



[4] In May 2007, Avonhead Tavern initiated disciplinary proceedings against Mr Bruce. It alleged that there were shortfalls in the cash register at the bar which improved when Mr Bruce was on annual leave.

[5] In total, Avonhead Tavern made five allegations against Mr Bruce, two of which he denied, two of which he gave plausible explanations to, and one of which he indicated that he followed the procedure used by the person who trained him.

[6] There was an initial meeting on 21 May and on 22 May 2007 there was a final meeting between the parties at which Mr Bruce was summarily dismissed.

[7] The matter having failed to be resolved by mediation between the parties, an investigation meeting proceeded on 29 November 2007 and, on the face of it, enabled the Authority to conclude its investigation on that day.

[8] However, on 6 December 2007, a telephone conference was convened by the Authority at the behest of counsel for the applicant who advised the Authority that a witness who had given evidence for the applicant at the investigation meeting had been subjected to punitive action by the respondent, allegedly as a penalty for the giving of his evidence.

[9] The advocate for Avonhead Tavern, on the other hand, indicated that his instructions were that, although punitive action had been taken by Avonhead Tavern against the aforementioned witness, such action had nothing to do with the investigation meeting and was a consequence of the improper behaviour of the witness at the licensed premises after the investigation meeting.

[10] As a consequence of those allegations being raised, and because the allegations, if true, raised very significant and serious issues about the administration of justice, and could amount to a contempt of the Authority, I determined that a further investigation meeting would be required and this second investigation meeting took place on 20 December 2007 at which this issue was explored.

### **Issues**

[11] Mr Bruce says that the dismissal was procedurally unfair and substantively unjustified and as I have already noted, there were five separate but interrelated

allegations which were put to him and which he says formed the basis for his eventual dismissal.

[12] It will be useful to look at the procedure adopted by the employer and consider that in the context of best practice. The individual allegations will then be considered. Finally, the Authority will need to review the evidence around the allegation that a witness for Mr Bruce was penalised for giving his evidence.

### **The employer's process**

[13] Mr Bruce returned from a fortnight on annual leave on 21 May 2007 and he says that as soon as he presented himself at the workplace to commence his first shift after annual leave, he was called to what he describes as *a disciplinary meeting*. At that meeting, according to Mr Bruce, he was subjected to an *interrogation* driven by Mr Mike Kyne who was Avonhead Tavern's representative.

[14] Avonhead Tavern's evidence is that this initial meeting on 21 May 2007 was properly characterised as a *preliminary* meeting and it rejects the description which Mr Bruce gives of the nature and character of the meeting.

[15] Mr Kyne, in his evidence before the Authority, indicated that the purpose of the 21 May meeting was to indicate to Mr Bruce the nature and extent of the concerns that the employer had, the process which the employer would adopt, the right Mr Bruce had to representation and a timetable for subsequent meetings. Mr Kyne's evidence is that Mr Bruce wished to discuss the matters in contention there and then and proceeded to insist on the matter being developed at that first meeting.

[16] Mr Kyne says that, because of Mr Bruce's insistence that the matter be progressed immediately, Ms Wali, the manager of Avonhead Tavern, showed Mr Bruce the video footage which the employer had collected and which allegedly identified the five matters that were of concern to Avonhead Tavern in relation to Mr Bruce's behaviour.

[17] Mr Kyne described Mr Bruce's attitude in that meeting as *aggressive* and said that his demeanour towards Ms Wali was *arrogant and condescending as he challenged her managerial ability*. Mr Kyne's evidence goes on to assert that Mr Bruce *initially ... would not answer directly* (Mr Kyne's questions about the allegations) *but would attempt to evade the question by asking another*. Eventually,

Mr Kyne says that Mr Bruce provided explanations which were recorded. A copy of Mr Kyne's file notes from that meeting were tabled at the Authority's investigation meeting.

[18] Once Mr Bruce had made those explanations, Mr Kyne adjourned the meeting to discuss matters with Ms Wali, then, a short time later, reconvened with Mr Bruce to indicate to him that a disciplinary meeting would be required because Ms Wali was not satisfied with all or some of the explanations that he had proffered.

[19] Of course, Mr Bruce categorised this first meeting as a disciplinary meeting in any event and it was Mr Bruce's view that he had little choice but to provide responses at the time which he said in his evidence, he did to the best of his ability and recollection. He noted that he had not been advised in advance of the nature of the allegations made against him and was certainly not represented at this first meeting.

[20] Mr Bruce denied Ms Wali's suggestion that he was *arrogant and condescending* towards her and also denied her contention that he attacked her to cover up his own dishonesty and save himself from having to make explanations for his own behaviour.

[21] The *disciplinary* meeting Mr Kyne said was required after the meeting on 21 May was convened the very next day. Avonhead Tavern claim that Mr Bruce agreed to attend this meeting; Mr Bruce says he had no choice but to attend because he was told he would be paid to attend.

[22] Because the second meeting was so soon after the first, Mr Bruce had difficulty seeing his lawyer. He had in fact managed to have a consultation, but his lawyer could not attend the second meeting. The evidence about whether Mr Bruce insisted on his lawyer being present or not is confused; in the result the meeting proceeded without Mr Bruce's lawyer. Without any further explanation offered by Mr Bruce, on top of the explanations he had offered at the earlier meeting the previous day, Mr Bruce was dismissed.

### **The allegations**

[23] It is illustrative to briefly sketch the allegations which Mr Bruce was confronted with in that first meeting. The first allegation is one of *palming*. This is

the dishonest process by which an employee serving a customer, while appearing to give change to the customer retains a note or notes in his or her palm which is subsequently pocketed.

[24] The allegation is seen on the video footage which Mr Bruce was shown by Ms Wali at the first meeting. The video footage was made available to the Authority as part of the evidence. The transaction in question involves a particular customer, Mr Robert Coker. Mr Coker gave evidence at the Authority's investigation meeting.

[25] Mr Bruce denied giving Mr Coker incorrect change, and indicated in his oral evidence that if he had given Mr Coker incorrect change, Mr Coker would have complained.

[26] Mr Bruce acknowledged that he may have made a mistake in giving change, but denied that it was deliberate. Mr Coker's evidence was quite unequivocal. He denied being given wrong change at any point by Mr Bruce and, critically for me, denied that he had ever been spoken to by Avonhead Tavern and yet it was plain even to me in reviewing the video evidence that Mr Coker was the customer who appeared in the video with Mr Bruce.

[27] The second allegation which Mr Bruce faced was one of failing to account for bar sales which, to put in more accessible language, meant providing free drinks to a customer.

[28] Again, Mr Bruce denied the allegation categorically and again the video recording seems to feature Mr Coker as the customer in question. Mr Coker gave evidence on this point as well. He said quite unequivocally that he was not given free drinks by Mr Bruce, either on the occasions filmed in the video or on any other occasion.

[29] Ms Wali, when pressed at the investigation meeting, declined to see any prospect of an innocent explanation for what was visible in the video footage. Ms Wali also said that she *doubted* Mr Coker's evidence.

[30] I do not share Ms Wali's view. Mr Coker's evidence is clear and unequivocal and he was unable to be shaken from his testimony during the investigation meeting. He made it clear that he stood by his evidence and I believe him. The only other

plausible conclusion is that Mr Coker gave completely untruthful evidence and I must say that I found not a shred of evidence to support such a contention.

[31] I accept that there is a conflict between Mr Coker's evidence and the apparent visual evidence from the video footage. Mr Bruce acknowledged that he might have made a mistake in giving change, although Mr Coker says that there was no mistake, at least on the occasions filmed on the video. In the end, one is left with the choice between the oral evidence of a witness who presented voluntarily and gave explicit, steady evidence from which he was unable to be shaken, and evidence of a grainy video which might show improper activity, but also might not. When Mr Coker's clear evidence is coupled with the equally clear denials of wrongdoing by Mr Bruce, it is difficult to see how the employer could reasonably have reached the conclusion that it did, that these two matters anyway were a reason to base a failure of trust and confidence.

[32] I am particularly drawn to this conclusion by confirmation during the investigation meeting that the employer, Avonhead Tavern, at no stage spoke with Mr Coker during its investigation into Mr Bruce's alleged impropriety. Given that Mr Coker is plainly the client involved in the first two allegations against Mr Bruce, it seems the most fundamental of errors to not speak to that customer and obtain his views. One has to imagine that if the employer had spoken with Mr Coker at the time that the disciplinary proceedings were on foot, his explicit denial of any impropriety by Mr Bruce might have put the employer on notice that its concerns might be misplaced.

[33] The next allegation is that Mr Bruce breached TAB procedures. In essence, this complaint is that Mr Bruce made bets at the TAB on the employer's site using another staff member. Mr Bruce's evidence to the employer and before the Authority was that this was a commonplace and that other employees did it. Further, and more damagingly from Avonhead Tavern's point of view, was the revelation that Mr Bruce's employment agreement actually allowed such a practice.

[34] It transpired at the investigation meeting that there were two original contracts of employment between Avonhead Tavern and Mr Bruce. Mr Kyne's evidence was that he prepared employment agreements for clients, including the Avonhead Tavern, and that he provided regular updates when provisions changed by reason of changes in the law and the like. He thought it was possible that when an update had been

provided, there had been some confusion in Avonhead Tavern's office and somehow two different versions of Mr Bruce's employment agreement had ended up being executed, one of which Mr Bruce retained and one which Avonhead Tavern retained.

[35] Under the version which, for convenience, I refer to as the *employer's copy* of the employment agreement, gambling by staff is forbidden on the employer's premises.

[36] On the employee's copy, gambling is allowed but *must be done as a customer, that is through another staff member*.

[37] Further it was established as a matter of fact and accepted by both parties that the employee's version of the agreement was the most recent.

[38] Mr Bruce's evidence was that he acknowledged that he did bet but that he bet through another staff member and, as I indicated above, Mr Bruce said that all but two staff members did precisely the same thing. That was the explanation that Mr Bruce says he offered to Avonhead Tavern and it confirmed that that was indeed the explanation that he offered in relation to that particular matter.

[39] The fourth allegation was that Mr Bruce had charged patrons for taking them home when they were the worse for drink, that he had used his own car to do this and had charged the patrons money for the service. Mr Bruce's explanation was that he had indeed received money from one patron when he took that patron home in his own car. Mr Bruce alleged that other staff had done precisely the same thing and his contention is that that allegation was never investigated by Avonhead Tavern.

[40] The context of this particular matter was that, like many licensed premises these days, Avonhead Tavern provided a service to its regular patrons whereby they could be provided with transport home rather than incur risk to themselves or others by driving home when they had been drinking alcohol. On the single occasion when Mr Bruce acknowledges that he took money from a patron for providing that service in his own car, Mr Bruce's evidence is that the Avonhead Tavern vehicle for the purpose was *unavailable* and that accordingly he used his own car and of course his own petrol.

[41] The final allegation is an allegation that Mr Bruce had used an improper process which had caused Avonhead Tavern loss in the handling of money from the

gaming machines in the tavern. Mr Bruce provided the explanation that he had followed the procedure shown to him by the duty manager and that the incident which the employer appeared to be complaining about had happened on 19 April, more than a month before the first meeting. Mr Bruce took the view, not unnaturally, that if there was a problem, it would have been fairer to him if it had been dealt with closer to the event. In that regard, Mr Bruce acknowledged that Ms Wali had in fact spoken to him about a cash handling incident on 19 April, but it was in no sense a disciplinary meeting in his view, did not result in a warning, and in fact appeared to go nowhere. In effect Avonhead Tavern confirmed that view of the matter.

[42] In that context then, it is difficult to see how a fair and reasonable employer, acting in good faith, could think it appropriate to include in a subsequent disciplinary process in relation to new matters, an historical allegation which, on the basis of Avonhead Tavern's own evidence, had already been disposed of after the incident on 19 April. Ms Wali says in her evidence, in relation to the 19 April *pokie cash handling incident*:

*we decided to give the applicant the benefit of the doubt on this matter. Clearly the matter could have put the applicant's employment at risk if we had decided to follow a disciplinary procedure. We tried to be a good employer and not take advantage of what we believed to be a silly mistake.*

[43] Notwithstanding those words, Ms Wali then goes on to admit that the 19 April incident put her on notice that she need be *suspicious* about Mr Bruce's *cash handling*.

[44] In her oral evidence at the investigation meeting, Ms Wali agreed that the 19 April situation *had already been dealt with*, but went on to say that *it was raised at the 21 May meeting just to finalise it*.

[45] This seems to be an example of the employer trying to have things both ways. Clearly, the letter of dismissal impliedly refers to this incident as one of the bases on which Mr Bruce lost his position. If, according to the employer's own evidence, the matter had already been *dealt with*, then it is plainly unfair to use this incident as one of the grounds on which Mr Bruce lost his position.

[46] In her oral evidence later on, Ms Wali denied that the 19 April incident was part of the dismissal decision and said that the dismissal letter was written by

Mr Kyne and not by her, but that statement frankly is inconsistent with the rest of the evidence, including her own. In her brief of evidence she refers to the 19 April incident as being a factor and, as I noted above, in her earlier oral evidence she clearly said that the 19 April incident had been dealt with already but was raised on 21 May *just to finalise it*.

### **Discussion about the employer's process**

[47] I have reached the conclusion on the balance of probabilities that the employer's process in effecting the dismissal of Mr Bruce was unfair and that in consequence the dismissal which resulted from it cannot be allowed to stand.

[48] Section 103A of the Act requires the application of an objective standard to the actions of employers where questions arise as to the propriety of dismissals and the test that ought to apply is one which asks the question whether a fair and reasonable employer, having conducted a proper investigation using an appropriate process, would reach the conclusion that this employer reached.

[49] Mr Bruce faced an allegation about his behaviour in relation to the collection of money from pokie machines on 19 April. I am satisfied that the evidence confirms that both Mr Bruce and the employer regarded that inquiry as at an end at the time that the events complained of happened or immediately thereafter. I am equally satisfied on the facts I heard that there was no disciplinary consequence for Mr Bruce and so that matter ought to have been at an end.

[50] Then, after two weeks on annual leave, Mr Bruce returned to the workplace and was immediately confronted with a meeting which the employer tried to categorise as non-disciplinary in nature, but plainly that is sophistry. The meeting was, I find, a disciplinary meeting in character and accordingly Mr Bruce should have been advised to obtain legal advice and given advice of the subject matter to enable him to prepare for the meeting.

[51] I accept the employer's evidence that Mr Bruce behaved badly at this first meeting on 21 May and that he was cheeky and disrespectful to Ms Wali. That does not justify the employer's behaviour in failing to conduct a proper inquiry into the matters in contention. Of the five allegations which Mr Bruce faced, the fifth and final one I have already made clear ought not to have formed any part of the discussion or the subsequent decision to dismiss, although plainly it did. That is

unfair to begin with. By all accounts, the 19 April incident had already been dealt with and it is not appropriate for it to be re-litigated in this way.

[52] Of the four remaining allegations against Mr Bruce, two were denied and two were the subject of explanation. The two that were denied involved Mr Coker and his evidence. I have already made findings about that. I accept Mr Coker's evidence as truthful. It is consistent with Mr Bruce's evidence. I prefer that evidence to the evidence of the video film which, as I have already indicated, is potentially capable of a number of explanations, some of which Mr Bruce sought to advance. I am particularly troubled by the employer's complete failure to talk to Mr Coker. Mr Coker was a key witness and whatever one might think about Mr Coker's evidence before the Authority (and I have made my view of it clear), he ought to have been consulted immediately that the issue arose. The fact that he was not spoken to by the employer is, in my view, fatal to a proper and balanced consideration of the first two complaints against Mr Bruce.

[53] The third allegation that Mr Bruce breached TAB protocols was the first of the two matters that Mr Bruce sought to explain. It will be remembered that Mr Bruce relied upon the clear provision in the employment agreement which he had in his possession. He followed the rules in that employment agreement and there is no basis on which the employer could have any complaint about Mr Bruce's behaviour if, in fact, what Mr Bruce said he did was what he actually did. Again, Mr Bruce makes the allegation that all but two of the staff of the Avonhead Tavern did precisely what he did, and none of them were the subject of any disciplinary consequences.

[54] In the circumstances relating to the third allegation as I have just described them, I am satisfied on the balance of probabilities that a finding against Mr Bruce in those circumstances is unsafe.

[55] The fourth allegation was that Mr Bruce had charged patrons for rides home. Mr Bruce acknowledged that this had happened on one occasion, said that it had happened in his own time (that is, after he had finished his duties) and that he had simply obtained a contribution to his own petrol costs because the service that he was providing was being provided using his own vehicle, the company vehicle being unavailable.

[56] Both parties also agree that Mr Bruce apologised to Ms Wali for doing this.

[57] On the face of it then, the only allegation which is made out is the allegation to which I just referred, namely the business of charging patrons for rides home. That he apologised and was acknowledged to have apologised would seem to be a mitigating factor in assessing the seriousness of the issue as well as the surrounding circumstances where Mr Bruce's allegation anyway was that on the occasion that he committed this complained about behaviour, the firm's vehicle was not available.

[58] I am satisfied that a dismissal based exclusively on this last mentioned matter would not be an appropriate and fair response for an employer to make and, as a matter of law, would not be the response of an employer in terms of the s.103A test requirement.

[59] As a matter of fact, however, it is clear from the employer's paper trail and their oral evidence that the dismissal was not simply based on this allegation and the finding in that regard but was based on all five issues which, as I have just explained, I regard as completely unjustified.

[60] To make matters worse in terms of the process the employer adopted, I am unimpressed with the second meeting the employer called as well. The first meeting was on 21 May and the employer sought to convince me that that first meeting was not disciplinary in nature. I have already made clear that I do not accept that submission. However, there was a second meeting the following day. Avonhead Tavern says that Mr Bruce agreed to attend that second meeting. Between the two meetings, Mr Bruce had been able to see his lawyer at short notice, but his lawyer was unable to be present at the second meeting on 22 May 2007. Mr Bruce says that he gave his lawyer's business card to Mr Kyne, told Mr Kyne that Mr Goldstein was acting for him and indicated that he did not have to stay at the meeting.

[61] Mr Kyne's evidence is that he made reasonable efforts to establish whether Mr Bruce expected him to contact Mr Goldstein but that Mr Bruce gave the impression that Mr Goldstein was not in fact necessarily acting for him. Mr Kyne put into evidence his notes of that conversation which I accept the truth of. Clearly, Mr Bruce, for whatever reason, was less than clear about what he wanted or expected and about what role Mr Goldstein could be expected to play.

[62] Fundamentally though I accept Mr Bruce's evidence that he was told that the second meeting on 22 May was a meeting on pay and that that influenced his view

that he had no right to leave. That interpretation of events is to some extent confirmed by Mr Kyne's own evidence when he says in his brief that he told Mr Bruce that the second meeting was *a disciplinary one for which he was being paid to attend ...* I accept Mr Bruce's evidence that at that second meeting, he was *made to feel* (he) *had to stay because I was being paid.*

### **Determination**

[63] I am satisfied that Mr Bruce has a personal grievance by reason of having been unjustifiably dismissed from his employment and that therefore he is entitled to remedies. I do not find it necessary to make findings about Mr Bruce's claim that he was the victim of a breach of good faith and/or that his employer breached an express term of his employment agreement as I think it appropriate that all of those matters be dealt with under the head of the personal grievance.

[64] Having found that Mr Bruce has a personal grievance, I need to consider the issue of contribution. I think Mr Bruce did contribute to the events complained of. His demeanour at the two disciplinary meetings plainly had a negative impact on Ms Wali in particular and indeed, on the basis of her oral evidence, may well have been almost an equal determinant of the eventual dismissal as the five complaints themselves.

[65] However, I think the nature of those disciplinary meetings which, I have found, were conducted in a thoroughly unsatisfactory way, must have influenced Mr Bruce adversely and accordingly I find that the contribution he made to his eventual dismissal was 15%.

[66] Mr Bruce is entitled to compensation for hurt, humiliation and injury to feelings. His evidence on that matter was clear. I direct that Avonhead Tavern is to pay to Mr Bruce the sum of \$5,950 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000, which figure takes into account the 15% contribution I have found.

[67] Mr Bruce says that he has lost wages as a consequence of the unjustified dismissal and he quantifies that loss at \$14,040. Avonhead Tavern invites me to ignore the claim for lost wages on the basis that there were plenty of jobs which Mr Bruce could aspire to within the hospitality industry; Mr Bruce says that the taint

of dismissal for dishonesty and his embarrassment at what had happened prevented him from re-engaging with the industry.

[68] I think it appropriate that Avonhead Tavern make a significant contribution to Mr Bruce's lost wages. If Mr Bruce were awarded the statutory minima provided in s.128(2) of the Employment Relations Act 2000, he would be entitled to the sum of \$6,760 gross. I think an appropriate mid-point between the figure claimed by Mr Bruce and the statutory minimum is an award of \$8,500 gross as a contribution to his lost wages. This figure also takes account of the 15% contribution.

### **The administration of justice issue**

[69] At the second investigation meeting relating to this matter, I was concerned to explore whether there had been any issues pertaining to the administration of justice and in particular whether a witness who had given evidence in the substantive hearing the previous month had been penalised by one of the parties because of that evidence.

[70] I am satisfied on the balance of probabilities that no such allegation can be made out. The factual position I find was that Avonhead Tavern had had a longstanding issue about the behaviour of Mr Coker when they say he had had too much to drink. The management had decided that it would be seeking to ban Mr Coker from the premises but that, conscious of the upcoming investigation meeting and Mr Coker's role in that as a witness for Mr Bruce, it determined not to take any action until after the hearing.

[71] In fact, the action was taken immediately after the hearing because it is alleged Mr Coker became difficult at the tavern and was excluded by the management. I am satisfied that there was no direction from Ms Wali as the manager and the person who in effect was Mr Bruce's employer, for Mr Coker to be penalised because of the giving of his evidence. Indeed, I am satisfied that Ms Wali took no part at all in the decision to ban Mr Coker from the tavern; she was not physically present at the tavern when the events complained of happened, and although I am clear she had a telephone discussion with the tavern, I accept her evidence that she did not instruct the staff then on duty to penalise Mr Coker although she knew that they were about to do that because they told her so.

[72] It follows that I am satisfied that the impetus for the decision to exclude Mr Coker came from the floor management who were on duty at the time and not

from Ms Wali and certainly not on her instructions. It follows that there is no issue pertaining to the administration of justice.

**Costs**

[73] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority