Determination Number: CA 97/06
File Number: CEA 242/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Jan-Hai Iosefa (Applicant)
AND	Canterbury Hospitality Group (Respondent)
REPRESENTATIVES	Bridget Ayrey, Counsel for Applicant Brian Nathan, Counsel for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	23 May 2006
DATE OF DETERMINATION	29 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Iosefa) says that she was unjustifiably dismissed by the respondent Canterbury Hospitality Group Limited (Canterbury Hospitality) on 29 July 2004. Ms Iosefa's claim is resisted by Canterbury Hospitality who say that the dismissal was justified on the grounds of serious misconduct.

[2] Ms Iosefa had been employed in the business in a number of its manifestations since January 2001 but the ownership changed in April 2004 when Canterbury Hospitality became proprietors. Ms Iosefa was a duty manager in the bar and restaurant run by Canterbury Hospitality.

[3] There was a disciplinary meeting between the parties on 21 July 2004 which resulted in Ms Iosefa being given a final warning for giving away free drinks. Ms Iosefa contests the process that Canterbury Hospitality used in that meeting.

[4] On the evening of Saturday 24 July 2004, Ms Iosefa was working in the bar and was requested by Canterbury Hospitality to secure a significant amount of money in the safe. The safe was in an office in the premises. Ms Iosefa effectively disappeared for a period of time (Canterbury Hospitality says 15 to 20 minutes) and was discovered in the office with her boyfriend, allegedly in a compromising position, and with the money still undeposited in the safe.

[5] There was a further disciplinary meeting on 29 July 2004 and again Ms Iosefa protests the process used by Canterbury Hospitality to run this meeting. A consequence of this second meeting was that Ms Iosefa was dismissed summarily.

Issues

[6] The first issue is whether the process used by the employer in progressing its disciplinary investigation of Ms Iosefa's conduct was a fair and proper one in all the circumstances and the second question was whether it was available to the employer to reach a decision to dismiss after that investigation.

[7] It follows that I will review the matter under the following headings:

(a) The process; and

(b) The decision to dismiss.

[8] Before addressing those matters of substance though, there is an evidentiary issue which I need to dispose of and I turn to that first.

The evidentiary issue

[9] Ms Iosefa was dismissed from her employment on 29 July 2004. Her proceedings in the Employment Relations Authority were not filed until almost exactly one year later. That initial delay has not been satisfactorily explained.

[10] Then there was a further delay in getting the matter to mediation but a mediation was eventually held in November 2005. The mediation was unsuccessful. For reasons which are not clear, neither the Mediation Service nor the applicant notified the Authority that the mediation had failed and the Authority's own follow-up process also failed to pick up the delay.

[11] The matter was eventually noticed in January 2006 and the Authority's support staff wrote to the applicant's counsel indicating that unless there was a response by a particular date, the Authority would treat the matter as resolved.

[12] At the eleventh hour, the Authority was advised that the applicant did in fact wish to proceed and the matter was then timetabled and set down for hearing.

[13] A consequence of that succession of delays is that three witnesses for Canterbury Hospitality, who made signed statements at the time of the incidents in question, are not now able to be brought before the Authority to give their evidence.

[14] Canterbury Hospitality sought an order from me that I would accept the documented hearsay statements of those parties and they cited as support for that proposition the Evidence Amendment Act (No 2) 1980, s.3 and the proposition that it would be unjust and inequitable not to allow that evidence in.

[15] As to the second point, Canterbury Hospitality say that, whoever was responsible for the delay, it is certainly not them and that, had the matter been progressed in a timely fashion by Ms Iosefa, those witnesses in all probability would have been available to physically give their evidence.

[16] Canterbury Hospitality also say that those witnesses offer important evidence about what actually happened particularly in terms of Ms Iosefa's complaint about process and that failure to entertain that evidence would grossly prejudice Canterbury Hospitality's ability to defend Ms Iosefa's claim.

[17] As to the Evidence Amendment Act (No 2) 1980, the relevant section contemplates the admissibility of documentary hearsay evidence in circumstances where the maker of the statement had personal knowledge of a fact or opinion which would be admissible by direct evidence and undue delay or expense would be caused by obtaining this evidence.

[18] Canterbury Hospitality's submission is that that is precisely the case in the instant proceedings as in respect of two of the witnesses, their location has simply not been able to be established but they were assumed to be overseas and in one case, the witness is known to be overseas and known to be in a particular jurisdiction but undue delay or expense would still have been required in order to have that witness give their evidence.

[19] Clearly, both the representatives and the Authority would have preferred to have those three witnesses physically available to give oral evidence. However, that was not possible and I accept the argument of Canterbury Hospitality that it would be unjust and inequitable to exclude the documentary hearsay evidence of the three witnesses concerned, particularly in the case of the two former staff members, whose evidence in my opinion was important to the disposition of the matter.

[20] I accept that I need to treat with caution evidence that is not able to be tested in an investigation meeting but I have decided, nonetheless, to allow this evidence in on the footing that it helps to give a picture of the circumstances surrounding the dismissal.

The process

[21] Ms Iosefa says that the process in relation to both of the disciplinary meetings was unfair and unreasonable. It is appropriate to deal with each of the disciplinary meetings in turn.

[22] As to the first meeting, Ms Iosefa's own evidence is that she was called into the meeting on 21 July 2005 and was told that the meeting was to discuss her *giving away drinks*. Her evidence is that she thought that related to a particular incident the week before but when she actually got into the meeting, she was confronted with an allegation that she had been giving away drinks to her boyfriend and his friends. She says that she was *surprised and unprepared for this allegation*. It is, nonetheless, an allegation of *giving away drinks* which is what she was told the meeting was about.

[23] Mr Jimmy Summerfield was the duty manager on the evening Ms Iosefa was supposed to be giving away drinks. He was one of the witnesses Canterbury Hospitality would have called if they had been able to. His file note, which I note is undated, and on which of course it has not been possible to question him, indicates that another staff member *caught* Ms Iosefa giving away drinks. Mr Summerfield goes on to recite that he had not given permission for that to happen and that after speaking to his general manager, Ms Anne-Marie Nadeau, Mr Summerfield rang Ms Iosefa and asked her to attend a meeting to discuss *a number of situations that happened (sic) on Saturday night*. He says he told Ms Iosefa that she could bring a representative if she liked. He records that Ms Iosefa asked him if she had to bring a representative and he said allegedly it was a matter for her.

[24] Ms Iosefa's version of the exchange with Mr Summerfield is different. She clearly had difficulty remembering the telephone conversation with Mr Summerfield but she seemed certain that Mr Summerfield had not told her she could bring a representative to the meeting.

[25] Ms Iosefa says that the employer parties (Ms Nadeau and Mr Summerfield) spoke to her in generalities about the giving away of drinks and she thought that they were talking about another incident involving a regular client of the bar who had come in without money and who Ms Iosefa

had given a drink to, on the basis that she would pay the money back later, which apparently she did.

[26] Accordingly, when Ms Iosefa was invited to explain herself, she says she owned up believing that she was pleading to the allegation involving the regular patron, rather than the allegation involving the boyfriend.

[27] Ms Nadeau, who gave evidence at the investigation meeting and who, of course was present at Ms Iosefa's disciplinary meeting, was clearly surprised by Ms Iosefa's explanation that she was in fact pleading to something other than the allegation actually levelled at her. Ms Nadeau said that Ms Iosefa had not made it clear, although allegedly she had plenty of opportunity to do so, that the parties were, according to Ms Iosefa, at cross purposes.

[28] Ms Iosefa's explanation is I find somewhat incredible because it seems to fly in the face of, amongst other things, her own evidence where she clearly acknowledges that she was confronted with an allegation about giving drinks to her boyfriend. Given that she agrees she assented to the allegation and did not quarrel with Canterbury Hospitality's evidence that she had *nodded her head* to the allegation, it is difficult to see how her explanation is credible.

[29] On the subject of the advice to Ms Iosefa to bring a representative, Ms Nadeau says that she made it absolutely clear to Mr Summerfield, when he talked with her before ringing Ms Iosefa, that he was to remind Ms Iosefa of her right to have a representative present. Ms Nadeau said that she had a high regard for Mr Summerfield and she thought it inconceivable that he would not have done precisely what he was told.

[30] On the face of it, this was a disciplinary meeting to consider a straight forward allegation that Ms Iosefa had been seen giving drinks away. Ms Iosefa said that she had it in her mind that the issue involved a longstanding patron but yet she acknowledges in her own evidence that the issue that was put to her was giving away drinks to her boyfriend and she further seems to accept that she accepted the allegation as presented to her. Certainly, the record of the meeting, which is signed by Mr Summerfield and Ms Nadeau and which clearly was written by Ms Nadeau, says inter alia: *I told Jan Hai what had been seen, she did not deny it!*

[31] The evidence about whether Ms Iosefa was offered the opportunity to bring a representative is equivocal. She herself does not remember that offer being made and Mr Summerfield is not available to answer questions. His written undated record suggests that that offer was made and Ms Nadeau says that she told him to make it clear that a representative was available.

[32] I am inclined to the view on the balance of probabilities, that this first meeting was not fundamentally flawed. I accept there is an issue about whether it was absolutely clear to Ms Iosefa that she could have a representative present but I am not persuaded that the allegation she was confronting was not put to her fair and square and that she was not given a reasonable opportunity to dispute it, if she chose to. I do not accept her evidence that in assenting to the allegation, she was somehow thinking about another different allegation as her own evidence makes clear the allegation the employer was concerned about, was actually put to her.

[33] That leaves us to consider the final disciplinary meeting which resulted in Ms Iosefa's dismissal, the earlier meeting having resulted in a final warning. The two are certainly related because Canterbury Hospitality's evidence was that they were, to some extent anyway, influenced in the decision to dismiss by the fact that Ms Iosefa was already on a final warning and that that final warning had been administered very recently.

[34] On 29 July 2006, Ms Iosefa was summoned to another disciplinary meeting. Her own evidence is that she was told that the meeting was a disciplinary meeting, that it was to discuss events that happened the previous weekend when she was working, that she was able to have a representative present but she says she was not told that the meeting could result in her dismissal.

[35] Ms Iosefa also alleges that Mr Summerfield, who required her attendance at the meeting, deliberately minimised the importance of the meeting by doubting out loud to Ms Iosefa whether she needed to have a representative present. That particular allegation is vehemently denied in the documentary hearsay evidence put in by Mr Summerfield. It is difficult, given that Mr Summerfield is not available to give evidence, to form a view about which recollection of events is more likely but I incline to the view, based particularly on Ms Nadeau's evidence, and her obvious regard for Mr Summerfield, that it is more likely that Mr Summerfield did not make the remarks attributed to him than that he did.

[36] The allegation that Ms Iosefa confronted on this occasion was that she had been absent from the bar on the previous Saturday night for an unreasonably long period of time when she was asked to lodge cash takings in the safe and that she was discovered in a compromising position in the office where the safe was installed in company with her boyfriend.

[37] It is clear that there is no impropriety in Ms Iosefa leaving her workplace to lodge the money in the safe; she was asked to do that by her employer. The impropriety (if any) relates to the time that she took to attend to that assignment and the fact that she chose to do it in company with her boyfriend who was not a member of staff.

[38] Ms Iosefa's explanation for taking her boyfriend upstairs to the office whilst she attended to her duties in lodging the money in the safe, was that she did it in order to prevent her boyfriend from becoming involved in an altercation either in the bar or immediately outside it. Ms Iosefa says she had a reasonable apprehension that her boyfriend might become involved in this altercation unless she removed him from the situation.

[39] Accordingly, her evidence is that she told her boyfriend to accompany her upstairs to the office whilst she deposited the cash. Ms Iosefa said that she was away from the bar for 5 minutes; her boyfriend says that they were away for 10 minutes; Canterbury Hospitality through its witnesses say that the pair of them were still upstairs after 10 minutes, then various co-workers tried to see what was going on.

[40] I am satisfied that the evidence suggests that Ms Iosefa was absent from the bar for more than 10 minutes because I accept the evidence from Canterbury Hospitality (in particular, Mr Tapili) that after 10 minutes of absence, colleagues started to look for Ms Iosefa.

[41] Ms Nadeau says that the explanation tendered by Ms Iosefa for her boyfriend being with her when she was lodging the cash into the safe, was both *surprising* and *ridiculous*. Ms Nadeau said in her evidence that she had told Ms Iosefa at the disciplinary meeting that having her boyfriend in the employer's office was *not acceptable* and that the fact that there was a large amount of cash there as well, made the boyfriend's presence *significantly worse*. The evidence given to the Authority was that Ms Iosefa was observed in the office kissing her boyfriend *passionately*. The witness who gave that evidence also gave evidence that he reported what he had seen to Mr Summerfield, who subsequently participated in the disciplinary meeting on 29 July 2004. There was criticism from Ms Iosefa that the statements, such as the one I have just referred to, were made in contemplation of the Employment Relations Authority investigation meeting and were not necessarily available to the employer at the time the decision to dismiss was taken.

[42] That may well be so but the evidence of the particular witness whom I referring to, Mr Tapili, is not only that he saw this intimate behaviour but that he reported it to Mr Summerfield. It follows that, given Mr Summerfield was by common consent at the disciplinary meeting, the employer knew about the behaviour complained of at the time of the meeting.

[43] Ms Iosefa also complains that Mr Tapili and another person who did not give evidence, but left a hearsay documentary record of what she had seen at the time, could not actually have seen into the office because of the physical configuration of it. Mr Tapili, who did give evidence, satisfied me by his evidence that he could in fact see into the office and see what Ms Iosefa and her boyfriend were doing.

[44] I have no reason to doubt his evidence and I have no reason to doubt that he passed the intelligence on to Mr Summerfield as he said in evidence he did. As a former work colleague of Ms Iosefa, I cannot imagine why Mr Tapili would make up a colourful story like this and, given that he is no longer working for the Canterbury Hospitality, there is little reason for him to *guild the lily* for the benefit of the employer.

[45] In any event, Mr Tapili's evidence is broadly consistent with the written record of the disciplinary meeting. That written record is contained in two separate documents, the first of which is a handwritten template sheet entitled Staff Discipline and, the second of which is a typed record (in the nature of a brief transcript) of the disciplinary meeting. Both documents are signed by Ms Nadeau and Mr Summerfield.

[46] The template document includes an opening statement in the following terms:

> *This is a disciplinary meeting that could ultimately lead to your dismissal. Q. Do you understand what this means and the implications of what I am saying? A. Yes (handwritten). Q. Would you like a personal witness present? A. No (handwritten).*

[47] The template document then goes on to provide a space where the employer identifies the reason for the meeting and that is described as inter alia …*employee was caught in a manager's office, with her boyfriend with money from the tills, she was not on a break!*

[48] The typewritten transcript traverses the same ground but in slightly more detail and includes the following passage referring to Ms Iosefa being …*locked in his (Mr Summerfield's) office in a most delicate situation with her boyfriend, the money sitting casually beside her*.

[49] Further down the transcript, there was a note to the effect that the meeting had commenced with a statement that *the discussion could lead to a written warning or dismissal*.

[50] Both documents refer to Ms Iosefa needing to *comfort* her boyfriend.

[51] There is dispute about whether the cash was actually counted and put away in the safe or not with Ms Iosefa's evidence being that she proceeded to the office and briskly went about the business of counting the cash, presumably without engaging with her boyfriend. Canterbury Hospitality's evidence (at least by implication) is that the cash was not dealt with, at least up until the point at which co-workers peered into the office to see what was going on. Ms Iosefa denied any impropriety with her boyfriend but eventually agreed that she might have given him a hug.

[52] I am satisfied that Canterbury Hospitality were apprised of an issue that had, as its component parts, the following elements:

(a) Ms Iosefa had been away longer than she ought to have been for the job of banking the cash in the safe; and

(b) Ms Iosefa had taken her boyfriend with her to the office; and

(c) Ms Iosefa had been found in a compromising situation with her boyfriend in the office

[53] I am satisfied that those three elements were properly put to Ms Iosefa at the disciplinary meeting.

[54] It appears to me that the employer's decision to dismiss may well have been based on all three elements, the length of time, the fact that the boyfriend was present in a management office and the alleged intimate behaviour.

[55] I have not found it possible to make a definitive judgement as to whether the alleged intimate behaviour took place or not but I have reached a conclusion about the reasonableness or otherwise of the employer's actions. Ms Iosefa complains that the employer conducted no investigation and simply considered her explanation and then announced after a period of reflection that she would be dismissed.

[56] In my opinion, it was available to the employer to do precisely that in this situation. This was a situation where two of the three significant facts (the time taken and the presence of the boyfriend) were not disputed by the employee. The only element that the employee disputes is whether she was doing anything intimate with the boyfriend or not. She does not deny the boyfriend was there and she does not deny that she was away for longer than would have been the case if she did not have the boyfriend with her. In those circumstances, it is difficult to see what further inquiries the employer could usefully make.

[57] I am satisfied that it was available to a fair and reasonable employer to reach the conclusion that Ms Iosefa had, by her admitted conduct, committed serious misconduct by a single but gross error of judgement in allowing herself to be distracted from her responsibilities to her employer by the presence of her boyfriend and, in particular, by allowing her boyfriend to join her in a management office with a significant amount of the employer's money.

Determination

[58] I have reached the conclusion that the procedure followed by the employer was the procedure that a fair and reasonable employer would follow and that the decision to dismiss was a decision that was available to such a fair and reasonable employer, applying the test required by the law prior to the enacting of s.103(a) of the Employment Relations Act 2000.

[59] It follows that Ms Iosefa's claim fails.

Costs

[60] Costs are reserved.

James Crichton
Member of Employment Relations Authority