

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 219
5367376**

BETWEEN BILLIE TAITUHA
Applicant

AND TE TII WAITANGI
INVESTMENTS LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Ngati Kawa Taituha, Advocate for Applicant
Murray Broadbelt, Advocate for Respondent

Investigation Meeting: 1&2 May 2012 at Paihia
15 June 2012 at Auckland by telephone conference

Determination: 28 June 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Billie Taituha, claims that she has been unjustifiably dismissed by the Respondent, Te Tii Waitangi Investment Limited (“TTWI”)

[2] TTWI owns and operates the Waitangi Holiday Park (“the Park”). Ms Taituha claims that she had been on site at the Park carrying out painting duties on 26 July 2011, however Mr Bill Tane, Director of TTWI, and Ms Pania Sigley, Office Manager of TTWI, said that they had been looking for, but were unable to locate, Ms Taituha at the Park that day.

[3] Ms Taituha subsequently submitted a timesheet indicating that she was at work on 26 July 2011. TTWI requested Ms Taituha to attend a disciplinary meeting on 31 August 2011 to discuss the timesheet submission and five additional allegations. Following this meeting TTWI wrote to Ms Taituha on 5 September 2011 confirming the immediate termination of her employment.

[4] TTWI denies that Ms Taituha has been unjustifiably dismissed, and claims that Ms Taituha was justifiably dismissed in accordance with a fair procedure.

Issues

[5] The issues for determination are whether:

- The decision by TTWI to dismiss Ms Taihua was a fair and reasonable decision.
- The decision by TTWI to dismiss Ms Taituha had been predetermined

Background Facts

[6] The Park, which operates on a seasonal basis as holiday accommodation, consists of 4 guest cabins, a camp site area, an Administration office, an Amenities Office, Staff, Toilet and kitchen block (“A Block”) and an Amenities Kitchen, Toilet and Laundry block (“B Block”).

[7] Ms Taituha had been employed as the Park Manager. In addition to her and Ms Sigley, there were a few support and casual employees whose numbers fluctuated according to the season.

[8] Ms Taituha’s duties as the Park Manager included general reception duties, banking and administration, motor camp maintenance and managing and maintaining the guest accommodation.

Events prior to July 2011

[9] During January to 20 July 2011 Ms Taituha reported to Ms Robyn Bolton, who had been appointed as Operations Manager by TTWI to look after both the Park and Mayfair Lodge, another accommodation property it owned,. Ms Bolton had left TTWI’s employment on 20 July 2011, following which Ms Taituha reported directly to the directors of TTWI.

[10] Ms Bolton said her role had been to work alongside Ms Taituha and the Manager of Mayfair Lodge to help improve all aspects of their performance. Ms Bolton also said she had had concerns with some aspects of Ms Taituha’s performance and ability to function as an effective manager. In order to assist Ms Taituha she had had regular meetings to discuss

performance related issues, and had provided regular and ongoing coaching in relation to basic administration, computerised systems, marketing and management.

[11] Ms Bolton said that she had had issues with Ms Taituha's attendance at the Park, stating that there had been occasions when Ms Taituha had not been present at the Park when she had been expected to be there. Ms Bolton made specific reference to two such occasions, one being an unexpected need on Ms Taituha's part to be absent on 28 June, and the other occurring on 29 June 2011.

[12] Ms Bolton said that on 1 May 2011 she had inspected the Park grounds with Ms Taituha and noticed children's toys strewn around the Park, many of which appeared to be in a broken or unsafe condition. Ms Bolton said she had concerns that these might pose an OSH or health risk, and she had asked Ms Taituha to have them removed.

[13] Ms Bolton said Ms Taituha had agreed to do so, and had reassured her on 27 June 2011 that the toys had been removed; however when Ms Bolton attended a Powhiri at the Park on 4 July 2011, she had noticed that the toys were still strewn around the grounds. As Ms Taituha had been on leave at the time, Ms Bolton had not been able to address the matter with her prior to her own departure from TTWI's employment on 20 July 2011.

Nexus Booking System

[14] Ms Sigley explained that TTWI used a computerised booking and reservation system for the Park ("the Nexus system"). At some time during July 2011 Ms Sigley said a cheque to the value of \$6,000.00 had been received in the post, however there had been no identifying document with it.

[15] Ms Sigley said that she had recognised the signature on the cheque and had telephoned that person, and requested a copy of the invoice to which the cheque payment related.

[16] Having received a copy of the invoice, Ms Sigley said she had then been able to identify the booking to which it related as being detailed on the Nexus system as an outstanding account for a booking which had taken place in February that year. Ms Sigley said without the cheque having arrived unexpectedly, there was the strong possibility that the outstanding amount might not have been followed up with the resulting loss of \$6,000.00 to TTWI.

26 July 2011

[17] Mr Tane, the TTWI director responsible for the Park operation, explained that WINZ had approved a Community work programme, known as Community Max for the Park, and during July 2011 there had been some 15 Community Max workers on site at the Park

[18] On the morning of 26 July 2011, Ms Taituha said she had commenced work at 8 a.m. and started painting in Cabin 2. Ms Taituha said she had not seen anyone at the Park prior to commencing work; however she had been interrupted by a neighbour, Ms Lydia Winiana, some time between 8.30 and 9.00 a.m.

[19] After Ms Winiana had left, Ms Taituha said she locked the cabin door, opened all the windows and carried on with the painting. Ms Taituha said she had the radio on as she painted, and had placed a bag containing some oranges for her lunch on the table outside the cabin.

[20] Mr Tane said on 26 July 2011 he had arrived at the Park at 9.00 a.m. and after spending approximately 30 minutes with Ms Sigley at the TTWI office which was adjacent to the Park, he had decided to see Ms Taituha, who was due to have returned that day after 3 weeks' annual leave.

[21] Mr Tane explained that his reason for wanting to see Ms Taituha was that he wished to discuss the removal of some of her personal items of property from three rooms in A Block in order that the rooms could be repaired and refurbished by the Community Max workers before the Community work programme finished at the end of that week.

[22] Mr Tane said that he had walked across the road to the Park and had gone to B block where he had met with some of the Community Max workers. Mr Tane said he had asked if anyone had seen Ms Taituha, however no one had done so.

[23] Mr Tane said he had then gone to A Block to look for Ms Taituha, but had not found her there, so he had gone to the cabin area and looked into all the cabins. Mr Tane said that he had looked in all the windows and the sliding doors of cabins 2, 3 and 4 and had observed that all the windows and doors were locked and secure. Mr Tane said he had not seen Ms Taituha, heard a radio, or seen a bag on the table outside Cabin 2.

[24] Mr Tane said he had returned to B block and again asked various Community Max workers if they had seen Ms Taituha but the response having been negative, he had spoken to Mr Whanake Taituha, the Community Max Supervisor at the Park, and informed him that the

work was unable to proceed on the three rooms in A Block until he had been able to speak to Ms Taituha.

[25] After having spent some time walking around the Park site with Mr Taituha discussing the work in progress, Mr Tane explained that he had lunch at B Block with Louanne, a Community Max worker, and asked if she had seen Ms Taituha, but she replied that she had not. At approximately 12.30 p.m. Mr Tane said he had returned to the TTWI office and rejoined Ms Sigley.

[26] Ms Sigley said during Ms Taituha's absence on leave she had booked for them to attend a HAPNZ road show, and on 26 July 2011 she had looked for Ms Taituha to inform her of this.

[27] Ms Sigley said that because she recalled Mr Bruce McLean, a contractor for WWTI who acted as the Park supervisor, saying that he was organising for Ms Taituha to paint the rafters in Cabin 2 upon her return from leave, she had walked to Cabin 2 to find Ms Taituha.

[28] Ms Sigley said that she had approached Cabin 2 and tried to open the door, however it was locked. Ms Sigley said that she had looked through the windows and had seen a trestle ladder inside the lounge/dining area which was not being used. Ms Sigley said that she had not heard a radio, seen a bag on the table outside the cabin, or seen any sign of someone being in or around Cabin 2.

[29] Ms Sigley said she returned to the TTWI office where she had seen Mr McLean and asked him if he had seen Ms Taituha, however he said he had not done so.

[30] Ms Taituha said that at mid-day Mr Stan Taurua, her partner, had joined her for lunch which they had eaten at the table outside Cabin 2.

[31] An hour later at 1.00 p.m. Ms Taituha said she had resumed the painting in Cabin 2 and at approximately 3.30 p.m., having finished that task, she had moved to Cabin 4 to paint behind the stove. At 5 p.m. she had finished for the day and left the Park.

[32] Mr Tane and Ms Sigley said that at approximately 2 p.m. after an Audit Committee Meeting, they had met with two Government officials and Iwi providers to show them the cleanup work undertaken by the Community Max workers.

[33] Ms Sigley said they had walked in groups to the Park, walking around the cabins along the river road frontage, stopping for some time in front of the cabins for recorded interviews. The tour lasted for approximately one and a half hours.

[34] Mr Tane and Ms Sigley stated that they had not seen Ms Taituha during the duration of the walk around the Park, however Ms Sigley said she had seen Mr McLean leaving as the groups walked towards the TTWI office, and according to her recollection and Mr McLean's time sheet this had been at 3.30 p.m.

[35] On 28 July 2011 there had been a meeting between Mr Tane, Ms Sigley and Ms Taituha. Mr Tane explained that this had been a monthly meeting as initiated by Ms Bolton, the purpose of which was to discuss Ms Taituha's performance. Mr Tane explained that the meeting had been arranged prior to Ms Taituha going on annual leave.

[36] Ms Sigley said that towards the conclusion of the meeting Mr Tane had asked Ms Taituha to prepare a roster for the following fortnight and to continue filling in her timesheet.

[37] On 9 August 2011 Ms Taituha submitted a time sheet for the period 25 July to 7 August 2011 which recorded her as having worked on 26 July 2011 from 8 a.m. until 12.00 p.m. and from 1.00 to 5.00 p.m.

[38] On 25 August 2011 TTWI wrote to Mr Taituha requesting her to attend a disciplinary meeting in order to provide explanations to six allegations. The allegations were stated to be:

1. *Falsification of the timesheet in respect of 26 July 2011.*
2. *Failure to account for site fees by failing to properly account for the revenue of the February 2011 booking on the Nexus system.*
3. *Being absent without leave on 26 July 2011 and providing no explanation at the meeting on 28 July 2011.*
4. *Failing to train the Relief Manager in carrying out daily bank reconciliation.*
5. *Failing to instruct Ms Gaylene Peters to divert the telephones to the TTWI office after the end of the morning sessions as advised on 5 and 8 August 2011.*
6. *Failing to remove the trampoline and children's' toys from the Park as instructed on 5 August 2011.*

Disciplinary Meeting

[39] Ms Taituha, and Mr Taurua as her representative, attended the disciplinary meeting on 31 August 2011. The meeting was chaired by Mr Murray Broadbelt acting as TTWI's advocate.

[40] During the meeting the various allegations were put to Ms Taituha and she was given the opportunity to provide an explanation to each one.

[41] In respect to the allegations that she had been absent without leave on 26 July 2011, and had subsequently falsified her timesheet, Ms Taituha explained she had been painting in Cabin 2 with the radio on, the door locked, and the windows open.

[42] Ms Taituha said that she had placed a bag on the table outside Cabin 2, and Mr Taurua had had lunch with her. Ms Taituha also said that she had reported to Mr McLean when she had finished at 4.15 p.m.

[43] In respect of the second allegation Ms Taituha explained she had not used the Nexus booking system for the February booking in question, but had instead written a manual invoice; however she said that she did use the Nexus system for everything else.

[44] Ms Taituha provided explanations in respect of the fourth and fifth allegation. In respect of the sixth allegation, Ms Taituha explained that the toys had been removed as at the date of the disciplinary meeting, and had apologised for not having removed them when asked to do so.

[45] Following the meeting Mr Tane said he had given Ms Taituha's explanations full consideration. Mr Tane explained that in his view the only matter that presented a serious conflict between the parties was whether or not Ms Taituha had worked on 26 July 2011.

[46] On 5 September 2011 Mr Tane wrote to Ms Taituha confirming that the outcome of the disciplinary meeting on 31 August 2011 was the termination of her employment. Mr Tane explained that on the balance of probabilities TTWI did not accept that Ms Taituha had been at work on 26 July 2011, and set out the reasons for this as being:

- *You would not normally lock yourself in a cabin to paint all day, and only come out for lunch*
- *There were many people around in the immediate area who did not see you at all that day*

- *Pania Sigley visited Cabin 2 around 11.30 am and found it locked up. She did not hear a radio, did not see your bag on the outside table and could see the trestle ladder in front of the door in the main room. She did not see you or signs of anyone in Cabin 2. The trestle ladder was a necessary tool to paint the beams and it was not being used.*
- *I also visited Cabin 2 during the day and found no one there*
- *I had visitors in the late afternoon, around 4pm, and they toured the site and did not see you either.*
- *You could not have spoken to Bruce to say you had finished painting at 4.15 pm as he was not on site.*

[47] As a consequence Mr Tane explained that TTWI concluded that Ms Taituha had falsified her timesheet. Mr Tane further confirmed that TTWI had considered as unacceptable Ms Taituha's conduct in respect of the February invoice noting that she had failed to: ... *provide a full and reasonable explanation as to why you manually wrote an invoice when the Nexus system had been in operation since 2008.*

[48] Ms Taituha's explanations in regards to the fourth and fifth allegations were accepted, and it was noted that Ms Taituha had removed the broken toys in the preceding few days to the disciplinary meeting.

[49] Mr Tane concluded:

The Company has carefully considered your explanations to the allegations. The Company has found that you have breached the trust and confidence it expects to have in an employee. We consider your actions constitute serious misconduct and consequently advise your position is terminated without notice effective from today's date, 5 September 2011.

Determination

Was the decision by TTWI to dismiss Ms Taihua a fair and reasonable decision?

[50] The decision to dismiss Ms Taituha must be a justifiable decision in accordance with the test as set out in s 103A of the Employment Relations Act 2000 ("the Act"). Section 103A of the Act states:

S103A Test of Justification

- 1. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- 2. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[51] Mr Tane and Ms Sigley's evidence was that during their visits to Cabin 2 in search of Ms Taituha they had seen nothing to support her assertion that she had been there painting throughout the day.

[52] Having made a site visit, I accept that had the windows of Cabin 2 been open with a radio playing as stated by Ms Taituha, this would have been clearly audible to someone standing outside and peering through the door and windows as Mr Tane and Ms Sigley say they had done. I also accept that it would also have been difficult to miss seeing a bag on the table which is adjacent to Cabin 2 and which Mr Tane and Ms Sigley would have stood next to in order to look into Cabin 2.

[53] Ms Taituha said that she had not been using the trestle table to paint in the small bedroom of Cabin 2. If this had been the case, I accept that Ms Taituha may have been obscured from sight.

[54] In reaching his decision to dismiss Mr Taituha, Mr Tane said that he had also taken into consideration the fact that none of the Community Max workers on site said they had seen Ms Taituha that day, and that Ms Taituha could not have reported to Mr McLeod at the time she claimed she had since he had already left the Park by that time.

[55] In consideration of the above, I consider that TTWI had substantive justification for concluding that Ms Taituha had not been present at the Park as claimed on 26 July 2011, and had subsequently falsified her time sheet, resulting in a loss of trust and confidence in her on the part of TTWI.

[56] I further find that in respect of Ms Taituha's failure to correctly record an invoice for the outstanding amount of \$6,000.00 which was a significant amount of money for TTWI, and which, without the cheque having arrived unsolicited some months after the booking,

could not easily be identified from the Nexus system; this might have resulted in a loss of revenue to TTWI.

[57] It is clear from the evidence of Ms Bolton and Ms Sigley that Ms Taituha had received training in how to operate the Nexus system, and her failure to do so coupled with the potential for loss to TTWI, I find had justifiably contributed to the loss of trust and confidence they had felt in her as the Park Manager.

[58] A dismissal must not only be substantially justifiable however, it must be procedurally justifiable. Pursuant to s 103A (3)(a) of the Act, the employer must: "*having regard to the resources available to the employersufficiently investigate the allegations against the employee ..*"

[59] During the course of the Investigation Meeting Ms Winiana said she had been to Cabin 2 on 26 July 2011 and seen Ms Taituha there painting, however she had been advised by her sons prior to the disciplinary meeting not to give evidence in support of Ms Taituha as they had feared there might be adverse consequences for her. Ms Taituha said she had understood and respected Mr Winiana's decision.

[60] TTWI could not take into consideration the evidence of Ms Winiana because this was not made known to it at the time of the disciplinary meeting on 31 August 2011, or prior to Mr Tane's decision being notified to Ms Taituha on 5 September 2011. Consequently I find that there is no procedural flaw in this aspect.

[61] However there was also the assertion made by Ms Taituha during the disciplinary meeting that Mr Taurua had lunch with her at Cabin 2 on 26 July 2011.

[62] In his evidence Mr Taurua said that he had not only had lunch with Ms Taituha on 26 July 2011 but he had also informed Ms Winiana that Ms Taituha was working at the Park when she had been looking for Ms Taituha that morning, and he had spoken to some Community Max workers when he had arrived at the Park who had told him that Ms Taituha was working in Cabin 2.

[63] Whilst I accept the evidence of Mr Tane and Ms Sigley that Mr Taurua was disruptive during the disciplinary meeting, I also find Mr Taurua's explanation at the Investigation Meeting that he had not attempted to provide his evidence at the disciplinary meeting on the basis that it would have been discounted by TTWI, to be reasonable in the

circumstances in which Mr Tane confirmed at the Investigation Meeting that he did not trust Mr Taurua.

[64] However TTWI was made aware of evidence that could have been provided by Mr Tuarua by Ms Taituha's explanation that Mr Tuarua had been present with her outside Cabin 2 on 26 July 2011. Even taking into consideration the fact that TTWI is a small employer, I find that the fair and reasonable employer would have carried out further investigation to ascertain if Ms Taituha's statement that she had had lunch with Mr Tuarua was credible by further questioning the Community Max workers, and indeed Mr Tuarua himself.

Was the decision by TTWI to dismiss Ms Taituha predetermined?

[65] Ms Hari Makiha, the sister of Ms Taituha, said she had been working in her capacity as Restaurant Manager at the Copthorne Hotel on the evening of 5 February 2011.

[66] Ms Makiha said she had been managing a function in the Yacht Club Grounds, which Mr Tane attended as an invited guest. Ms Makiha said she had been surprised when Mr Tane, whom she knew well, had asked her to telephone him in connection with Ms Taituha.

[67] Ms Taituha said Mr Tane had told her that he had just dismissed the Manager of the Mayfair Lodge, and that Ms Taituha would be "*going down the same track*". Ms Makiha said that she had been very upset by the incident and had reported it to Ms Taituha..

[68] Mr Tane said at the Investigation Meeting that he had realised that on that occasion he had not behaved appropriately , however he had felt at the time that this was a Maori way of resolving the issues TTWI was experiencing with Mrs Taituha.

[69] Mr Tane explained that Ms Taituha and Mr Tuarua had appeared during the conclusion of a meeting of TTWI not long after this incident, and he had apologised profusely to Ms Taituha at that time and also to the two other TTWI directors. Mr Tane said that this incident had not influenced the decision to dismiss Ms Taituha.

[70] I find that there is evidence that the incident on 5 February 2011 indicates that Mr Tane had concern about Ms Taituha's performance and he had formed a preliminary view about the possible outcome, which influenced his decision making process and the finding that Ms Taituha had breached the trust and confidence TTWI should have had in her. In turn this had resulted in TTWI reaching the decision that dismissal was the appropriate outcome.

[71] I determine that taking all these considerations together that Ms Taituha has been unjustifiably dismissed.

Remedies

[72] Ms Taituha has been unjustifiably dismissed and is entitled to remedies.

Reimbursement of Lost Wages

[73] Ms Taituha was employed subject to an individual employment agreement in accordance with which her annual salary was \$30,000.00. Ms Taituha has not worked since her dismissal.

[74] Ms Taituha to be reimbursed for lost earnings for a period of 3 months pursuant to s 128(2) of the Act.

[75] TTWI is to make a payment in respect of lost wages to Ms Taituha of \$7,500.00 gross.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[76] Ms Taituha is entitled to compensation for humiliation and distress. Ms Taituha said that she experienced a sense of shame, humiliation, loss of dignity and injury to feelings following her dismissal. I accept that this has been the case, especially in light of the associated strong community and familial relationships.

[77] TTWI is to pay to Ms Taituha the sum of \$8,000, pursuant to s 123(1) (c) (i).

Contribution

[78] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[79] Ms Taituha had been informed in the letter dated 25 August 2011 of the nature of the allegations against her, one of the most significant of which was the allegation of not being at work at the Park on 26 July 2011 and the subsequent falsification of the timesheet for that day.

[80] At the disciplinary meeting on 31 August 2011 some 6 days later, Ms Taituha had failed to mention any potential witnesses other than Mr Taurua. Ms Taituha attributed this omission

to not having had sufficient time to gather her thoughts and recall any potential witnesses, and to the fact that she had forgotten the events on that day.

[81] I appreciate that Ms Taituha had felt she could not ask Ms Winiana to provide evidence on her behalf for the reasons stated at the Investigation Meeting. However according to Mr Tuarua, there were other witnesses, namely the Community Max workers to whom he claimed to have spoken, whose evidence would have been significant in corroboration of Ms Taituha's explanation that she had been present at the Park on 26 July 2011.

[82] The letter of 25 August 2011 stated that some of the allegations were serious, and the outcome if they were to be upheld could be disciplinary action, including the termination of her employment.

[83] In these circumstances I consider that during those 5 days prior to the disciplinary meeting on 31 August 2011, Ms Taituha and Mr Tuarua had sufficient time and motivation to consider the situation, recall the events of the day, and identify those Community Max workers to whom Mr Tuarua said he had spoken on the morning on 26 July 2011.

[84] However Ms Taituha had failed to provide this information at the disciplinary meeting on 31 August 2011.

[85] Further, that having attended the disciplinary meeting on 31 August 2011 and realised the seriousness of the situation she faced, Ms Taituha had a further 5 days before Mr Tane reached his decision to dismiss during which she could have provided substantiation of her claim that she had been present at the Park on 26 July 2011.

[86] However Ms Taituha had again failed to provide this information to TTWI.

[87] I also consider it significant that Ms Taituha made a statement at the disciplinary meeting that she had spoken to Mr McLeod at 4.15 p.m. on 26 July 2011, however TTWI had established that Mr McLeod had left the Park approximately one hour earlier. I find that this statement further undermined TTWI's confidence in the explanations Ms Taituha provided.

[88] I find contributory fault on the part of Ms Taituha and reduce the remedies awarded by 60 %.

[89] Accordingly:

- TTWI is to pay Ms Taituha \$3,000.00 respect of lost wages
- In respect of the claim in respect for hurt and humiliation, TTWI is to pay to Ms Taituha the sum of \$3,200.00, pursuant to s 123(1) (c) (i).

Costs

[90] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority