

Determination Number: WA 128/05

File Number: WEA 462/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Haavi Tararo (applicant)
AND	Toll NZ Consolidated Holdings Limited (respondent)
REPRESENTATIVES	Peter Cranney for the applicant Hamish Kynaston for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 7 July 2005
SUBMISSIONS RECEIVED	14, 22 July & 2 August 2005
DATE OF DETERMINATION	3 August 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Haavi Tararo's claim is that he was unjustifiably dismissed – statement of problem received on 16 December 2004. He seeks reinstatement, compensation of \$35,000 for humiliation, etc, lost wages and costs.

2. The Company says Mr Tararo was justifiably dismissed for theft – statement in reply received on 4 February 2005.
3. The parties underwent mediation but the employment relationship problem remained unresolved.

Investigation

4. The parties agreed to a two-day investigation in Wellington commencing at 10.00 a.m. on Thursday 7 July 2005. As it happened, only one day was required for the investigation. The parties usefully provided witness statements and documentary evidence in advance of the investigation.
5. Efforts by the parties during and after the investigation to settle this matter were unsuccessful.

Background

6. From the statements provided by the parties and the evidence presented at the investigation, I am satisfied that key background details are as follows.
7. Amongst other activities, the Company operates one of the Cook Strait ferry services, the Interislander.
8. Mr Tararo was employed as a barman or cashier by the Company and its predecessors, from December 1989.
9. On 20 June 2004 Mr Tararo was working on board the Aratere. He was operating a till in the cafeteria on the 10.00 a.m. sailing from Picton to Wellington.
10. Sometime between 10.30 and 11.00 a.m. a passenger informed the Aratere's On Board Services Supervisor that the applicant was stealing from the respondent. The passenger said she had been observing Mr Tararo for some time and had noticed he was not ringing up purchases correctly and was sure he had put a \$20 note in his pocket. The passenger completed and signed a customer comment form confirming

her advice and, later, also provided a statement to one of the Company's security officers.

11. The Aratere's Master spoke to Mr Tararo and his union representative in respect of the passenger's allegations later that day. The applicant denied the allegations. He advised the Master that he had taken \$80 from the till and, via the Information Officer, exchanged it for coins. The Information Officer subsequently advised the Master that she had given coins in exchange for \$60.
12. The Master's request that security cameras be checked disclosed they were not operating at the time.
13. The Master met again with Mr Tararo on 21 June: amongst other matters he advised he would stand aside from the investigation which would be pursued further by the Company.
14. The inquiry was taken over by Mr Jonathan Morgan, the Company's then Passenger and Hotel Services Manager. He set out his preliminary concern in a letter dated 25 June. It said he was investigating an allegation that Mr Tararo "*took \$20 belonging to the Company*" (first bundle, page 15). A number of meetings with him and the applicant followed. Mr Morgan also spoke twice to the passenger and to various Company employees.
15. At a meeting on 9 July the Company's evolved position was put to Mr Tararo and his representatives by Mr Morgan in the following, verbatim, way:

What has been alleged in nutshell is that Haavi Tararo was stealing from Company.

(second bundle, page 7); and

In summary – this woman says on a number of occasions you did not ring up orders – ... Big order – ring up. Small order not – Count notes – till drawer open. Put \$20 (at least) into pocket.

(second bundle, page 10)

16. The parties' last meeting was on 12 July. During that meeting the respondent advised Mr Tararo that it preferred the passenger's account, that it therefore believed he was stealing on that day, and he was dismissed for serious misconduct with immediate effect.
17. A letter recording the same was forwarded to Mr Tararo dated 13 July. It stated amongst other things that:

I have considered the detailed statements provided by the passenger regarding your behaviour whilst operating the till on ARATERE on 20 June 2004 (which she confirmed to me verbally), and the explanation you and your representatives gave on your behalf. I have decided, on balance, to accept the passenger's version of events and therefore believe that you were stealing from the (Company) on that day.

This behaviour represents serious misconduct, and I confirm that you are dismissed from the Company's employment with immediate effect.

(first bundle, page 43)

18. On 13 July Mr Morgan reported the outcome to relevant managers. He also issued a set of fresh instructions aimed at improving on-board cash handling and theft detection procedures (first bundle, pages 41 & 42).

The Applicant's Position

19. Mr Tararo has throughout consistently denied the allegation of theft and of improper till procedure.
20. From the moment it was first raised with him, at a meeting on 9 July 2004, Mr Tararo agreed he had put money into his pocket before going and changing it for coins. When an explanation was subsequently sought in respect of his action, Mr Tararo said that he put the money into his pocket as he was "busting" (Authority's investigation) to go to the toilet, before going to change it for coins.
21. He was obliged to go and seek change because the vessel was short staffed that day and no one was available to bring the change to him.

The Respondent's Position

22. The Company's decision to dismiss Mr Tararo was based on an investigation into the allegations of a passenger. Ultimately, the Company preferred the passenger's account of events to that of the applicant.
23. The decision to dismiss Mr Tararo was made by Mr Morgan.
24. As Mr Morgan made clear in his written statement to the Authority, and as he reiterated during the Authority's investigation, he preferred the passenger's account of events to that of the applicant for the following reasons:
 - He was satisfied the complaint was not vexatious and that it appeared to be genuine.
 - He reached his conclusions on the grounds that the passenger had set out her initial complaint in writing (first bundle, page 1), had repeated them in a second written report (first bundle, pages 20 & 21 inclusive), and on the strength of speaking to the passenger by telephone on two separate occasions (he did not keep detailed notes of those discussions).
 - The passenger was not known to, and did not have an interest in, the Company. She did not know the applicant. Her only interest in the matter was professional – she had been an auditor for approximately 11 years and was at the time of the incident an income controller.
 - The passenger spoke freely, openly and with confidence and it was not necessary to prompt her. Mr Morgan found her to be honest, straightforward and credible in her efforts to assist the Company.
 - The statements provided by the passenger were consistent.
 - Nothing that Mr Tararo or his representative said convinced Mr Morgan that the passenger was mistaken. By comparison (with the passenger) the applicant did not have a convincing explanation: he admitted putting money in

his pocket and his recollection of the amount was different to that of the Information Officer's.

(pars 32, 33, 34, 35, 51 and 52 of Mr Morgan's statement)

Discussion and Findings

25. I am satisfied the applicant was unjustifiably dismissed for the following reasons.
26. The standard of proof an employer must establish to justify a dismissal is the balance of probabilities. However, where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing as the charge is grave: *NZ (with exceptions) Shipwrights etc Union v Honda NZ Ltd* [1989] 3 NZ ILR 82.
27. The basis of the passenger's complaint, as accepted by the Company, was, verbatim:
- (Mr Tararo was) *At 10-18 ... leaving draw open and playing with money, he took out a \$20 note put it on the side of the till and placed it in his pocket (first bundle, page 1); and*
 - *I saw that (Mr Tararo) didn't ring (the last transaction) on and he just put the change in the till. ... The fact that it wasn't rung up caught my attention.*

Customers after that if it was a big order he would ring it up but if it was small order he either didn't ring it up or he rung something up and he would screw up the receipt and put it down at the side ...

I saw him start to write things down. He served about 20 people after me. At least half he didn't ring up. He was always counting the \$20.00 notes. He did that at least 5 times. When a supervisor or staff walked around he shut the till draw, otherwise it was open.

I saw him count the \$20.00 notes right over the till. He put the rest inside and put at least one \$20, it could have been more, beside the till. If a staff member came by he

would hide it under the till top. A couple of minutes later he put the money in his left side trouser pocket.

(first bundle, page 20)

28. In her written statement to the Authority, the passenger repeated the above. She said she watched Mr Tararo,

... serve at least 20 people after me. At least half of those, he didn't ring up. The big orders he would ring up, but if it was a small order, he would either not ring it up, or ring up something and screw up the receipt and put it down to the left-hand side of the till.

He wrote things down on a pad next to the till a number of times, but I could not see what he was writing. ...

I saw him put at least one \$20 note, although it could have been more, next to the till. ... I then saw him put the \$20 note or notes into his left side trouser pocket.

29. In this instance the Company was confronted with a difficult contest between a passenger's apparently genuine and repeated version of events and an employee's equally insistent denial of the interpretation placed on those events. The Company was in an invidious position.
30. Mr Tararo has always denied stealing from his employer and of ringing up only large sales but not small sales. He has always accepted some of the passenger's allegations: first, he agreed he had put money into his pocket. As he explained to the Company when the matter was first put to him, it was for the purpose of obtaining coin change. Second, he also admitted to writing things down. He says he was doing a magazine puzzle between customers. Third, he also agreed he screwed up receipts (and binned them) after they were refused by customers, so as to keep his work station – and the ship – tidy.
31. Oddly, Mr Morgan described the applicant's consistently articulated position as not helping him: he found Mr Tararo's often yes/no answers as "vague" (Authority's investigation). It became quickly apparent during the Authority's investigation that Mr Tararo is a man of few words and frequent pauses, but not, I am satisfied, because he is evasive or attempting to evade questions put to him.

32. Prior to dismissing the applicant, the Company expressly elected not to pursue the apparent discrepancy between the amount Mr Tararo says he handed to the Information Officer, and the amount the Information Officer says she received (page 22 of the second agreed bundle). Mr Tararo was advised of the Company's decision. As it happened, the latter's record of the transaction was recovered after the dismissal: Mr Tararo says he saw the record – page 40 in the agreed bundle – for the first time on the day of the investigation; he has not counter-signed that record and disputes its accuracy.
33. However, as is made clear in par 52 of his statement and as he repeated to the Authority's investigation on several occasions, the discrepancy was an admitted factor in Mr Morgan's mind at the time of coming to a decision to prefer the passenger's complaint over Mr Tararo's explanation and to dismiss him (par 52 of his statement): Mr Tararo was unjustifiably disadvantaged by the Company's unfair reliance on its conclusion, having told Mr Tararo it would not take the discrepancy into account when in fact it did.
34. The Company accepted the passenger's complaints. It put them to Mr Tararo in a summarised, "*nutshell*" (above), form at its meeting with him on 9 July. They were: that he was stealing from the Company and that he did not ring up small orders and put at least \$20 into his pocket.
35. The Company accepts it cannot point to any amount and say that sum was stolen by Mr Tararo, as the final cash sum cannot be reconciled with sales if some are not rung up.
36. The Company accepts that, from time to time and when short-staffed, employees leave their work stations with money taken from the till in order to obtain change. The Company is not saying that Mr Tararo was under instruction in that situation to not put the money in his pocket. The Company also accepts that not all customers take their receipts: staff are often obliged to bin them.
37. During the Authority's investigation, Mr Morgan said he had looked at the till record but could not say when: he confirmed it was before dismissing Mr Tararo. Mr Morgan says he found the record "*inconclusive*". His conclusion is difficult to follow,

particularly as it was – with the security cameras not working – the only independent and objective information potentially available to the Company in the context of two fiercely, and seriously, competing claims.

38. His conclusion is also difficult to follow because the till record covers the 45 minute period in which the passenger says she began watching the applicant, from 10.18 a.m. until 11.04 a.m.
39. A further difficulty arises in understanding Mr Morgan's view because the till records Mr Tararo entering 22 transactions, for amounts ranging from \$2.00 to \$21.50. Ten of those transactions are for \$5.00 or less. On their face, the number of transactions and the actual amounts recorded support Mr Tararo's account over the passenger's complaint. This is because the number of transactions could be read as confirming the passenger's allegation of numbers of customers served by the applicant, i.e. of Mr Tararo serving at least 20 people after her (in fact it records 22 separate entries over the 45-minute period identified by the passenger who, it is agreed, was the first).
40. The till record also shows the applicant entering small amounts. Of course it might be said that Mr Tararo did not record all of the passengers' transactions or the full amounts. But that is not the thrust of the passenger's allegations: what she specifically alleged, and what the Company proceeded to act on, and what was put to Mr Tararo, was that at least half were not rung up and/or that small orders were not rung up. The Company did not investigate that possibility of Mr Tararo ringing up lesser orders: it did not put that allegation to him.
41. What the till record makes clear is that Mr Tararo did make small entries: nearly half of the entries are in that category. The till record expressly contradicts the passenger's specific claim that he was not ringing up small orders. It does support her claim that "*he rung up something*" (above), but in the absence of evidence that the something was less than the actual sale it is difficult to see how – on the basis of this vague assertion and given the level of evidence required in respect of a serious allegation, on a balance of probabilities basis – the Company could fairly and reasonably reach a conclusion that Mr Tararo was stealing and was guilty of serious misconduct.

42. A fair employer could not conclude that serious misconduct had occurred without giving the till record sufficient scrutiny and without giving the applicant an opportunity to make submissions in respect of that record.
43. It is similarly difficult to understand the Company's failure to take proper account of Mr Tararo's explanations of why the passenger may have misinterpreted his actions: he said it was regular practice to anticipate sales and to ring them up in advance of the transaction. This was because the applicant was standing at his till and could see in advance an impending sale. The Company did not contradict that evidence, specifically or as a general practice by its staff, during the Authority's investigation.
44. The respondent never pursued with the applicant the (implied) allegation that his writing was a running record of the money he was stealing: Mr Tararo any way admits to writing and says he was doing a magazine puzzle between customers.
45. The Company found against Mr Tararo because he admitted putting money in his pocket even though it accepted he had exchanged some money and despite the absence of any instruction against that practice.
46. The significance of the evidence summarised above is, I find, crucial to determining this matter. Because of its failure to fully and properly consider the significance of the till tape, and to provide it to Mr Tararo for his comment, I am satisfied that the Company has failed to undertake a full and fair investigation: *Airline Stewards and Hostesses v Air New Zealand Limited* [1990] 3 NZLR 550 applied.
47. Had it undertaken an adequate investigation then the Company would have had the benefit of evidence with which to properly weigh the, no doubt sincere but, I find ultimately unsustainable complaint from the passenger.
48. It was therefore not in a position to conclude that Mr Tararo was guilty of serious misconduct: *W & H Newspapers Limited v Oram* [2002] 2 ERNZ 448 applied. Mr Tararo's summary dismissal was therefore unjustified.

Remedies

Reinstatement

49. Mr Tararo seeks reinstatement. It is the primary remedy: s. 125 of the Act. Given the applicant's unblemished and lengthy history working for the Company and its predecessors, and the size of the Company's Cook Strait operations and the number of positions of the category previously held by Mr Tararo on its vessels, I can see no reasons for not ordering Mr Tararo's reinstatement: I therefore direct that the applicant be reinstated to his former position.
50. As this order is opposed by the respondent, it appears to me appropriate that mediation would usefully assist the parties in respect of how, amongst other matters, the reinstatement might be best achieved. I therefore direct the parties to undertake further mediation in respect of this employment relationship problem within 28 days of the date of this determination: s. 159 of the Act applied.

Lost Wages

51. I am satisfied that Mr Tararo is entitled to recover all of the wages lost to him between his unjustified dismissal and his reinstatement, less the monies he has earned as a result of his – I find – sufficient efforts to mitigate his financial losses during the period in question: s. 123 (1) (b) of the Act applied. The parties are well placed to attempt to calculate the relevant sum in the first instance.

Compensation

52. I accept the submission that Mr Tararo is entitled to significant compensation as a consequence of the impact on him of his unjustified dismissal. I also find that the effect of that unjustified dismissal will be substantially mitigated by his reinstatement. I am therefore satisfied that the sum claimed of \$35,000 is excessive but that the amount of \$15,000 is adequate compensation: s. 123 (1) (c) (i) of the Act applied.

Contribution

53. The Company was clearly obliged to look closely into serious and apparently entirely genuine allegation against Mr Tararo. However, as already made clear, I am satisfied it failed to carry out a full and fair investigation and cannot justify Mr Tararo's dismissal. The responsibility for an inadequate investigation must reside with the Company.
54. Having reheard not only the evidence that was considered by the Company at the time it came to its decision to dismiss the applicant but also a considerable quantity of submission as to what conclusions should be drawn from that and additional evidence, I am also satisfied there was nothing put forward during the Authority's investigation such as to support a finding that Mr Tararo's actions contributed toward the situation that gave rise to his personal grievances.
55. There is no evidence that the applicant was behaving other than consistently with his employer's less than precisely stated requirements on the day of the incident leading to his summary dismissal: s. 124 of the Act applied.

Determination

56. For the reasons set out above I find in favour of the applicant, Haavi Tararo's, claim that he was unjustifiably dismissed by the respondent, Toll NZ Consolidated Holdings Limited. I therefore order that,
- The applicant is to be reinstated to his former position. However, the parties are to undertake mediation within the fortnight from this determination as to how this may be done so as to best suit the parties' requirements; and
 - That he be paid lost wages for the period between his termination and reinstatement. Leave is reserved for the parties to bring the quantum to the Authority for determination if their efforts to reach agreement are unsuccessful; and

- That Mr Tararo be paid \$15,000.00 (fifteen thousand dollars) as compensation for humiliation, etc.

57. At the request of the parties costs are reserved.

Denis Asher

Member of Employment Relations Authority