IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 70
3118792

	BETWEEN	RICHARD GUERRA Applicant
	AND	WILSON-GRANGE INVESTMENTS LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Simon Greening, counsel for the Applicant James Turner, counsel for the Respondent
Investigation Meeting:	18 and 19 November 2021 at Auckland
Submissions and Further Information Received:	25 November 2021 from the Respondent 1 December 2021 from Applicant 7 December 2021 from Respondent
Date of Determination:	4 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Around the beginning of October 2019 Richard Guerra was employed in the position of Front of House Staff by Wilson-Grange Investments Limited (the respondent) to undertake general hospitality duties for The Grange bar and restaurant located at Smales Farm on the North Shore.

[2] Mr Guerra was experienced in the hospitality industry. He held a Duty Manager's licence for The Grange and prior to that he had worked on other licensed premises. He had also run his own bar and restaurant in Milford.

[3] Mr Guerra was dismissed for serious misconduct on 31 August 2021, and he claims that was unjustified. Mr Guerra also claims he was unjustifiably disadvantaged in his employment and that the respondent breached its good faith obligations to him and made unlawful deductions from his wages. The respondent denies all of his claims.

[4] Mr Guerra's complaint that he was owed wage arrears because he had not been rostered his minimum contractual hours of work was settled after the Authority's investigation meeting.

Issues

[5] The following issues are to be determined:

(a) Was Mr Guerra unjustifiably disadvantaged in his employment by:

(i) Not being rostered, and therefore not being paid, for a minimum of 35 hours work a week;

(ii) The 20% reduction in his wages the respondent implemented in March 2020 due to Covid-19 issues;

(iii) The way the respondent handled anonymous allegations made about him;

(b) If so, what if any remedies should be awarded?

(c) Was Mr Guerra's dismissal justified?

(d) If not, what if any remedies should he be awarded?

(e) What if any costs and disbursements should be awarded?

Was Mr Guerra unjustifiably disadvantaged in his employment?

[6] The Authority was satisfied that Mr Guerra was disadvantaged in relation to each of the three grievance claims he had made. The failure of the respondent to roster Mr Guerra to work a minimum of 35 hours a week and the 20% reduction in his wages both resulted in him being paid less than his contractual entitlements, which is obviously a disadvantage. The way the respondent raised anonymous allegations with Mr Guerra also put him at a significant disadvantage.

[7] Whether or not the respondent was justified in disadvantaged Mr Guerra is to be objectively assessed in accordance with the justification test in s 103A(2) of the Employment Relations Act 2000 (the Act).

Failure to roster him to work for 35 hours a week

[8] The respondent's claim that Mr Guerra was only rostered less than 35 hours work in a week if he had asked for that to occur does not succeed. The Authority has preferred Mr Guerra's evidence about that because:

(a) His denial of that was consistent with his actions in making multiple complaints that he had not been rostered the minimum hours he was entitled to under his employment agreement;

(b) He repeatedly asked Mr Roux (who was responsible for the rosters) to ensure he was rostered for at least 35 hours a week;

(c) He escalated his concerns about not being rostered for at least 35 hours a week by seeking a meeting with Mr Wilson, the owner/director of The Grange, to complain he was not getting his minimum contractual hours of work;

(d) There was no documentation to support the respondent's assertion that the reduced hours had occurred at Mr Guerra's request;

(e) Reducing Mr Guerra's minimum contracted hours of work was a variation of his employment agreement. Clause 21 of his employment agreement said no variation of the agreement was effective unless in writing and signed by both parties. The respondent admitted no signed variation existed, which supported Mr Guerra's claim that he had not agreed to reduce his minimum hours of work.

[9] The respondent was not justified in reducing Mr Guerra's hours of work to less than 35 hours a week. It did not have a good reason for doing so and it did not follow a fair process when doing so. Mr Guerra succeeds with this disadvantage grievance.

Reduction of wages by 20%

[10] Mr Guerra's wages were reduced by 20% for the pay periods ending 29 March to 10 May 2020 due to the Covid-19 lockdowns. Instead of receiving $840 gross he only received the government subsidy of $585 gross a week.

[11] The respondent had a good reason for wanting to decrease its wages bill. It had experienced a significant slow-down in trade prior to the lockdowns and it could not trade while the country was in level 4 and level 3 lockdowns. It was a time of great stress and uncertainty for the owners of The Grange, who were focused on keeping the business afloat.

