your response that you denied free drinks being given to customers and then your acceptance that they had when you viewed the video footage. You commented that you were tired at the time.*
>
> *This has created a complete breakdown in our trust and confidence in you, and as a result we would like to notify you that your position as manger of Lumsden Accommodation Ltd is terminated effective immediately.*
>
> *You have two weeks to vacate the house, with the house to be vacated by the 19th of October. All monies owing to you, including holiday pay will be paid in full on completion of a house inspection on the 19th of October or on the day you leave the house.*

[37] Mr Cleland said in his evidence that he was concerned about staff being asked to come in at unreasonable hours and the over-staffing issue but the main reason for the dismissal was the giving away of the drinks and the tee shirt.

[38] I find that these two matters were the reasons for Ms Murray's dismissal notwithstanding that the dismissal letter makes no mention of the tee shirt.

Was the investigation into Ms Murray's actions fair and reasonable?

[39] Ms Murray asked a friend, Linda Smith, to be her support person at the two meetings that took place on 4 October 2006 before Ms Murray's dismissal. Ms Smith has experience in the hospitality industry.

[40] Mr Cleland attended the first meeting with Rochelle Dillon who is a farm investment manager employed by Farmright Limited. Mr Cleland is a shareholder in, and managing director of, Farmright Limited. Primarily Ms Dillon's role was note taker at that first meeting. He attended the second meeting on 4 October 2006 during which the video footage was viewed with Mrs Cleland.

[41] I find that the notes taken by Ms Dillon, although not a verbatim record, were accurate in terms of the first meeting on 4 October, as far as they went. I accept that the matters that Ms Murray provided explanation for may not have been in the order set out in the notes.

[42] Ms Murray was asked to explain allegations that she had given away property belonging to her employer, being the tee shirt and drinks. These are serious allegations. The standard of proof is

the balance of probabilities which should be applied to reflect the gravity of the allegations – *Honda NZ Ltd v. NZ etc Shipwrights etc IUOW* [1990] 3 NZILR 23.

[43] Ms Murray alleges several procedural issues in terms of the investigation of the allegations which she says made the process unfair.

[44] The first issue was that Ms Smith was restricted by Mr Cleland in terms of her support role during the disciplinary process.

[45] Ms Smith initially questioned Mr Cleland about the formality of the process. Mr Cleland explained, I find, that the formality of the process was to protect Ms Murray's rights. She also questions why Mrs Cleland was not present. Ms Smith accepted that she then raised some issues about the operation of the Royal Mail. Ms Smith said that Mr Cleland told her that it was not her role to ask questions.

[46] Mr Cleland denied that. He said that he reminded Ms Smith that her role was a support person and not to ask questions about his business. Ms Dillon said in her evidence at the Authority meeting that Mr Cleland advised Ms Smith her role was to give Ms Murray support and not to question the process.

[47] The way a business is operated can be relevant to a disciplinary matter, but in this case the matters Ms Smith talked about in relation to Mr Cleland's business did not appear relevant to the allegations that Ms Murray was being asked to explain. Ms Smith was though entitled to question the process.

[48] I accept Mr Cleland did not intend to place any limitation or restriction on Ms Smith with respect to her role. Ms Smith, who is a fairly assertive person did I find feel less able to question the process as a result during the first meeting. At the second meeting Ms Smith felt less restricted in her questioning. I am not satisfied from the evidence that Ms Smith was refused an adjournment to talk to Ms Murray during the first meeting.

[49] Ms Murray said at the first meeting on 4 October 2006 that every drink she served goes through the till and while cash may not have changed hands it would have been charged to an account. She said that as far as she was aware, all drinks had been charged to an account. Mr Cleland advised Ms Murray that on the video footage there were at least five drinks that were not charged to an account or put through the till at all.

[50] There is a dispute about whether Ms Murray asked to see the video or Mr Cleland suggested that she do so. The notes do support it is more likely that Mr Cleland suggested the video be watched, but I think it was probably obvious to both Ms Murray and Mr Cleland, as a result of Ms Murray's explanation, that the video footage did need to be viewed.

[51] Arrangements were made to view the video an hour or so after the first meeting. This was a not a situation where Mr Cleland surprised Ms Murray with the video records after she had denied the allegation about the drinks. Ms Murray knew from the letter of 3 October 2006 that there was video footage concerning the events of 28 and 29 September 2006. She I do not find that much turns in the way of unfairness on who asked to view the video. When Ms Murray viewed the video records she was also aware of the specific allegations.

[52] There is a dispute in the evidence about whether or not Ms Murray or Ms Smith asked to see the till tapes during both meetings. Ms Smith said that the till records were requested and she was told they were no longer available. Mr and Mrs Cleland and Ms Dillon do not accept that the till tapes were requested. I find weighing the evidence up carefully that is less likely the till tapes were requested because the evidence supports that the first the Clelands knew of the unavailability of the till tapes was from the technician after the dismissal. I am not satisfied from the evidence that there was any reason why they would not have been provided if a request had been made. I find it more probable that the till tapes were not requested by Ms Smith or Ms Murray during the disciplinary process.

[53] It is not enough though for an employer to say that information was never requested.

[54] An employer has good faith obligations under s.4(1A)(c) of the Employment Relations Act 2000 when proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee. An employer is required to provide access to information relevant to the continuation of the employee's employment about the decision and an opportunity to comment on that information. Good faith obligations apply in disciplinary situations.

[55] Mr Cleland says in his evidence that it was quite obvious that there was no attempt by Ms Murray to go near the till from the video footage. He also had a note with him of the drinks in question and the time they were served. I accept Mr Cleland told Ms Murray and Ms Smith that it was a note taken after analysing the video footage and the till tape.

[56] Considering the gravity of the charge which Ms Murray was facing about the drinks, it was essential for her to have the relevant part of the till tape in order to be able to properly refute,

explain or mitigate her conduct with respect to the drinks. That is because it is an essential element of the allegation that the drinks served were not paid for or put on a customer's account and Ms Murray's first explanation was that every drink goes through the till or is charged to an account.

[57] I find that Ms Murray in all likelihood accepted after watching the video footage, that some drinks during the evening of 28 September 2006 were in all probability not have been put through the till. Ms Murray said that she was tired and I find that was the reason given why the drinks may not have been put through the till. Ms Murray said in her evidence to the Authority that she accepted that she may not have put the drinks through the till but that she needed to see the till tapes. I have not found that there was a request to see the till tapes by Ms Murray or Ms Smith. I have found in any event the till tape should have been provided. I accept Ms Murray's evidence that she never accepted that she deliberately or knowingly failed to charge for the drinks.

[58] I found Mrs Cleland to be a credible witness. She gave evidence in a straightforward way and about matters not favourable to the respondent's case. I accept her evidence that after viewing the video footage Ms Murray apologised and said that she was tired and that she could not recall anything being said about till tapes.

[59] Ms Murray was not asked whether she was friendly or not with one of the customers she served. There was no dispute that the customer Ms Murray gave a tee shirt to at or about 4.30am on the morning of 29 September 2006 was one of those in the bar who had been served earlier at the time it was alleged Ms Murray served free drinks. There was no dispute that Ms Murray kissed the customer at or about the time the tee shirt was handed to him. The nature of the kiss was disputed. Ms Murray said to the Authority that it was simply a friendly kiss and she had never met the man before 28 September 2006 and indeed had not met with him after 29 September 2006. She said the two of them swapped tee-shirts

[60] This was a matter that went to the motive in terms of the allegation about the drinks and whether Lumsden Accommodation could conclude that the giving away of drinks was deliberate or because Ms Murray was tired and simply forgot to put the drinks through the till.

[61] It also seems from the evidence that a drink given by Ms Murray to the other employee Raewyn on the evening of 28 September 2006 had not been recorded in the staff book. Raewyn was never asked about the evening of 28 September, although she gave evidence at the Authority investigation meeting and is still working at the Royal Mail. She said in her evidence to the Authority that there was nothing talked about on the evening of 28 September 2006 about free drinks.

[62] Mr Walker referred to the Court of Appeal judgment of *Chief Executive of the Department of Inland Revenue v. Buchanan* [2005] ERNZ 767 at para.[36] to support that a failure to establish wilfulness does not mean the conduct was not serious misconduct.

[63] Lumsden Accommodation was required to assess why the drinks were not charged and reach some conclusion as to whether it was an oversight/negligence on the part of Ms Murray or deliberate – *Angel v. Fonterra Co-operative Group* [2006] ERNZ 1080.

[64] I am not satisfied that Mr Cleland considered there was any difference between the two matters and he simply concluded that Ms Murray had given away free drinks.

[65] Ms Murray explained that she had left a note about the tee shirt. I accept there was some searching for a note before Ms Murray was dismissed but it could not be found. Ms Murray also said by way of explanation that she talked to Raewyn about the tee shirt about paying for the tee-shirt on the morning of 29 September 2006.

[66] Raewyn said that she was not spoken to before Ms Murray was dismissed as to whether or not there had been a discussion about the tee shirt. She was spoken to about the matter after Ms Murray was dismissed. Raewyn said that she thought she would have remembered if Ms Murray had showed her the tee shirt she swapped with the customer, but did not.

[67] There was a failure by Lumsden Accommodation to follow its own procedures in terms of the disciplinary procedure for matters that are considered serious misconduct and may result in summary dismissal. Clause 13.2.2(iii) provides:

> *When the employer is satisfied that the matter has been fully investigated, the employer will arrange a further meeting with the employee and make the findings of the investigation known. The employee will be allowed a reasonable and adequate opportunity to make further representations to the employer.*

[68] This required a further meeting to take place after the second meeting on 4 October 2006 for Mr Cleland to advise Ms Murray of the findings of the investigation. No further meeting took place and Ms Murray was simply advised of the decision to dismiss. Had a meeting taken place then Ms Murray would have had an opportunity to make any comments in terms of the note and she would have been able to remind Mr Cleland to talk to Raewyn. It would also have been an opportunity for Mr Cleland to advise whether he considered the failure to charge for the drinks was deliberate or an oversight and for Ms Murray to make submissions in terms of this.

[69] In conclusion, I find that the investigation carried out was not what a fair and reasonable employer would have done in all the circumstances of this case. Ms Smith was less effective in

terms of her support role because she felt she was not able to ask questions. The till tapes were not provided to Ms Murray and Ms Smith. Matters in terms of any friendship with customers at the bar on 28 September which went toward a motive for giving away free drinks were not properly put to Ms Murray. There was no investigation undertaken in terms of Ms Murray's explanation that she had talked to Raewyn about the tee shirt before her dismissal. There was a failure by Lumsden Accommodation to follow its own disciplinary procedure and make the findings of the investigation including findings about the other allegations in the letter of 3 October 2006 known. There was no reasonable and adequate opportunity for Ms Murray to comment on the conclusions.

Was Lumsden Accommodation justified as a result of its investigation into Ms Murray's actions in concluding that her actions amounted to serious misconduct?

[70] The giving away of product which an employee is to sell can amount to serious misconduct. Ms Murray accepted that she knew she was not to give product, including drinks, away. The carrying out of an investigation into Ms Murray's actions was justified in this matter.

[71] Mr Walker refers to para.[114] in *Air New Zealand v. Hudson* [2006] 1 ERNZ 415, where Shaw J states:

> *An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must however show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct.*

[72] Ms Murray accepted that in all probability some drinks on the evening of 28 September 2006 had not been put through the till or charged. She said that she was tired and apologised. She accepted that she gave the tee shirt away but said that she left a note, spoke to Raewyn and intended to pay for the tee shirt on her return from her holiday.

[73] I find that a fair and reasonable employer would have concluded that Ms Murray accepted, after viewing the video footage, that some of the drinks had in all probability not been put through the till or charged for. No note was found about the tee-shirt. That is the evidence that the Authority has of the conduct by Ms Murray.

[74] It is difficult in this case for the Authority to draw a distinction between the fairness of the investigation and the substantive fairness. I have not found that the investigation was fair or full. Raewyn gave evidence at the Authority investigation meeting that she did not know of the giving away of drinks on the evening of 28 September 2006. This was, in my view, significant because there was agreement that there were only three people in the bar that evening and Raewyn was also

present. The relevant till tape was not provided to Ms Murray as part of the investigation and should have been.

[75] There was no conclusion reached by Mr Cleland as to whether Ms Murray's actions were deliberate or an oversight and Ms Murray therefore could not respond to that matter. It was open to Mr Cleland to conclude that the interaction between Ms Murray and one of the customers showed a degree of friendliness although this was never actually put to Ms Murray.

[76] I find in conclusion the inadequacy of the investigation was such that a fair and reasonable employer would not at the point Ms Murray was dismissed have concluded that her actions, although unwise, unprofessional and negligent, amounted to serious misconduct. In other words, such a conclusion was premature as at 5 October 2006.

[77] Had Raewyn been questioned before Ms Murray had been dismissed then she may have had a better recollection or may have put forward additional matters that could have resulted in Lumsden Accommodation seeing Ms Murray's actions in a different way. If Ms Murray had had the findings of the investigation put to her she may also have put additional matters forward that may also have had an impact on the conclusion as to whether the misconduct was serious.

[78] A fair and reasonable employer would have concluded as at 5 October 2005 that Ms Murray accepted that some drinks were not in all probability put through the till or charged. On that basis, I find that a fair and reasonable employer would have concluded that Ms Murray's actions in that regard amounted to misconduct.

Was the decision to dismiss Ms Murray justifiable in all the circumstances?

[79] Ms Murray was the Hotel Manager. She held a senior and important role at the hotel and I accept that Mr and Mrs Cleland placed considerable trust in her. They were upset and hurt by what they saw on the video records. They had made it clear that product must be paid for. That it the profit for the business the Lumsden Accommodation operates.

[80] I do not find, however, that a fair and reasonable employer would have dismissed Ms Murray for these very serious matters without following the procedure set out in Ms Murray's individual employment agreement, investigating the explanations fully and disclosing the till tape to Ms Murray.

[81] In conclusion, therefore, a fair and reasonable employer would not have made the decision on 5 October 2006 to summarily dismiss Ms Murray. With the evidence though that Lumsden

Accommodation had and the explanation from Ms Murray it could have given Ms Murray a written warning.

[82] Ms Murray has a personal grievance that she was unjustifiably dismissed. She is entitled to remedies.

Remedies

Concerns about payment of a bar tab after dismissal

[83] Ms Knowles said that after Ms Murray was dismissed she received a text from the publican of the other hotel in Lumsden about payment of a bar tab that had been run up on the morning of 29 September 2006. Ms Knowles said the publican advised that Ms Murray had authorised the bar tab and it would be paid by the Royal Mail. As it turned out Ms Knowles was able to organise payment of the tab elsewhere.

[84] Ms Murray said that she did not authorise the bar tab or set it up. She said she simply advised the other hotel in Lumsden to send it [the bar tab] across the road at the end of the night and that the Royal Mail would include it with its own account for the company.

[85] This was not a matter raised with Ms Murray and it is not relevant to the dismissal. I have decided to consider this matter in this case as to whether it was likely the relationship between Ms Murray and Lumsden Accommodation would have continued beyond the trial period.

[86] Ms Murray advising that a bar tab should be sent to the Royal Mail from another hotel in Lumsden was irregular and there was no authorisation. A fair and reasonable employer would have warned Ms Murray about her conduct in terms of this matter. Considering that therefore with the events of 28 and 29 September 2006, there was a very real possibility that Ms Murray's employment would not have continued beyond the three month trial period. I accept in this regard that Ms Murray also had some reservations initially about her position with Lumsden Accommodation because she had just finished employment which involved long hours before she was offered the position at the Royal Mail. There are also some accounting aspects of her role with the Royal Mail which Ms Murray was inexperienced with. Ms Murray intended to see how things were after three months.

[87] In those circumstances without a certain possibility that employment would continue beyond three months, I intend to limit the recovery of any lost wages for the trial period – *Schofield Airport Gateway Hotel v. Clark* [1998] 3 ERNZ 629.

[88] Ms Murray did manage to obtain work after her dismissal but there was a shortfall in terms of what she received of $684.16 per week. The trial period was from 1 August 2006 to 31 October 2006. Ms Murray was paid until the end of Thursday 5 October 2006.

[89] There was, therefore, a period just short of one month of 3 and 3/5th weeks. Without taking contribution into account, the amount of lost wages for that period is $2,462.98.

Compensation

Unjustified action causing disadvantage

[90] Ms Murray was suspended for, at the most, one day. In those circumstances, whilst I accept that the way she was advised of the suspension caused her some upset, only a small award of compensation is justified. I order Lumsden Accommodation Limited to pay to Janine Murray the sum of $400 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s.123(c)(1) of the Employment Relations Act 2000. Ms Murray did not contribute to the manner in which she was advised of her suspension.

Unjustified dismissal

[91] Ms Murray was distressed by her dismissal and in particular the implication that she had been dishonest. I have not found that a fair and reasonable employer would have concluded without Ms Murray having an opportunity to comment on the conclusion that she deliberately rather than negligently omitted to charge for the drinks. Her explanation for the conduct in terms of the tee shirt was not properly investigated.

[92] Ms Murray was prescribed anti depressants following the dismissal. She said that that was the first time she had been prescribed anti depressants and has only recently regained her confidence.

[93] Subject to any findings I may make about contribution the amount I would have awarded Ms Murray for compensation is the sum of $9,000 compensation.

Contribution

[94] I am required to consider under s.124 of the Employment Relations Act 2000 the extent, if any, to which Ms Murray's actions contributed to the situation that gave rise to the personal grievance. If I consider that there is contribution then I must reduce the remedies that may otherwise be awarded.

[95] Ms Murray knew that drinks should not be given away. She also knew the importance about paying for product because Mr Cleland had talked to her as Hotel Manager about this. Lumsden Accommodation had to trust Ms Murray because she often worked alone. There was no note found for the tee shirt and although Raewyn was only spoken after the dismissal, she could not recall a discussion with Ms Murray about the tee shirt. Ms Murray accepted that some drinks were in all probability not put through the till.

[96] Mr Walker submits that the contribution should be 100% or close to that and says that it does not seem appropriate that Ms Murray should benefit from the situation of her own making. One of the obvious difficulties for Lumsden Accommodation is that it did not have the evidence available of the video recordings and till tapes for the Authority to view and assess objectively.

[97] I consider that Ms Murray did contribute to her personal grievance by her actions. Her explanation in terms of the drinks that she was tired would still have entitled her employer to warn Ms Murray about her actions. Whilst I accept that Ms Murray had worked some long hours leading up to 28 September, there were only a very small number of customers to serve that evening. Ms Murray's actions in terms of the tee shirt were unwise and it is not surprising, when viewed, that they created suspicion. The investigation into the matter though was not full and fair in terms particularly in light of the gravity of the allegations.

[98] In all the circumstances I assess contribution at 60%.

Application of contribution to lost wages and compensation

Lost wages

[99] I apply the contribution to the amount I have found should, subject to any finding of contribution, be awarded for lost wages. I order Lumsden Accommodation Limited to pay to Janine Murray the sum of $985.20 being lost wages under s.123(b) of the Employment Relations Act 2000.

Compensation

[100] I apply the contribution to the amount I have found should subject to any findings of contribution, be awarded for compensation. I order Lumsden Accommodation Limited to pay to Janine Murray the sum of $3,600 being compensation for humiliation, loss of dignity and injury feelings under s.123(c)(1) of the Employment Relations Act 2000.

Costs

[101] I reserve the issue of costs.

Summary of orders and findings

- I have found that Ms Murray was unjustifiably disadvantaged in terms of the manner in which she was suspended.

- I have ordered Lumsden Accommodation Limited to Ms Murray compensation in terms of her suspension of $400. There are no issues of contribution in terms of the suspension.

- I have found that Ms Murray was unjustifiably dismissed.

- I have found that Ms Murray contributed to her personal grievance and have assessed that contribution to be 60%.

- I have ordered Lumsden Accommodation Limited to pay to Ms Murray, taking contribution into account, the sum of $985.20 for lost wages.

- I have ordered Lumsden Accommodation Limited to pay to Ms Murray, in terms of the unjustified dismissal, taking contribution into account, the sum of $3,600 without deduction for compensation.

- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority