

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 407
3137902

BETWEEN

SAMUEL DAY
Applicant

AND

THE LAST WAVE LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Dave Cain, advocate for the Applicant
Anna Oberndorfer, advocate for the Respondent

Investigation Meeting: 29 April 2022 and 26 May 2022

Submissions received: On the day

Determination: 23 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Day) says the respondent (LW), his former employer, was unjustified to dismiss him from his role as Duty Manager (DM) in its licenced premises. LW dismissed Mr Day because it decided he had not followed his DM obligations by serving alcohol to an intoxicated patron (M), and by not removing an intoxicated patron (W) appropriately. As a result, LW found it had lost its trust and confidence in Mr Day to perform his role.

[2] Mr Day says he did nothing wrong. He says that M was not intoxicated and that he followed his DM obligations in relation to W. Mr Day says his contribution to LW's disciplinary investigation was not genuinely considered; that LW's decision was pre-determined; that providing him with a positive reference and allowing him to work out his

notice was inconsistent with a finding that it did not trust him to do the job. Mr Day also says he was not warned, or performance managed about his behaviour before dismissal, and that the complaints raised by his colleagues about the M and W incidents were false and ill motivated towards him.

[3] LW says the dismissal for serious misconduct was justified and that it carried out a fair investigation. LW says its finding of a loss of trust and confidence was because there was a risk to its licence and business if it could not trust that such incidents would not recur, and this risked its licence under the Sale and Supply of Alcohol Act 2012 (SSAA Act). This was in the context of a police meeting that Mr Day attended before the M and W incidents where alcohol related harm call outs were discussed.

[4] Mr Day seeks compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and costs. He withdrew his earlier claim for lost earnings during the investigation meeting.

The Authority's investigation

[5] For the Authority's investigation, witness statements and affidavits were lodged. Across two investigation meeting days eight witnesses were heard, two by telephone conference. CCTV footage (the footage) of the M and W incidents was viewed during the investigation meeting. The representatives gave closing submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[7] LW operates a suburban sports bar with gambling facilities (the premises). Mr Dear is the sole director of LW. Ms Walker-Anderson is the manager. Mr Day commenced working in the premises in about 2012 as a security person for a security business contracted to LW. In about 2017 he was directly employed by LW and started doing bar work as well as security.

Mr Day completed qualifications to be a DM and signed an employment agreement with LW in March 2020 (the employment agreement) to work as a DM having commenced in the role over New Years' Eve 2019 to 2020.

[8] The employment agreement records at clause 17 that Mr Day agreed to perform his employment duties subject to (amongst other statutes and regulations) the SSAA. The DM role has specific obligations under the SSAA. These are generally provided in the manner of offences with penalties for noncompliance against the manager and or the licensee of the licenced premises.

The police meeting on 22 September 2020

[9] On 22 September 2020 staff and management of LW attended a meeting with a senior police constable in the Alcohol Harm Prevention Unit (the police meeting). The meeting was organised by a senior police officer due to the police concerns about recent call outs to the premises.

[10] A recent call out on a night that Mr Day was DM was included in the discussion at the police meeting. This involved a patron who was reported as "intoxicated" on the police job sheet. The senior police officer's concern was that the patron was served "one for the road." Mr Day did not agree that the patron was intoxicated. Mr Day maintained that the attending officer had agreed with his view. Mr Dear intervened and stopped Mr Day arguing further with the senior police officer. Mr Dear took minutes of the police meeting. He recorded that the senior police officer did not agree that the patron was not intoxicated and explained that it was "unacceptable to provide an intoxicated person with another drink." The police took no further action in relation to this incident due to an irregularity with police process.

[11] Mr Dear recorded that the overall police view was that LW "must do better" to manage alcohol related harm incidents. Mr Dear records that he told the staff including Mr Day to work as a team and report alcohol related harm incidents directly to him.

The M incident 25 September 2020

[12] On the evening of 25 September 2020 Mr Day was DM. M, a regular patron entered the premises. Mr Day's co-worker, Ms Neale told Mr Day she thought M should not be served alcohol or had herself refused to serve M. Either way Ms Neale raised the issue with Mr Day.

[13] Mr Day interacted with M and decided she was not intoxicated. M was served two handles of beer between the time she entered and about 45 minutes later when she approached the bar for a third. Mr Day served her a mid-strength beer and Ms Neale took her money while Mr Day went on to serve someone else. A regular patron, Mr Larkin, was sitting at the bar immediately next to where M was standing. Mr Larkin objected to M being served due to her level of intoxication. Footage shows Mr Larkin shaking his head from side to side. M shook hands with Mr Day and had some words with Mr Larkin before walking off with her drink. Ms Neal reported the incident to LW sometime after the night that it occurred after Ms Walker-Anderson asked her to do so. She squeezed her report into the bar incident book retrospectively and then into an email to Mr Dear after he found her small writing difficult to read.

[14] The words Ms Neale wrote in the bar book entry were:

Sam served someone another drink after she had been cut off. Sam said she could have one more then 30-40 mins later she came up and begged for another one and Sam gave it to her even though she was cut off and I had refused to serve her.

[15] The words used in Ms Neale's email to Mr Dear were:

Hi Richard, further to the incident on Friday 25 September, I squeezed my comment into the incident book at Tania's request to clarify exactly what happened "Sam served a woman who I believe should have been cut off and asked to leave because of intoxication. He told her that it would be her last drink. About 30-40 minutes later she returned to the bar. I refused to serve her she begs Sam for another drink, and he serves her."

[16] Under s 248 of the SSAA it is an offence for a licensee or manager to provide alcohol to an intoxicated person. Upon conviction a licensee and or manager can be fined a maximum of \$10,000 and the licensee can have its licence suspended for a maximum of 7 days.

[17] Section 5 of the SSAA defines ‘intoxicated’ as:

observably affected by alcohol, other drugs, or other substances (or a combination of 2 or all of those things) to such a degree that 2 or more of the following are evident:

- (a) appearance is affected:
- (b) behaviour is impaired:
- (c) co-ordination is impaired:
- (d) speech is impaired.

[18] Combined industry guidance¹ refers to assessing intoxication. This includes a tool often referred to by the acronym of “SCAB” which includes indicators for three states of sobriety being “Sober”, “Influenced” and “Intoxicated.”

The W incident 3 October 2020

[19] On the evening of 3 October 2020 Mr Day was the DM. At approximately 7.30 pm W, a patron known for intoxicated behaviour and associated violent reactions when removed from the premises, entered the premises in a clearly intoxicated state. Mr Day and the other bar person ‘J’ refused to serve W alcohol. Mr Day says his plan was to sober W with water and food so that a taxi would take him home. Mr Day explains this was because he did not want a repeat of a previous time when he removed W from the bar. On the previous time Mr Day had locked the door to prevent W re-entering. W made gun gestures back through the glass frontage of the premises at Mr Day, exposed himself and urinated. W was then allegedly assaulted by another patron of LW. Mr Day says he did not call the police about that incident because he did not want W to get into trouble. Mr Day says he helped W and organised him into a taxi home. Mr Day did not want a repeat of this situation if he removed W before he knew a taxi would take him home safely.

¹ *Intoxication Assessment Tool*, March 2019, AL804 published online by Hospitality New Zealand, New Zealand Police, NZILLI, and Health Promotion Agency.

[20] Minutes after W entered the premises on 3 October 2022, Mr Day provided him with water and got him to purchase hot fries. The footage and evidence explain what happened next:

- a. W went off in the direction of the pokies area of the premises with the jug of water and glass that Mr Day gave to him.
- b. About 10 minutes later footage shows W sitting at a table on his own amongst patrons drinking at nearby tables. The table had a full jug of beer on it for a time until another patron collects it.
- c. W sits at the table on his own for approximately 15 minutes. During this time W interacts with two other patrons. During this time Mr Day cooks W his hot chips, refills the fridge and demonstrates various karate kick movements to his colleague J which included going out the front of the premises to display a large karate kick.
- d. Mr Day provides W with two bags of hot chips and talks him out of the premises to the outside area in front of the premises. It is approximately 20 minutes since W had entered. W throws the chips at Mr Day when outside.
- e. Mr Day twice restrains W from re-entering the premises including the use of a “head lock”.
- f. Mr Day’s co-worker, J, tells Mr Day the door should be locked, and the police called. Mr Day does not agree. The door remains unlocked. Mr Day stays in the outside area in front of the entrance with W until approximately 9.00pm when he puts W into a taxi.
- g. Mr Day’s evidence indicates that the earliest he likely called a taxi was 8.15pm. Evidence is unclear as to why an available taxi took 45 minutes to arrive.

[21] J reported the W incident to Mr Dear by text on the night it happened, 3 October 2020. The following are the relevant words from that entry which were then pasted into the bar entry book later:

[W] came in well intoxicated I refused him service Sam sold him fries and told him to have water the point is he should be removed straight away not sat down in the bar pissed as fuck drinking water then he decided I was right he shouldn’t be in there then put him outside and stay with him smoking cigarettes waiting for his taxi its bullshit I’m behind the

bar doing all the work I then told Sam to leave him out there come back in and lock the door Sam then says that's not how it works I have to make sure he gets home fine ...

[22] Under s 252 of the SSAA it is an offence for a licensee or a manager to allow an intoxicated person to remain on licenced premises. Upon conviction there can be a maximum fine of \$5,000.00. Section 252 includes a statutory defence which is to take the intoxicated person to a place of safety in the licenced premises or remove them.

[23] Combined industry guidance has been published to assist with what a “place of safety” should be. This describes a place that is alcohol free, away from the bar, away from friends and others drinking, and where staff can keep an eye on the person.²

[24] LW commenced a disciplinary procedure about both the M and W incidents. This included providing both Ms Neale and J's reports to Mr Day.

The disciplinary process

[25] Mr Dear first met with Mr Day to ask him about the M and W incidents. He then provided him with a letter outlining LW's concerns which included an invitation to a disciplinary meeting. The letter included that the M incident came soon after the police meeting where the police had reinforced that intoxicated persons were not to be served a last drink. The letter explained the issues were serious and may result in termination of employment.

[26] Mr Day and his domestic partner attended a meeting on 12 October 2020 (the first disciplinary meeting) with Mr Dear and Ms Walker-Anderson. Handwritten notes were taken. Mr Day initialled these and indicated that he wanted to see the footage and provide further information.

[27] After the disciplinary meeting Mr Day provided feedback to Mr Dear.

² *Host Responsibility Guide*, Te Whata Ora, Health New Zealand at page 5.

[28] Mr Dear replied with a reminder that feedback needed to be relevant. He extended the time to provide further relevant feedback to the concerns raised.

[29] Mr Day was provided access to footage after which he produced detailed written feedback of what he saw on the footage of both the M and W incidents (further feedback).

[30] Mr Day provided further email responses to LW that he obtained from the senior police officer who had attended the police meeting, and a licencing inspector from the Christchurch City Council (the Council). These emails were only about the W incident.

[31] Mr Day attended a further meeting with Mr Dear on 22 October 2020 (the second disciplinary meeting). Notes were taken. Mr Day was informed he was dismissed at this meeting and Mr Day received a letter dated 22 October 2020 recording this.

[32] On 17 November 2022, Mr Day raised a personal grievance through his representative claiming he was unjustifiably dismissed.

The issues

[33] The issues are:

- (a) Was LW substantively justified in dismissing Mr Day for the M incident?
- (b) Was LW substantively justified in dismissing Mr Day for the W incident?
- (c) Did LW carry out a fair process before deciding to dismiss Mr Day and if not was this more than minor to have been unfair to Mr Day?
- (d) If the dismissal was unjustified should Mr Day be awarded compensation under s 123(1)(c) of the Act?
- (e) If compensation is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Day that contributed to the situation giving rise to his grievance?
- (f) Should either party contribute to the costs of representation of the other party?

Was LW substantively justified in dismissing Mr Day for the M incident?

[34] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the dismissal and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[35] Under s 103A of the Act the following factors are considered to measure an employer's fair process leading to a decision to dismiss

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback.

[36] To prove it is justified to dismiss an employee, an employer needs to prove its decision was fair and reasonable. The New Zealand Court of Appeal has said this includes having "clear evidence upon which any reasonable employer could safely rely or having carried out reasonable inquiries" finds that on the balance of probabilities "grounds for believing ... the employee was at fault."³

[37] It is not for the Authority to re-run the case and decide what it thinks the outcome should have been but rather to examine whether the decision was one that was within the range of what a reasonable employer could have done in the circumstances.

³ *Airline Stewards & Hostesses of New Zealand Union v Air New Zealand Limited* (1990) 3 NZLR 549 (CA) at 556.

Was LW justified to find that M was intoxicated when served

[38] Mr Day's primary objection to dismissal in relation to the M incident is that LW was not substantively justified to make a finding that M was intoxicated when he served her alcohol.

[39] Affidavit and statement evidence was put forward by both parties from people (other than Mr Dear and Ms Walker-Anderson) who were not on the premises that night. These witnesses included their views about whether M was intoxicated from looking at the footage. These opinions about M's sobriety were of little value to my investigation about whether LW was justified in its decision to find M was intoxicated.

[40] The issue is whether LW as a fair and reasonable employer could in all the circumstances have decided that M was intoxicated and then have concluded that this was serious misconduct warranting dismissal.

[41] The information that Mr Dear had before him prior to deciding for LW to dismiss included the report from Ms Neale, the footage, feedback from Mr Day and the two emails Mr Day obtained from the senior police officer and the Council.

[42] The first disciplinary meeting notes include the following:

Mr Day: 'M had come in from [another licenced premises]. Assessed as OK, given a handle of Speights. Nice, quiet, polite woman. Served second of Speights. Rosie [Ms Neale] said she was intoxicated (becoming) or drunk. I did a second assessment – showing signs of intox – a bit wobbly. Had two handles of Speights and puff of cannabis, she said, at [another licenced premises]. Gave her a water. Told her it might be her last drink. Helped her order an UBER (10 minutes away). Told Rosie this. Asks for another drink and was served. 'Handle of "mid". "Mid" is lower alcohol.

...

Mr Dear: 'What was Chris [Mr Larkin] nutting off about?'

Mr Day: [Mr Larkin] said "You are serving an intoxicated woman"

...

Mr Day: 'She did not drink all the "mid". At the Wave she had two handles of Speights, ½ a mid and 2 waters which reduces the effect. No problem if a cop came in.'

Mr Dear: 'That may not be the Police opinion'

Mr Day: 'Police sometimes get it wrong.'

[43] Mr Day's further feedback confirms that Ms Neal did not think M was ok to be served and that he assessed M explaining:

[M] doesn't have red eyes or slurring words because of Rosie's influence I decide to go talk to her at this time ... I ask her how she was feeling if she was okay she said she was fine I informed her that the half of the handle she had left might be her last one ... she told me ... she was ok and wondering why I was asking her these questions. I informed her she was a tiny bit wobbly on her feet but she was not intoxicated and that maybe it was the high shoes she was wearing she agreed to order an uber I watched her do it, it was 10 minutes away once confirmed I went back to the bar ... [M] came back to the bar I knew her uber was 8 minutes away ... [M] asked me for another beer while she was waiting for her uber which was 7 minutes away I told her that I had let her know that the previous handle might have been her last she told me I was a good barman and thanked me for looking after her and could she have 1 more please NO BEGGING I told her I was prepared to cut her down to a Speights mid 2.5 and she was able to have 1 while she waited knowing that in 7 minutes it would be impossible for her to finish her drink anyway also she smokes cigarettes and must have had a dry mouth.

[44] Mr Larkin recalled being next to M when she came up to the bar for her last drink request. He says she spoke quietly like a person who was trying to be sober when she was not. Mr Larkin said he had been in enough bars to recognise an intoxicated person. Mr Larkin's evidence was not available to LW at the time of its investigation, but it did have the footage showing Mr Larkin shaking his head and Mr Day's feedback that Mr Larkin had objected to M being served. I found Mr Larkin's evidence consistent with Ms Neale's report and the footage.

[45] The respondent submits that I should find Mr Day an unreliable witness about whether M was intoxicated when he served her. I agree. The following are inconsistencies that support this.

- a. Mr Day's feedback in the first disciplinary meeting was that M was "showing signs of intox – a bit wobbly." He later changed this in his further feedback saying that M was not intoxicated but "wobbly" because of high heels. The footage shows M wearing flat sandals. I asked Mr Day about this inconsistency. He twice told me at the investigation meeting that M was "wobbly" because of her flat shoes.
- b. I asked Mr Day about his further feedback relating to M and his "NO BEGGING" reference. He said this did not mean he told M not to beg for a drink. He said he should have put a full stop after these words to mean that M did not beg for a drink. I find this explanation made no sense. I find it likely that M had begged him for a drink, and he responded with "NO BEGGING" as he had explained to LW in his earlier feedback. This is consistent with Ms Neale's report that M begged Mr Day for another drink before he served her. It is consistent with the footage showing Mr Day talking with M before he served her and his own acknowledgement that he reminded her the last drink may have been her last. It is consistent with Mr Day serving a mid-strength beer which he says she could not finish before her Uber arrived. Had M not been intoxicated there would have been no reason not to serve her the alcohol she asked for.
- c. Mr Day's feedback at the first disciplinary meeting included that Ms Neale had raised an issue with him about not serving M. Later in his oral evidence he denied that Ms Neale raised any issue with him.

[46] LW's decision that M was intoxicated could reasonably have come from the information it had from Mr Day during its investigation. This included that:

- a. M was 'showing signs of intox- a bit wobbly' before he served her the second handle of beer on the premises.
- b. Mr Day told M the second handle of beer could be her last.
- c. Mr Day reminded M when she came up to the bar to ask for her third handle of beer on the premises (having told Mr Day she had two previously at another premises) that he had already told her the previous drink could be her last.
- d. Mr Day served her after hearing protests from Mr Larkin sitting immediately next to where M came up to the bar close enough to observe her state.
- e. Mr Day served M with a mid-strength beer on the basis she likely could not finish it in time before her Uber arrived.

[47] Mr Dear told me that he considered the service of the second full-strength beer on the premises arguably should not have occurred but acknowledged that the finding LW made was based on the service of M's last drink that night, the mid-strength beer.

[48] Mr Day made distinctions in his evidence between people being or becoming "influenced" or "intoxicated". He says he relied on industry guidance to assess M using the SCAB test. While he continued throughout the Authority investigation to submit that M was not intoxicated, I find that the above information available to LW at the time it investigated, including the inconsistencies in what Mr Day said about M's sobriety levels, supported a finding that M was intoxicated when Mr Day served her the mid-strength handle of beer.

Was dismissal justified for the M incident?

[49] In his further feedback Mr Day said that "as [M] had done nothing wrong and did not cause any trouble and was not intoxicated and compliant" ... "this complaint about me [by Ms Neale] is an empty one if police came in and did a check, they would have had no issues or taken action against me."

[50] The respondent submitted that whether or not an offence would have been prosecuted does not determine whether it is reasonable for an employer to decide there has been serious misconduct against the context of the SSAA. It referred me to an Authority determination that took this approach.⁴ I agree. I find it reasonable that LW found it could not trust that Mr Day would not serve an intoxicated person again given his denial about M's intoxicated state when LW's findings reasonably found otherwise. Further I find it reasonable that LW found this was serious misconduct given the risk to its licence under s 248 SSAA and that just days prior there had been the police meeting about not serving intoxicated people. LW was facing what could reasonably be seen as an 'on notice' warning from the police about previous incidents at the premises. Mr Day was aware of this.

[51] It was submitted for LW that I should take note of another Authority determination where a dismissal was found justified against the background of the SSAA. In that case a DM employee left premises unattended for a very brief time. The employer's decision to dismiss was found justified because of the risk to its licence and business if such actions occurred again.⁵ I accept this was a similar situation and supports a finding here of serious misconduct by Mr Day resulting in dismissal.

[52] Accordingly, based on the above, I find that LW was substantively justified to dismiss Mr Day for the M incident.

Was LW substantively justified in dismissing Mr Day for the W incident?

[53] Mr Day's evidence was that his plan in relation to W was to sober him up for a taxi and to see him safely home. On its own I find this was a humanly admirable aim. He described his plan to be consistent with his duty under "the law". It was submitted for Mr Day that his plan was consistent with section 4 of the SSAA which includes that harm caused directly or indirectly by excessive consumption of alcohol is to be minimised including harm such as injury and harm to the public generally. In his evidence Mr Day variously said he decided to manage W with an aim to look after him and also protect the

⁴ *Guerra v Wilson-Grange Investments Ltd* [2022] NZERA 70.

⁵ *Broughton v Portage Licensing Trust* [2012] NZERA Auckland 179.

public walking by outside, the musician's uninsured equipment that was being set up, the disturbance that W may make to the good time that other patrons were having in the bar.

[54] Mr Day's position is best summed up in his email to Mr Dear dated 19 October 2020 giving further feedback to LW on the concerns it had raised about the W incident:

we are expected to try and reduce harm caused by intoxicated patrons or non-patrons its all the same law the second anyone walks into your bar they become my responsibility to look after while on premises or off to try my best to get them home via taxi Uber or sober driver they need to get home ...

[55] Mr Day says he followed his obligations as a DM by ensuring W did not come to harm by placing him in a place of safety before removing him. However, LW submits the legislation is clear under s 252 of the SSAA and the sequence of events shows that Mr Day did not put W into a place of safety as he claimed or remove him within a reasonable time. I agree with LW's submission that it was reasonable to come to this conclusion after its investigation. I accept LW's submission that Mr Day's interpretation of his DM obligations focused primarily on his concern for the welfare of W rather than the legislative requirements relating to the strict options for removal of an intoxicated person from licenced premises.

[56] For LW I heard evidence from Mr Jonathan Alve who currently holds the position of National Operations Manager for Hospitality New Zealand. I accept that Mr Alve has an expert understanding of the requirements of training for the DM certificate Mr Day held. He described the DM qualification as one that requires several qualification stages and that having attained this Mr Day would be "highly trained in the requirements of the SSAA". Mr Alve gave his opinion that 'a place of safety' is aimed at protecting an intoxicated person from harm and not for providing an opportunity to sober that person up, an action unlikely to work for a person as intoxicated as W was. He pointed out that there is no positive duty under the Act for an intoxicated person to be looked after to the point of getting them home safely. He distinguished the industry host responsibility guidelines from the legislative obligations of the SSAA, the former not overriding the latter. I agree with this interpretation in relation to the W incident.

[57] I found the evidence of Mr Day's witness, L, less helpful about DM obligations in relation to removing someone from licenced premises. I accept that L has a history and experience of operating businesses in licenced premises but not recently. He could only answer vaguely about why he believed the duty to look after a intoxicated patron to get them home under "host responsibility" obligations to be as important as the statutory provision obliging a DM to act in a specific way when removing an intoxicated person from licenced premises.

[58] Mr Dear and Mr Day both refer to W having a known history of becoming violent when intoxicated. Mr Day's own logbook indicates the problems he had when trying to remove W previously. While I am not satisfied that LW had its own readily available policies and procedures such as those that Mr Dear detailed in his written evidence, Mr Day promoted his knowledge, skill and ability throughout his evidence and through submissions on his behalf. In other words, I find that Mr Day appeared to be proud of the procedure he took to look after W and see him into a taxi that night. He did not say that he did not know any better but rather he reiterated that his plan was the right thing to have done.

[59] Further to the above, Mr Day's initial feedback to Mr Dear was that he agreed that he should have removed W and that Mr Dear should be unhappy with his actions. Later Mr Day changed his position to saying that he had done nothing wrong in relation to W. Mr Day explained this change to me as trying to save his job. I found this made Mr Day an unreliable witness in relation to his management of the W incident.

[60] I find that it was reasonable for LW to conclude that W should have been removed when he first entered due to his known violent reactions in the past to removal. That was effectively the position that LW took in its decision making based on the information before it.

[61] I find it reasonable that LW concluded that Mr Day should have sought help to deal with W. Mr Day's evidence was that he did not want to involve the police because of his concern about not getting W into trouble. Mr Day's evidence was that he did not agree with J's suggestion he lock the door and call the police. I find it was reasonable for LW to

conclude, as it did, that Mr Day chose to do things as he saw fit rather than follow his obligations as a DM and this raised a real risk for LW's ongoing compliance with the SSAA.

[62] Mr Day raised further issues about whether a finding of serious misconduct for breach of trust and confidence was genuine. I will consider these now.

Notice period

[63] I accept on the face of it, Mr Day's submission that the opportunity given by LW to work out his notice without anything changing in his DM role appears inconsistent with a finding of serious misconduct for loss of trust and confidence. However, the dismissal letter dated 22 October 2020 states, "In consideration of your long service you are not dismissed with immediate effect but are given three weeks' notice." Mr Dear acknowledges that he weighed up and then took this risk because he was concerned about instant dismissal on Mr Day's family situation. I accept that Mr Dear's intentions were genuine. I accept as the director of LW Mr Dear accepted the risk he took. Working out the notice period was of benefit to Mr Day.

[64] In these circumstances I do not find that the three weeks' notice period was inconsistent with a finding of serious misconduct warranting dismissal.

Written reference

[65] Mr Day says giving him a "glowing" reference was inconsistent with LW's finding of serious misconduct. Mr Dear explains the same motivation as above when deciding to provide the reference. Mr Dear points out that he did not recommend Mr Day for bar work. The reference refers to Mr Day's positive attributes which Mr Dear in part reiterated at the investigation meeting:

'Sam is an enthusiastic, motivated person who enjoys physical work and an outdoor environment. He also enjoys social interaction. He offers future employers honesty, loyalty and a willingness to tackle anything even if it is beyond his job description. I recommend him to any employer who can provide him with a stimulating environment. He may well have a future in sales.'

[66] The reference comes across as carefully worded. I found it likely that the reference was a further genuine attempt by Mr Dear to help mitigate the effect of dismissal on Mr Day and his family.

[67] Considering the above, I do not find LW's written reference was inconsistent with LW's finding that it could not trust Mr Day to carry out his DM obligations.

[68] Accordingly, based on the above, I find it was within the scope of what a reasonable employer could have done for LW to have decided it had lost its trust and confidence in Mr Day not to take similar action again in relation to M and W type incidents. This was especially so given Mr Day's firm stance that he had done nothing wrong and in the context of the risk to LW of breaches of the SSAA occurring in the future.

Did LW carry out a fair process before deciding to dismiss Mr Day and if not was this more than minor to have been unfair to Mr Day?

[69] While I have found that LW was substantively justified to dismiss Mr Day for both the M and W incidents I will consider the procedural issues raised by Mr Day.

The disciplinary process

[70] Having viewed the correspondence provided and the notes of the meetings held by LW, I am satisfied that LW properly identified the specific concerns it had as being grounds for dismissal and the reason it considered these concerns serious. LW gave Mr Day a reasonable opportunity to respond which included giving further time to provide relevant feedback after initial responses focused more on Mr Day's views about his co-workers' shortcomings than the issues raised. LW gave Mr Day full access to footage of both incidents. Mr Day completed detailed summaries of these incidents that LW was given to consider.

Was the decision to dismiss for serious misconduct unjustified because Mr Day had not been given an opportunity to have a second chance or improve in past performance reviews or disciplinary warnings?

[71] It was submitted that LW had not raised issues with Mr Day before dismissing him for the W and M incidents. LW says the police meeting made it clear that patrons were not to be served “one for the road.” I agree that this meeting likely made it clear to Mr Day the importance to LW of not serving intoxicated people, something as DM he should already have been well aware of.

[72] Ms Walker-Anderson says she had informal discussions with Mr Day about managing patrons but was vague on any details. Mr Day gave evidence that management had previously discussed informally with him the need to be “more violent” with intoxicated patrons. While a curious choice of words, Mr Day clearly disagreed with this and in his evidence stood by his host focus to those who may be intoxicated.

[73] The M and W incidents were found to be serious enough that LW considered Mr Day should be dismissed for a loss of trust and confidence for the reasons outlined above. Ordinarily this would not require the matters to have been raised before with him. I find that LW was justified in dismissing for the M and W incidents even if LW had not previously initiated formal processes.

Genuine consideration of the licencing inspector and police emails

[74] Mr Day says that his feedback was not given genuine consideration because Mr Dear said he was not interested in the emails from the senior police officer and the Council. Mr Dear says he took little notice of these emails. His view was that those writing the emails did not have all the information about the situation. I have read the emails and I agree.

[75] Both emails related to the W Incident. Neither responder had the benefit of seeing footage or could reasonably have understood all the material that Mr Dear had before him. Mr Day gave each responder a brief overview of a situation that I accept was his version of

the W incident. Mr Dear has provided further emails from the agencies that responded. Both indicate that their earlier responses were based on the information provided and that they had not intended to be involved in Mr Day's employment relationship problem.

[76] In these circumstances I find it was open to Mr Dear for LW not to put any weight on these emails.

Pre-determination

[77] Mr Day says that the decision to dismiss was already made before the end of the investigation process because Mr Dear visited his partner and discussed applying for a wage subsidy. Mr Day says this showed Mr Dear had made up his mind about dismissal. He says the suggestion was dishonest because Mr Day would not be entitled to the subsidy. Mr Dear's explanation for his approach was that he valued Mr Day's partner as a past employee and had concerns about the effect of a dismissal on the family. He says he had not considered whether the subsidy option would work but was trying to suggest ways to mitigate the effect of dismissal. I find Mr Dear's explanation genuine and reflected the human context in this small place of employment where Mr Day, Mr Day's partner and Mr Dear had been involved with LW for several years together. In this context I do not find there was predetermination by LW of the outcome of its disciplinary investigation.

Were the complaints against Mr Day ill motivated?

[78] Mr Day says Ms Neale's report about M was ill motivated. Mr Day said in the first disciplinary meeting that M was a "nice, quiet, polite woman." In his oral evidence he said he thought "[Ms Neale] was picking on [M]". It was submitted for Mr Day that if M's intoxicated state had been an issue Ms Neale would have reported it on the night and would not have smiled at M when she took her money for the last drink.

[79] I accept that Ms Neal was asked to put her report about the M incident into the book retrospectively. Ms Neale explained in her evidence that she did not want to further challenge Mr Day's decision to serve M.

[80] Ms Neale gave evidence that she found Mr Day difficult to work with. Mr Day in his evidence says the same in reverse to the extent that he raises personal issues about Ms Neale in support of his contention that she lied in her report to LW about the M incident.

[81] Ms Walker-Anderson says there were problems in the working relationship between Mr Day and Ms Neale that were unresolved. Ms Walker-Anderson's evidence is that it was Mr Day who caused the problems and that she had often talked to him about the way he needed to work with other staff in a team approach. She said he would improve and then things would continue to be a problem again. Ms Neale in her evidence expressed concern about the personal things raised about her. She declined to comment about these in her oral evidence. I found Ms Neale to be a straightforward witness and find a likelihood that she felt uncomfortable challenging Mr Day's way of doing things in his DM role.

[82] J reported the W incident. He did not appear to give his evidence. A short positive letter was submitted by the employer he worked for after his employment with LW. This was apparently submitted because of the allegations that Mr Day made in his claim before the Authority which attacked J's personal habits and integrity. I have already found that the evidence supports LW's finding that W was not put into a place of safety when he was not immediately removed from the premises. This is not inconsistent with J's report about the W incident.

[83] I do not find that Ms Neale or J reported the M and W incidents by making up what they said to get Mr Day "into trouble".

[84] Accordingly, based on the above I do not find that there was procedural unfairness in LW's investigation.

Summary of findings

[85] I find that LW was both substantively and procedurally justified in dismissing Mr Day for the M incident and for the W incident.

[86] Mr Day's claim is dismissed.

Costs

[87] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[88] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[89] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.⁶

Antoinette Baker
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].