[12] The respondent was required to continue meeting its fixed outgoings while not receiving any income. The adverse effect Covid-19 had on its business was financially very serious and the future impacts Covid-19 concerns would have on The Grange going forward were unknown. Mr Wilson said he implemented the 20% pay cut for staff to avoid redundancies.

[13] The Authority was satisfied that the respondent was substantively justified in reducing wages for all staff, in order to achieve immediate savings, in the hope it would keep the business going through the lockdowns and future uncertainty it faced. However, the respondent failed to establish that the pay cut was done in a procedurally fair way that was consistent with its good faith and contractual obligations.

[14] Mr Wilson announced the wage reduction at a staff meeting held on 17 March 2020. He told staff that while The Grange was still able to operate they would be paid 80% of their normal wages, which was inclusive of the government subsidy, but if it closed they would only receive the government subsidy (and no wages) while it was unable to operate.

[15] Although Mr Wilson invited staff to speak to him if anyone had any issues, the pay reduction was presented as a fait accompli. Mr Wilson did not ask staff, he told them. There was no consultation because the decision had already been made. The point of the 17 March 2020 meeting was to convey that decision to staff.

[16] Mr Wilson did not speak to any of the employees on an individual basis. He did not give the staff any information to support his claim that a 20% reduction was needed to avoid redundancies. Employees had no information about what would happen if they did not agree to the reduction. They were not told which roles would be made redundant or when that would occur or even what would happen to their own role if they did not go along with the wage reduction.

[17] The Authority did not accept Mr Wilson's evidence that staff made a unanimous decision to reduce their wages by 20%. Mr Guerra did not agree to it. Staff were not in a

position to make informed decisions. They had minimal at best, and more likely no real information, on which to base a decision to agree to a wage reduction. Mr Wilson took the absence of verbal objections by the staff during the meeting on 17 March 2020 as agreement. That is insufficient, and inconsistent with what the employment agreements and good faith obligations required.

[18] An impromptu meeting, where there is no advance warning of what will be discussed, an absence of individualised information, no disclosure of the financial or other evidence the decision was based on, no time to consider their position or take advice or respond and no opportunity to influence the decision before it was made are all factors that made the way this change was implemented unfair and unjustified.

[19] The 20% wage reduction implemented by the respondent was either:

(a) A breach of the Wages Protection Act 1983 (WPA) because it amounted to a deduction by the respondent from Mr Guerra's normal contractual wages that occurred without his prior written consent. The clause 8 wage deduction clause in the employment agreement did not include written consent to a wage decrease and genuine agreement had not been reached about the wage reduction, because it had been unilaterally imposed; or

[20] A contract variation to his contractual wages, that was not implemented in accordance with the variation process set out in his employment agreement. The parties did not sign a written variation to Mr Guerra's wage rate, as required by clause 21 of his employment agreement.

[21] Under either scenario, the disadvantage Mr Guerra suffered by having his wages unilaterally decreased was unjustified. A fair and reasonable employer would have implemented a wage reduction after a fair and proper process, that required genuine consultation and genuine agreement to changes being made. This situation lacked that. Consent was implied or assumed from Mr Guerra's silence at a group meeting. That did not meet the variation requirements recorded in clause 21 of his employment agreement. That meant the variation was not effective and therefore unenforceable.

[22] Mr Guerra's evidence that he did not agree to the respondent reducing his wages was accepted. The respondent's evidence of his supposed agreement to the 20% reduction was

inadequate and fell far short of what was required to prove that genuine and mutual agreement had been reached between the parties.

Force majeure clause

[23] Clause 20 of Mr Guerra's employment agreement was a force majeure clause that stated:

> 20.1 Neither party will be liable to the other for any failure to perform any obligations under this agreement by reason of circumstances beyond the party's reasonable control, including (but not limited to) nature disaster, adverse weather conditions, health epidemic or pandemic, civil unrest or war ("Force Majeure Event"). The party affected must:
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> (a) Notify the other party as soon as practical after the Force Majeure Event occurs, and provide information containing the Force Majeure Event, including an estimate of the time likely to be required to overcome it;
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> (b) take all reasonable steps to overcome the Force Majeure Event and minimise the loss to the other party; and
>
> (c) continue to perform the party's obligations as far as practicable.
>
> 20.2 Without limiting this clause, you acknowledge we will not be provided to provide you with work or pay you remuneration, and you will not be required to work, where work is not available for you or you are unable to work due to a Force Majeure Event.

