

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Perry William Walen (Applicant)
AND SkyCity Management (Auckland) Limited (Respondent)
REPRESENTATIVES Perry Walen In person
Shan Wilson, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 23 November 2005
DATE OF DETERMINATION 13 January 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] SkyCity Management (Auckland) Limited (“SkyCity”) employed Mr Walen as a dual rate security supervisor and relief manager at its Auckland casino. It dismissed him for serious misconduct because of what it considered to be his unacceptable and unprofessional approach in an interview he conducted with a patron.

[2] Mr Walen says the dismissal was unjustified and has raised a personal grievance.

The incident leading to the dismissal

[3] In a period up to and including May 2002 the casino was experiencing a problem with rival syndicates competing for space at gaming machines. The syndicates’ purpose was to ensure their members were seated at the machines when the jackpot was hit, so that they could claim the winnings. A key member of one of these syndicates was a Mr Wu. A person named Josh Ogilvie was thought to be associated with another, smaller syndicate competing with Mr Wu’s.

[4] In mid May an exchange at the casino involving these two men led to a complaint to the casino from Mr Ogilvie. The casino investigated and prepared a written report on the matter. Mr Wu was spoken to about it. I was told that an aspect of the rivalry between the syndicates was that they would complain to the casino about each other’s members, in the hope that the casino would then ban those concerned from the premises. Thus syndicate members’ complaints had an extra element of significance to them, and added to the casino’s difficulties with the syndicates.

[5] On or about 20 May 2002 Mr Ogilvie approached the casino’s security staff to voice his belief that the casino had identified him to Mr Wu as the originator of the complaint (it hadn’t), and that as a result Mr Wu had accosted Mr Ogilvie and his family in the street.

[6] Mr Walen and Duane Hughes, a member of the security staff, took Mr Ogilvie to an interview room. The resulting interview was recorded by the video camera Mr Walen knew was installed there and used for recording interviews.

[7] The interview began with Mr Ogilvie, who was calling himself 'Peter', expressing his concern that Mr Wu had been shown the casino's report on his complaint. He described the incident in the street, indicating it amounted to verbal abuse in the form of various statements incorporating the phrase 'fuck you' as well as some shoving. When asked if he had been physically threatened, Mr Ogilvie told Mr Walen the incident was more one of standover tactics. Mr Walen advised Mr Ogilvie to report the matter to the Police. Mr Walen also pointed out that Mr Wu was probably bluffing if he said he had seen the casino's report.

[8] The interview then took the direction which led to Mr Walen's dismissal. Mr Ogilvie said he was in a scary situation and the following exchange ensued:

“Walen Why don't you stand up to him mate?
 Patron You mean what like fight with him?
 Walen This is advice that, you don't have to take this onboard if you want. Its not professional advice, but why don't you stand up to the motherfucker. Say come here mate, I will rip your fucken legs out.
 Patron Yeah. That is just not me. I would defend myself but I ...
 Walen No. You are not listening to me. Don't wait for it to happen. Stand up for yourself now because he knows you are on the back foot and if you are on the back foot he will keep going to keep doing.
 Patron Its ...
 Walen No, no, I want you to answer Peter.
 Patron It has been an endless stream of abuse from him
 Walen Exactly. Do you want that abuse to stop?
 Patron Yeah, I do.
 Walen Mate I would stand up to him. But make sure there is no-one around when you do it. Alright? Because then you can be had for threatening behaviour also. Stand up to him Peter. Say 'come here, I will rip your fucken throat out. Fuck off.'”

[9] The exchange continued in that tone, with Mr Walen going on to suggest to Mr Ogilvie that, even if he did not mean what he said, he should call Mr Wu's bluff. Mr Walen returned to this suggestion several times. He also returned to the suggestion that, if Mr Ogilvie took action against or threatened Mr Wu he do so while there was no-one around, and in addition to any approach to the Police.

[10] The interview continued as follows after a further exchange about the need for Mr Ogilvie to go to the Police:

“Patron I fully intend to go, I mean this is just a stop on the way to there.
 Walen You need to go there Peter and you need to say that I have been assaulted and you need to go through with it. But if you went there and said “he said this and he said that” then there is nothing they can do. But you have been physically assaulted.
 Patron I fully intend to. That's the best way to deal with it.
 Walen No, that is not the best way. That is a way to deal with a person. There is more than one way to skin a cat Peter ... I would stand up to him mate ...
 Patron That is not the issue ... it's right and wrong.
 Walen Unfortunately Peter we don't live in a perfect world mate. ...”

[11] The video record of the interview came to the attention of Kathryn McGregor, the Executive Manager – Security and Surveillance. Ms McGregor was so concerned about the content that she arranged a disciplinary meeting for 22 May 2002. She formally advised Mr Walen of the meeting by letter dated 21 May 2002.

[12] The meeting went ahead on the evening of 22 May. Mr Walen and Ms McGregor attended, as well as Elizabeth Jeffs, a member of the human resources staff.

[13] The part of the video containing the matters of concern was played to Mr Walen, and his explanation sought. Ms McGregor explained that SkyCity's concerns were with the appropriateness of the language Mr Walen used, and with the fact that, rather than de-fusing the situation, Mr Walen was apparently advocating an aggressive response. Moreover, Mr Walen was aware that the response he was advocating was wrong.

[14] Mr Walen acknowledged giving the advice he did, and said he stood by it. He also said that perhaps it could have been worded differently, and that he should have ensured it was clear he was giving the advice in his personal capacity rather than as a representative of SkyCity. He sought to characterise the advice as 'off the record'. To Ms McGregor, he did not understand the point that the approach he was advocating was unacceptable. Instead of discouraging unlawful behaviour, he was encouraging it.

[15] By way of further explanation of his conduct Mr Walen alleged that other employees had been guilty of worse behaviour than his, although at the time he was unable to give examples. Mr Walen complained about the lack of a sign warning that the interview was being video-taped, although he acknowledged he knew the interview was being recorded anyway. He said he became complacent, when a warning sign would have alerted him not to be. Finally, he said he would learn from his mistake, and invoked his long period of unblemished service. The meeting was adjourned to allow a consideration of Mr Walen's responses.

[16] There was a further meeting on 24 May. Since he considered Mr Wu may have been trying to bully Mr Ogilvie - hence his advice to Mr Ogilvie - Mr Walen explained his philosophy on bullying. Standing up to bullying was a significant issue to him. For Mr Walen's information, the legal meaning of the term 'ethical belief' is as set out in s 21(1)(d) of the Human Rights Act 1993.¹ The term means 'the lack of a religious belief, whether in respect of a particular religion or all religions'. Accordingly it does not extend to personal views on matters such as bullying, and Mr Walen has not been subjected to unfair discrimination in respect of those views.

[17] During the 24 May meeting Mr Walen again apologised for his behaviour and said it would not happen again.

[18] At the end of the meeting Ms McGregor informed Mr Walen he was being dismissed for serious misconduct. The reasons for her decision were that she could not accept Mr Walen's behaviour could ever amount to acceptable conduct, or that it was appropriate for him to purport to go 'off the record' with patrons. He was acting in a managerial capacity, was identified as a SkyCity employee, and was at work when he spoke as he did. For Mr Walen's further information, an employer is entitled to hold a person with managerial responsibilities to a higher standard of behaviour than employees without those responsibilities, and Ms McGregor's taking into account that matter here did not amount to unfair discrimination.

[19] Finally, Ms McGregor was not persuaded by Mr Walen's argument that a warning sign might have prevented the behaviour, and said she expected security staff to act properly all the time. She was concerned that Mr Walen had said he would give similar advice again, although it might be phrased differently. She considered it was not for SkyCity to hand out advice of that nature to patrons. Accordingly she concluded Mr Walen had 'crossed the line' and she could not continue to have trust in him.

¹ By virtue of s 105(2) of the Employment Relations Act 2000.

The justification for the dismissal

[20] There was no real dispute about the material facts, rather the dispute concerned SkyCity's decision as to what should be done in response. Nor was there any real dispute about whether Mr Walen had conducted the interview with Mr Ogilvie appropriately, rather, again, the dispute concerned how seriously SkyCity should view the interview and the appropriateness of its decision to dismiss.

[21] I accept that Mr Walen 'crossed the line' of acceptable conduct in the interview with Mr Ogilvie and, subject to matters to be addressed in the remainder of this determination, that SkyCity conducted a fair and reasonable investigation into Mr Walen's conduct. Mr Walen's challenge to SkyCity's decision is to say his dismissal was unfair and unjustified because:

- (a) he had six and a half years' unblemished service, yet lost his career over one mistake;
- (b) SkyCity did not look at alternatives to dismissal, such as further training;
- (c) there was no sign in the interview room warning that discussions were being recorded;
- (d) it was unfair that Ms McGregor handled the matter rather than the security manager Douglas Glazebrook, to whom Mr Walen reported and who in turn reported to Ms McGregor; and
- (e) other people were not treated as harshly as he was.

1. Mr Walen's previously unblemished service

[22] It is true that Mr Walen's previous service was unblemished, and he had received a number of commendations for his responses to particular incidents during that period. I accept Ms McGregor was aware of those matters from her general knowledge of Mr Walen, and because she had reviewed Mr Walen's human resources file. While it might have been prudent to do so, she was not necessarily obliged to view a separate file on Mr Walen which Mr Glazebrook held as line manager.

[23] Mr Walen asserted that there were letters of appreciation on Mr Glazebrook's file which were not on the human resources file, but did not produce them and did not offer any other evidence that Mr Glazebrook's file differed in any material respect from the human resources file. However even if such letters were on Mr Glazebrook's file and not on the human resources file, I conclude Ms McGregor was sufficiently aware of the existence of commendations of Mr Walen to mean any failure to view those letters does not vitiate the justification for the dismissal.

[24] In any event the real point is that Mr Walen believes his error should not have been held against him to the extent that it outweighed his good employment history. While another manager might have reached a different conclusion when weighing those matters, Ms McGregor's approach was within the range reasonably available to her. Mr Walen's conduct amounted to more than mere error.

2. Alternatives to dismissal

[25] Mr Walen suggested that further training in interview techniques might have prevented the present problem, or alternatively that he could have been given further training rather than being dismissed.

[26] I cannot accept that. Regarding the possible prevention of the problem, Mr Walen was an experienced staff member with many years' service who had conducted dozens of interviews. He should have known better than to behave as he did. As for alternatives to dismissal, the primary focus is on Mr Walen's conduct and whether it justified dismissal. Counselling or retraining may

be an alternative to dismissal, but this fact alone does not exclude the possibility of a justified dismissal if the conduct in question is sufficient to destroy the necessary relationship of trust and confidence.

3. Lack of a warning sign

[27] Mr Walen's concern about the lack of a warning sign was that, had one been present, he would have been more careful about what he said. That is no excuse for his conduct.

[28] Mr Walen also asserted that the lack of a warning sign breached Principles 3 and 4 of the Privacy Act 1993. Those principles are concerned respectively with the obligation to take steps to ensure individuals are given certain advice about the collection of information about them, and with the manner of collecting such personal information. The Authority has no power to make binding findings about breaches of the information privacy principles,² but even if it did I would not be persuaded by Mr Walen's argument. His real concern is not that he was unaware of the recording or the reasons for it, rather that he was not reminded of it and spoke unwisely as a result.

4. Ms McGregor should not have handled the matter

[29] It was within Ms McGregor's authority to conduct the disciplinary proceedings against Mr Walen. Not only did she have that authority in any circumstances, but Mr Walen's interview had extra significance because it took place against the background of the wider problem with syndicates. On top of that SkyCity was restructuring and was just about to embark on a consultative process with Mr Glazebrook regarding his redundancy, and Mr Glazebrook himself had a minor illness. There was nothing inappropriate in Ms McGregor's conducting the disciplinary process rather than Mr Glazebrook.

[30] The concern about Ms McGregor's involvement was really that Ms McGregor was perceived to be imposing higher standards than Mr Glazebrook. Moreover Mr Walen was saying he would not have been dismissed if Mr Glazebrook had handled the matter. Mr Glazebrook confirmed that when he gave evidence, as well as speaking eloquently of the importance of not dismissing an otherwise good employee for a genuine mistake. At the same time he acknowledged he had not seen the video record of the relevant interview, and was relying on the accounts of Mr Walen 'and others'. He was not in a position to do more than speculate about how he would have addressed Mr Walen's conduct. In any event, the possibility that he would have made a different decision does not of itself render Ms McGregor's decision unjustified.

5. Disparity of treatment

[31] This leads me to whether Mr Walen was subject to disparity of treatment of a kind which rendered his dismissal unjustified. Mr Walen did not word the issue that way himself, but for his information that is a translation of his argument that other employees were not dismissed when they were guilty of misconduct he considered to be more serious than his.

[32] Although Mr Walen provided the Authority with a list of incidents in support of his allegation that other people were not treated as harshly as he was, Mr Glazebrook's evidence carried more weight because he raised incidents of which he had direct knowledge. For example he said he had twice given final written warnings to a person employed in a dual rate position like Mr Walen's, despite the person's behaviour amounting to serious misconduct both times. Mr Walen's

² As discussed in **New Zealand Public Service Association Inc v Southland Regional Council** (CC 15/05, 28 October 2005, Judge Colgan)

examples included the matters in which Mr Glazebrook was involved, as well as some others which were several years old, did not involve comparable conduct, or both.

[33] Two of Mr Glazebrook's examples were illustrative of disagreements between him and Ms McGregor over the conduct of particular disciplinary matters, rather than being examples of disparity of treatment. Thus on another occasion Mr Glazebrook gave an employee a final written warning for what he considered to be inadvertent misuse of the call centre system, although Ms McGregor had expressed the view that the misuse was dishonest and the employee should be dismissed for serious misconduct. Mr Glazebrook's final example concerned an employee who was dismissed following an alcohol-related incident, with dismissal being the preference expressed by Ms McGregor. For Mr Glazebrook's and Mr Walen's information, the resulting personal grievance was settled in mediation and was not a personal grievance which the employee 'won'.

[34] The legal tests when considering allegations of disparity of treatment in the context of unjustified dismissal include:

"... if there is a prima facie case of disparity or enough to cause inquiry to be made ... into the issue of disparity, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming." **Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Limited** [1985] ACJ 952, 954 (CA).

"There must ... be a sufficient degree of similarity and materiality for comparison to be made. But I think it is preferable for the Court or Tribunal to assess whether the proven facts of any case amount to such. Factors such as the identity of the employer, position held by the employees, the general nature of the misconduct, and the like are all relevant and will assist in the assessment of whether a valid comparison can be made." **Sutherland v Air New Zealand Limited** [1993] 2 ERNZ 386, 397 (CA).

"... if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is forever bound by mistaken or over generous treatment of a particular employee on a particular occasion." **Samu v Air New Zealand Limited** [1995] 1 ERNZ 636, 639 (CA).

[35] None of the incidents disclosed circumstances directly comparable with Mr Walen's. Ms Jeffs had checked on the matter prior to the decision to dismiss, and came to a correct conclusion in that respect. The evidence was more concerned with the differing approaches of Mr Glazebrook and Ms McGregor to whether dismissal should be imposed when misconduct was established. In particular Ms McGregor's tended towards the strict end of the scale. Mr Glazebrook's second-chance oriented approach was more generous to the extent that he may have been over-generous in his treatment of the employee who was warned twice for serious misconduct. Having said that, I accept Mr Glazebrook's statement that he made his decisions in consultation with the human resources department and not arbitrarily.

[36] Further to the difference in approaches, Ms McGregor had been in her position for a little over 6 months by May 2002, although her period of employment was longer than that. Her appointment was part of a drive to improve standards at SkyCity, and she said she sought to establish a new culture in the security and surveillance department. Mr Glazebrook had held his position for some 6 years, but had also been employed at the casino for longer than that. Overall, while it is risky for a new management regime to take a stricter overall approach to disciplinary matters than an earlier regime without educating staff about the change, the general emphasis on raising standards was not new.

[37] In turn, Mr Walen was guilty of serious misconduct anyway and even Mr Glazebrook had dismissed people for serious misconduct. Although at least one other person had been guilty of serious misconduct and not dismissed, I take into account that the employee's treatment was

generous. That Mr Glazebrook did not sanction the employee's conduct with dismissal should not limit SkyCity's ongoing ability to dismiss for serious misconduct.

6. Conclusion on the justification for the dismissal

[38] Bearing in mind the above conclusions, SkyCity has shown that it conducted a full and fair investigation which disclosed conduct capable of amounting to serious misconduct. Against a background of a potentially volatile problem with syndicates in the casino, and in circumstances where his actions were identified with the casino, Mr Walen made a number of inappropriate statements to a person he was aware was probably associated with syndicate activity. In particular, he advocated taking what was at best a threatening or aggressive approach (even if the approach was a bluff), without reference to the Police. He made matters worse by indicating to Ms McGregor that the advice itself was not wrong, although being caught giving it might be a problem. Ms McGregor was entitled to conclude that the conduct was sufficient to destroy the faith and trust necessary in the employment relationship and, accordingly, to dismiss Mr Walen.

[39] I accept that it is hard on a long-serving employee like Mr Walen, and having his employment history, to have his employment end in that way. However Ms McGregor did take his employment history into account when concluding that trust and confidence had been broken. Since I have found the conclusion she reached was open to her, it is not open to me to substitute a different view of the weight that history should have been given.

[40] For these reasons I conclude that Mr Walen's dismissal was justified. He does not have a personal grievance.

Costs

[41] Costs are reserved. The parties are invited to agree on the matter themselves. If they seek a determination from the Authority they should file and exchange written statements of their position within 35 days of the date of this determination.

R A Monaghan
Member, Employment Relations Authority