[24] A force majeure clause often occurs in commercial contracts to give effect to the doctrine of frustration. The Authority is not aware of any Employment Court decisions about whether a force majeure clause may be used within an employment context. Although the Authority has determined other cases that have involved a force majeure clause, those cases involved substantially different circumstances, so are not of assistance in this matter.

[25] This determination therefore specifically leaves open the general principle of whether a force majeure clause in an employment agreement is enforceable because the particular facts of this matter meant that did not need to be resolved in this case.

[26] The respondent's submission that the 20% wage reduction was justified under the force majeure clause in Mr Guerra's employment agreement does not succeed. That claim was made retrospectively. The first time the respondent invoked its reliance on the force majeure clause was on 20 October 2020, when it lodged it's statement in reply with the Authority. It is

significant that the express requirements set out in the force majeure clause were not invoked at the material time.

[27] Mr Wilson did not inform staff at the 17 March 2020 meeting that the force majeure clause was being invoked to reduce their wages. None of the respondent's written communications to staff on 30 March 2020, 17 April 2020, 24 April 2020 and 11 May 2020 said that the force majeure clause in their employment agreement had been invoked to reduce their wages. Nor did the respondent refer to the force majeure clause when it responded to the personal grievance Mr Guerra raised in August 2020.

[28] If the respondent had relied on the force majeure clause in March 2020 to reduce staff wages by 20% then it was required to inform staff of that. Failure to do so is procedurally unfair, contrary to good faith requirements, and inconsistent with the express requirements of the clause. That failure meant staff were prevented from seeking advice on the validity of the use of a force majeure clause to reduce their wages.

[29] It is also questionable whether a force majeure situation genuinely arose in these particular circumstances. The government wage subsidy enabled the respondent to pay staff $585 per week for the pay periods ending 29 March to 10 May 2020, meaning it could continue to meet some of its financial obligations to staff.

[30] In Mr Guerra's case that left a deficit of $255 per week. If he had agreed to reduce his minimum contractual hours of work to 24 per week then that would have been fully covered by the wage subsidy. The wages deficit could therefore have been addressed by a variation that was properly entered into under clause 21 of the employment agreement.

[31] The ability to vary the rate of pay, and/or the minimum contractual hours of work to be provided each week, along with an employee's ability to take accrued annual leave or annual leave in advance, or to agree to a period of unpaid leave, were all options that could have potentially avoided the need for the force majeure clause to be invoked. These options were not properly explored with Mr Guerra.

[32] Staff had their wages unilaterally reduced out of the blue. The respondent's failure to provide staff with any information associated with that decision (other than saying it was necessary to avoid redundancies) meant they were not in a position to be able to properly engage with their employer about its legal obligations or about their rights.

[33] Because the respondent did not rely on the force majeure clause at the material time, it cannot now retrospectively use it to justify its reduction to Mr Guerra's wages.

[34] Mr Guerra's unjustified disadvantage grievance succeeds.

The way the anonymous allegations were dealt with

[35] Around July 2020 a member of the public (the first complainer) told Mr Wilson when he was out drinking in a bar on the North Shore that he (the first complainer) and others he knew would not drink at The Grange while Mr Guerra worked there.

[36] When Mr Wilson asked why, the person made adverse comments about Mr Guerra's conduct at a previous bar he (Mr Guerra) had owned in Milford. The first complainer repeated heresay allegations apparently reported to him by other unnamed people that consisted of generalised 'unsavoury conduct'.

[37] Mr Wilson asked for a written complaint from the complainer, who then sent Mr Wilson a text. The text produced to the Authority did not have the name of the sender, the number it was sent from or the time and date it was sent.

[38] The Authority considered the 'text' so non-specific as to be useless in terms of legitimately raising a complaint and/or allegations. It did not identify who had been involved in the heresay information being reported, where or when the issues had occurred, what exactly was allegedly said or done by those involved in the matters being referred to, or what the unidentified people the complainer was reporting on did about their issues at the time they arose.

[39] Mr Wilson then had another trip over to a bar on the North Shore to solicit further information from some of the 'other people' who the first complainer said would not drink at The Grange. Mr Wilson had drinks in a bar/restaurant with people I shall refer to as "the new complainers". Mr Wilson did not take notes of what was discussed, the adverse information conveyed to him or of the 'unsavoury' allegations the new complainers made about Mr Guerra.

[40] On 13 July 2020 Mr Wilson received an email from a Milford bar owner (whose name was redacted) who said Mr Guerra was not welcome in their establishment. Once again what was disclosed to the Authority was vague hearsay information being passed on by the email

writer from unidentified people, who had apparently made adverse comments about Mr Guerra to the writer of the email.

[41] The email did not identify who had provided the information being disclosed, who was involved in whatever was being complained about, when or where the issues being complained about had occurred or what exactly Mr Guerra was alleged to have done. The email alleged the writer had heard (heresay) from other people that Mr Guerra had engaged in "*inappropriate and unprofessional behaviour*", which objectively is so non-specific as to be meaningless.

[42] The Authority agre with Mr Guerra that the manner in which the respondent dealt with these matters unjustifiably disadvantaged him.

[43] Mr Wilson and Mr Roux (Mr Guerra's co-worker) met with Mr Guerra on 3 August 2020. Mr Guerra was not told what the purpose of the meeting was. Mr Wilson said he had received adverse information about Mr Guerra that had the potential to affect The Grange and its business. Mr Wilson described the concerns as "*of a serious nature and regarding his conduct behaviour or reputation.*" He declined to tell Mr Guerra who had complained about him and no specific details of the so called complaints were provided.

[44] Mr Wilson also raised concern with Mr Guerra about an email he had sent in the early hours of the morning to a female co-worker who had recently left The Grange to move overseas. The employee had complained that Mr Guerra's text was inappropriate.

[45] It was unfair and potentially misleading that Mr Wilson did not tell Mr Guerra that he had seen the text and also considered it was inappropriate. Mr Wilson told the Authority that the explanation Mr Guerra gave the Authority, about texting the woman about accommodation, was inconsistent with the content of the text he had seen. The text was apparently not copied, so was not available to the Authority.

[46] Mr Guerra denied any wrongdoing. Mr Wilson said he told Mr Guerra he was going to investigate the anonymous complaints further. Mr Wilson believed Mr Guerra was going to provide him with a Police check, but Mr Guerra disputed that. Mr Guerra believed his explanation that the renewal of his Duty Manger's Licence in 2017 meant he could not have been involved in any criminal matters was accepted by Mr Wilson. As far as Mr Guerra was concerned that was the end of the matter.

[47] This type of confusion about the outcome of the meeting and the next steps to be taken by each party was not something a fair and reasonable employer could have created or have left unresolved. It shows that the 3 August 2020 meeting was not conducted fairly.

[48] Mr Guerra says his relationship with his co-worker Mr Roux markedly deteriorated after this meeting, which Mr Guerra attributed to the nature of the adverse 'allegations' that had been made about him.

[49] The anonymous allegations were overtaken by a disciplinary concern, that was pursued to a formal disciplinary meeting held on 31 August 2020. This is discussed in detail under the dismissal grievance section of this determination.

[50] What is relevant to the determination of the disadvantage grievance is that despite no disciplinary allegations ever being put to Mr Guerra, Mr Wilson brought the anonymous allegations up again up the disciplinary meeting that was being held to discuss a completely different disciplinary concern. That was unfair to Mr Guerra and should not have occurred.

[51] The way the complaints were raised with Mr Guerra was unjustified and unfairly disadvantaged him. The anonymous complainers and the lack of anything specific he could respond to meant Mr Guerra he could not substantively rebut any specific allegations but was left simply having to deny any wrongdoing. Raising the vague but detrimental anonymous allegations in front of a co-worker Mr Guerra was already having problems with was unfair and unjustified.

[52] Mr Wilson should have known the vague information he had received from the complainers was insufficiently detailed and therefore wholly inadequate in terms of giving him legitimate information he could reasonably investigate. A fair and reasonable employer could not have raised these issues, in this way, with Mr Guerra in all of the circumstances. He should not have been blindsided in front of a co-worker about such vague, unsubstantiated, adverse and anonymous allegations.

[53] A fair and reasonable employer also could not have revisited these unsubstantiated anonymous allegations that were never the subject of a formal investigation or disciplinary allegations during a disciplinary meeting involving other, entirely separate and completely different, disciplinary concerns.

[54] Even if Mr Wilson believed he was required to raise the allegations with Mr Guerra, a fair and reasonable employer would still have taken steps to ensure that was done in a fair and proper way that did not unjustifiably disadvantage Mr Guerra.

[55] At a minimum that would have involved giving Mr Guerra advance warning of what was going to be discussed at the meeting, the information Mr Wilson had received would have been fully disclosed, as would the circumstances in which it had been received along with the names of the complainers and a summary of all of the verbal information that had been imparted to Mr Wilson. Mr Guerra would have been given the opportunity to have a support person with him and to have taken advice in advance of the meeting, should he have wanted to do so.

[56] Mr Guerra's unjustified disadvantage claim succeeds.

What if any remedies should Mr Guerra be awarded?

[57] Mr Guerra is entitled to recover the renumeration he lost as a result of his contractual wages being unjustifiably reduced by 20%. The Authority has not been given the details of his actual lost remuneration. Therefore the parties will be given seven days from the date of this determination to agree on that amount. If agreement is not reached then, within 21 days of the date of this determination, either party may apply to the Authority to fix it.

[58] Mr Guerra is entitled an award of distress compensation under section 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury and to feelings he suffered as a result of the three unjustified disadvantage grievances he experienced while employed by the respondent.

[59] Within 28 days of the date of this determination, the respondent is ordered to pay Mr Guerra total distress compensation of $9,000, consisting of:

(a) $1,000 for its failure to provide him with, or pay him for, his contractual minimum 35 hours work per week;

(b) $2,000 for the 20% reduction in his wages;

(c) $6,000 for the way it dealt with the 'inappropriate conduct' allegations.

[60] Contribution, denoting blameworthy conduct, to the situations that gave rise to each of these three disadvantage grievances was not proven on the balance of probabilities.

Accordingly, the $9,000 Mr Guerra has been awarded is not to be reduced under s 124 of the Act.

[61] The respondent is ordered to pay Mr Guerra $9,000 under s123(1)(c)(i) of the Act within 28 days of the date of this determination.

Was Mr Guerra's dismissal justified?

Statutory justification test

[62] Justification is to be assessed in accordance with the justification test in s 103A(2) of the Act. This requires the Authority to objectively assess whether the respondent's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Mr Guerra.[1]

[63] A fair and reasonable employer is expected to comply with its contractual obligations and with the statutory good faith requirements in s 4(1A)(c) and with each of the four procedural fairness tests set out in s 103A(3) of the Act. Failure to do so may fundamentally undermine an employer's ability to justify a dismissal.

Good faith requirements

[64] An employer proposing to make a decision that may adversely affect the ongoing employment of an employee must give the employee access to relevant information and an opportunity to comment on it before a final decision is made.[2]

[65] The relevant information was the CCTV footage that showed Mr Guerra obtaining a beer from The Grange bar and then taking it outside The Grange's licensed premises and drinking it on the Fantail's licensed premises. Mr Guerra is seen clearly seen on the CCTV footage engaging in the conduct he was accused of.

[66] Although the respondent did not provide Mr Guerra with a copy of the CCTV footage in advance of the disciplinary meeting on 31 August 2021, it referred to it in the disciplinary

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1 Section 103A(2) of the Act.
2 Section 4(1A)(c)(i) and (ii) of the Act.

letter dated 28 August 2021, so he knew that it was evidence that would be relied on by the respondent.

[67] The disciplinary meeting was adjourned to give Mr Guerra and his representative an opportunity to view the CCTV footage and then respond to it. They did not ask for additional time to consider the CCTV footage. After viewing it Mr Guerra admitted it was him in the footage and that he could be seen doing what he was alleged to have done.

[68] The performance issues and anonymous allegations discussed during the disciplinary meeting were never pursued as disciplinary allegations and did not form part of the dismissal, so disclosure of information about those matters was not required.

[69] The Authority was satisfied that the respondent complied with its good faith obligations by providing Mr Guerra with information relevant to the disciplinary allegation and an opportunity to comment on it before he was dismissed. Mr Guerra's claim that the way the disciplinary meeting was conducted was a breach of good faith did not succeed.

Procedural fairness tests

[70] Section 103A(3) of the Act sets out minimum standards of procedural fairness that an employer must meet. The Authority is satisfied that each of these four tests were met. In particular the respondent:

(a) Investigated the liquor licensing allegation, as required by s 103A(3)(a) of the Act;

(b) Fully and fairly put its disciplinary concerns to Mr Guerra to respond to as set out in the email its lawyer sent on 28 April 2020, as required by s 103A(3)(b) of the Act;

(c) Gave Mr Guerra a reasonable opportunity to respond to the disciplinary concern during the disciplinary meeting held on 31 August 2020, as required by s 103A(3)(c) of the Act;

(d) Genuinely considered Mr Guerra's explanation and representations on the appropriate sanction before deciding to dismiss him, as required by s 103A(3)(d) of the Act.

The Authority does not accept Mr Guerra's claim that he was prevented from providing a response to the disciplinary allegations during the disciplinary meeting. Mr Guerra was accompanied by a representative whose job it was to represent Mr Guerra's interests. It is clear from the information conveyed that Mr Guerra did in fact provide a full explanation to the disciplinary concern. He did not identify anything else that was relevant that he would have said or was actually prevented from saying.

Other appropriate factors – s 103A(4) of the Act

[71] The other 'appropriate factors' under s 103A(4) of the Act that Mr Guerra relied on in support of his submission that the disciplinary process and dismissal was unfair, were not accepted by the Authority.

[72] The Authority did not agree with Mr Guerra's claim that the respondent breached the summary dismissal process set out in clause 13.2.2 of his employment agreement. The respondent complied with the requirements of clause 13.2 because Mr Guerra was required to attend a disciplinary meeting, he was advised of his right to representation, the allegation of serious misconduct was put to him, and he was given an opportunity to respond to it. The seriousness of the disciplinary concern was discussed with Mr Guerra during the disciplinary meeting, and he was given an opportunity to address that.

[73] Mr Guerra says there should have been another adjournment after he had provided his explanation to allow 'further investigation'. However, he did not identify what 'further investigation' could or should have been done.

[74] Mr Guerra's complaint about that arises from his misinterpretation of clause 13.2.2(ii) in his employment agreement that provides that after an employee has provided an explanation, that the employer considers unsatisfactory, "*the employer <u>may</u> inform the employee that the allegations may be investigated further*." (emphasis added).

[75] The Authority considers there was nothing further for the respondent to investigate. Mr Guerra is clearly seen on the CCTV footage removing a beer and drinking it outside The Grange's licensed premises, and he admitted to that. There was no need to delay the outcome of the disciplinary process by having another adjournment for the purposes of further investigation when the conduct in issue was admitted.

[76] The respondent did however have an adjournment after concluding that serious misconduct had occurred, so that it could consider the appropriate sanction. Mr Guerra was given an opportunity to provide representations on the appropriate sanction before the decision about the disciplinary outcome was made.

[77] Mr Guerra's submission that a breach of the liquor licensing legislation or regulations cannot amount to serious misconduct because it was not recorded in clause 17 of his employment agreement as an example of serious misconduct did not succeed.

[78] Clause 17.1 set out employment related statutory responsibilities and it specifically noted that Mr Guerra was required to perform a number of duties that were subject to statutory governance including but not limited to, the Sale and Supply of Alcohol Act 2012 and other related legislation and regulations.

[79] Clause 17.2 of the employment agreement identified that failure by the employee to meet the standards or satisfy the criteria or in the event of a breach of any requirement of any relevant statutory regulation could adversely affect their ongoing employment.

[80] Mr Wilson's first instruction to Mr Guerra on 27 August 2020 to attend a disciplinary meeting upon his return to work was inadequate as it did not contain details of the disciplinary concern. However, that was remedied after Mr Guerra's lawyer became involved and the respondent obtained legal advice.

[81] Mr Guerra's lawyer discussed the respondent's concerns with its lawyer, so Mr Guerra knew what the disciplinary concerns involved. The respondent's lawyer also sent a disciplinary letter dated 28 August 2020 that appropriately set out the details of the disciplinary allegations.

[82] The disciplinary letter made it clear that Mr Wilson wanted to discuss an incident where after the 3 August 2020 meeting Mr Guerra had taken a beer from The Grange outside its licensed premises to drink. He had been captured on CCTV drinking the beer outside its liquor licencing area and on the licensed premises of a neighbouring bar, the Fantail.

Substantive justification

[83] Mr Guerra's claim that his dismissal was improperly motivated because it was retribution for him having raised personal grievance claims on 25 August 2020 was not

accepted. That assertion was an example of Mr Guerra failing to appreciate the seriousness of his admitted actions.

[84] The respondent clearly had legitimate reasons for raising formal disciplinary concerns with Mr Guerra, it was not retaliatory action. The timing was coincidental. The Covid-19 lockdowns had slowed down Mr Wilson's ability to retrieve and review the CCTV footage of the disciplinary concerns. Once that was available, he acted in a timely manner.

[85] The Authority did not agree with Mr Guerra that his conduct was at worst misconduct that was not capable of being viewed as serious misconduct. The Authority was satisfied that the respondent had not misjudged the potential seriousness of Mr Guerra's conduct.

[86] The fact that The Grange was not prosecuted for a breach, because it did not come to the attention of the Police and/or a Licensing Inspector, did not mean that the breach was not serious. Mr Guerra's actions potentially put the respondent's licence in jeopardy or at risk of suspension and it would likely have faced at least a fine if Mr Guerra's breach had been discovered and prosecuted.

[87] Mr Guerra's submissions acknowledged that his behaviour was negligent. A negligent action may still be classed as serious misconduct depending on the level of seriousness. Objectively evaluated, Mr Guerra's conduct could have resulted in serious harm to the respondent and had potentially adverse consequences for its employees.

[88] The Authority accepted the detailed evidence given by an independent expert witness, Ms Georgina Robertson, an experienced liquor licensing consultant, who specialises in all aspects of liquor licensing for clients under the Sale and Supply of Alcohol Act 2012 (SSA Act). She is also an author for Thompson Reuters for their online platform practice and procedures for the Sale and Supply of Alcohol Act 2012 and its predecessor, the Sale of Liquor Act 1989.

[89] Ms Robertson is familiar with The Grange's liquor licence that allowed the sale, supply and consumption of alcohol on its "*licensed footprint*". This extends only to the external perimeter of its premises, being the bar and restaurant area and its inside area. Mr Guerra's action in taking a beer out of The Grange's licensed footprint to consume it on the Fantail's licensed premises was an obvious breach of The Grange's liquor licence.

[90] It was unlawful, because The Grange does not hold an off-licence, or any licence that permits the sale of alcohol that may be consumed elsewhere. It has an on-licence which allows the consumption of alcohol only on its licensed footprint.

[91] Ms Robertson explained how the Licensing Inspectors and the New Zealand Police take a very strict approach to compliance with all licenses and conditions associated with such licensing. Even though Mr Guerra consumed the beer that he had taken from The Grange bar on the licensed premises of another licensee, the Fantail, that was still a breach by The Grange of its liquor license that could be prosecuted under the SSA Act.

[92] Ms Robertson said the Licensing Inspectors and the New Zealand Police would not consider that it made a difference that The Grange did not sanction or approve of this consumption or that it occurred on the Fantail's licensed premises. The owner of the Fantail provided an email dated 15 November 2021 (presumably prepared for the Authority's investigation) expressing serious concern about how Mr Guerra's actions had also breached, and therefore threatened, the Fantail's liquor license.

[93] Prosecutions of breaches under the SSA Act can result in the suspension or cancellation of a licence. The situation could also be classed as a negative holding, which would increase The Grange's risk rating in terms of the terms of the Sale and Supply of Alcohol Fee Regulations 2013 and consequently the annual fees and the application fee for renewal of its licence would in turn increase.

[94] Ms Robertson considered the one off breach would be unlikely to have resulted in a suspension of The Grange's liquor license in the first instance, given there is no track record of breaches, but it would be a black mark and could potentially adversely impact on Mr Wilson's suitability to hold a licence and on any renewal of the liquor licence in future.

[95] Mr Wilson was entitled to conclude that Mr Guerra's explanation for his actions was unsatisfactory. Mr Guerra said he wanted to smoke and there was no smoking area in The Grange. That is incorrect, The Grange has a clearly designated smoking area, which Mr Guerra must have known about in his capacity as a Duty Manager.

[96] Mr Guerra attempted to shift the blame for his actions onto his co-worker Mr Roux, who had previously told Mr Guerra not to drink at the end of his shift in the garden bar if customers were still there. Mr Guerra said he understood it would be better for him to step

outside of The Grange's area to drink his beer where there were ashtrays. Mr Wilson considered that as an experienced Duty Manager Mr Guerra should have known not to have done that.

[97] Mr Wilson's genuinely believed, based on reasonable grounds, that Mr Guerra's admitted breaches of The Grange's liquor license amounted to serious misconduct. That was a conclusion a fair and reasonable employer could have reached in all the circumstances, based on the available evidence.

[98] The Authority was satisfied that Mr Wilson had good reasons, based on reasonable grounds, for concluding that Mr Guerra's explanation for his unlawful conduct was unsatisfactory.

Was the sanction of dismissal justified?

[99] Mr Wilson's decision that dismissal was the appropriate disciplinary sanction was within the range of responses available to a fair and reasonable employer in all the circumstances.

[100] Mr Wilson concluded that Mr Guerra's conduct was a flagrant breach of The Grange's liquor license. Mr Guerra was not a naive or inexperienced employee. He had run his own licensed premises and he was employed in a position that required him to take responsibility for The Grange fully complying with its liquor licence.

[101] Mr Wilson reasonably considered that Mr Guerra should have known about, and fully understood, the extremely strict conditions associated with The Grange's on-licence and the potentially very serious consequences associated with any breaches of those obligations. Mr Guerra did not demonstrate to Mr Wilson that he had fully understood that.

[102] The loss or suspension of The Grange's liquor licence (even for a day or two) would have had a terrible impact on the business and could have potentially put the continued employment of all staff in jeopardy. Mr Wilson was even more concerned than usual about the viability of the business given the struggles it was facing as a result of the lockdown restrictions. Mr Wilson considered Mr Guerra (and his lawyer) had been far too blasé about the breach and the risks that posed to the business, and potentially other staff.

[103] Mr Wilson did appropriately consider imposing a sanction short of dismissal. He asked Mr Guerra to address him on a final written warning for 12 months as well as dismissal.

However, Mr Wilson decided against imposing a final written warning because he felt that Mr Guerra had not accepted the seriousness of his breach, so could not be trusted to act appropriately in future.

[104] Mr Wilson said he could not risk the business by taking a chance on Mr Guerra, given his minimising of the seriousness of the breach, which had undermined Mr Wilson's trust and confidence in Mr Guerra's ability to fully adhere to liquor licensing laws.

[105] Mr Wilson was aware of other premises that had lost their liquor licence for non-compliance with liquor licensing obligations. Mr Guerra was employed as a front of house staff so he had to maintain standards for the business and ensure that staff knew about the liquor licence requirements and were complying with them.

[106] In weighing the appropriate outcome, Mr Wilson said he was concerned that Mr Guerra's conduct was not only wrong and unlawful but it also set a bad example to staff. Part of Mr Guerra's role as a Duty Manager was to require patrons and staff to comply with all liquor licenses restrictions, so he had to be seen by others to be taking those obligations very seriously.

[107] Mr Wilson told the Authority that if Mr Guerra had demonstrated insight, contrition and expressed an understanding of the seriousness of Mr Wilson's concerns, then he would have been inclined to have issued him with a final written warning. Mr Wilson felt there was too big of a risk associated with issuing Mr Guerra with a final written warning.

[108] Mr Guerra's claim that Mr Wilson improperly took the anonymous allegations into account does not succeed. While they should not have been mentioned at all during the disciplinary meeting held on 31 August 2020, Mr Wilson's view was that they still required further investigation so he did not take them into account. His focus was solely on the liquor licensing breach.

[109] The Authority accepted that evidence. Mr Wilson was a forthright witness, who gave direct answers and he was someone who was prepared to admit when he was wrong during the investigation meeting. The Authority was satisfied on the balance of probabilities that Mr Wilson did not take irrelevant factors into account when considering the appropriate disciplinary sanction.

[110] Mr Wilson appropriately considered all potential sanctions, including options short of dismissal. The sanction of dismissal was justified in all the circumstances.

Outcome

[111] The respondent has established that it complied with its good faith, procedural fairness obligations and contractual obligations to Mr Guerra regarding the disciplinary process. The respondent has discharged its onus of justifying that the disciplinary process it used, and its decision to dismiss Mr Guerra were what a fair and reasonable employer could have done in all the circumstances, at the time he was dismissed.

[112] Accordingly, Mr Guerra's dismissal grievance does not succeed.

What, if any, costs should be awarded?

[113] Both parties have had some success. The Authority's preliminary view, subject to feedback from the parties, is that this may be an appropriate matter in which costs should lie where they fall. Mr Guerra has succeeded with his unjustified disadvantage claim, while the respondent has succeeded with its unjustified dismissal claim.

[114] The parties have seven days within which to reach agreement on how costs should be dealt with, and in particular whether they should lie where they fall. If agreement is not reached and one or both parties seek a costs order in their favour then each party has 14 days in which to file a costs memorandum.

[115] If a costs determination is required then the Authority is likely to adopt its usual notional daily tariff approach to costs which is currently $4,500 for the first day of an investigation meeting and $3,500 for each subsequent day. The parties are therefore invited to identify any factors that they say should result in the notional starting tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority