

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

File Number 5033871  
Determination Number  
WA113/07

BETWEEN                   ALEXANDRA MARTIN  
                                  Applicant

AND                         LIFEBOAT INVESTMENTS  
                                  LIMITED  
                                  Respondent

Member of Authority:     GJ Wood

Representatives:         Graeme Ogilvie for Applicant  
                                  Costas Matsis for Respondent

Investigation Meeting:   17 July 2007 at Wellington

Submissions received:    By 31 July 2007

Determination:            17 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Ms Alex Martin, claims that she was unjustifiably dismissed by the respondent (Lifeboat or the tavern) without notice or even any investigation, for allegedly using company product and finances for her own use. She claims compensation for injury to her feelings, lost remuneration, costs and the reimbursement of legal expenses following the involvement of the Police in the matter.

[2] Lifeboat, while accepting that there was no formal investigation, at least one involving Ms Martin, claims that she was justifiably dismissed because of her failure to account for Lifeboat's money and product.

## The Facts

[3] Mr Gary Ruane is a successful businessman based in the Hutt Valley. In March 2005 he set up the respondent company to run the Lifeboat Tavern in Eastbourne. The tavern runs in conjunction with a restaurant. As the two premises are not separated, restaurant staff have access to the till and the tavern's products.

[4] Mr Ruane bought the tavern not only as a business venture, but also to provide employment for his sister, who was to be the General Manager. This was because his sister had had a number of difficulties in life, including imprisonment for theft as a servant and the recent suicide of her husband. Unfortunately, it was clear from the evidence before the Authority that his sister did not repay this act of generosity, but rather the reverse. Not only did she tell staff, including Ms Martin, that the business was effectively hers to run as she liked, but she also appears to have utilised the income and stock of the business as if it was her own so as to improve her own lifestyle. That is a matter that may be formally determined by other Courts in due course, according to Mr Ruane.

[5] Suffice to say that soon after discrepancies in Lifeboat's finances were raised with Mr Ruane's sister she attempted suicide and left the business. Mr Ruane and his financial controller, Ms Pauline Wells, then discovered that the discrepancies were even more serious than they had originally envisaged and raised with Mr Ruane's sister.

[6] Ms Martin was employed by Mr Ruane's sister in mid April 2005, originally as a part-time bar tender. Mr Ruane's sister and Ms Martin got on well and Ms Martin was soon promoted to Duty Manager, in effect second in charge of Lifeboat. Ms Martin and Mr Ruane's sister also socialised together outside of work hours and at one point Mr Ruane's sister provided Ms Martin with temporary accommodation when she needed it.

[7] Towards the end of 2005, Mr Ruane began having serious concerns about Lifeboat's accounts and its finances. His concerns were based around stock irregularities, cash shortages and accounts not balancing. He raised some of these concerns with his sister in January 2006, but was not satisfied with her answers and therefore decided to get Ms Wells to investigate the tavern's finances further by way of an audit.

[8] One issue that had earlier been raised with Mr Ruane's sister was Lifeboat's account at the shop across the road being used for what appeared to be personal purchases by staff, such as cigarettes and ice creams. Ms Wells had informed Mr Ruane's sister that this practice was not acceptable, but there was no evidence, however, that Mr Ruane's sister ever passed that instruction on to other staff, including Ms Martin. Ms Martin claimed that Mr Ruane's sister authorised all

purchases at the shop on the Lifeboat account and that she would pay back the sums owing to her each week.

[9] On 1 February Mr Ruane and Ms Wells undertook a stock take at Lifeboat. They discovered that compared with the stock take undertaken by Mr Ruane's sister 28 days earlier, over \$2,000 in product was missing. Mr Ruane raised this with his sister later that day. Mr Ruane's sister did not react well to the close scrutiny that Lifeboat's finances were being put under and she left, never to return. In fact, Mr Ruane's sister attempted suicide that evening and was discovered by Ms Martin. As soon as she recovered, Mr Ruane's sister left the district, again never to return.

[10] Mr Ruane called the staff together the next day and noted that they would all have to pull together to help the business, at least in the interim. Ms Martin, as the next most senior employee, effectively took charge of the tavern from that point.

[11] Mr Ruane and Ms Wells also took an even closer interest in the tavern from then on. Although they were not involved behind the bar, they assisted in administrative matters and continued with their investigations into the financial issues facing Lifeboat.

[12] Ms Martin was aware that Ms Wells was looking at various financial and administrative issues in the business, as well as advertising for additional staff. For example, before Mr Ruane's sister left Ms Wells had raised an issue about the veracity of Ms Martin's timesheet, which she agreed to change.

[13] Ms Martin became aware that an audit was being undertaken in February (after Mr Ruane's sister left). That same week she arranged for \$100, being what she thought was owed on the shop account that week, to be paid to Mr Ruane's wife. For some reason Ms Martin did not give this money to Ms Wells or Mr Ryan.

[14] I note here that purchases at the shop by staff for non-work related expenses was one of several issues Ms Wells identified in her time at the tavern. The other most serious concerns involved eftpos transactions being processed without a sale being run up on the till, fraudulent vouchers and stock unaccounted for.

[15] On 10 February Ms Wells and Mr Ruane were told by another employee that she had observed Ms Martin hand across 12 bottles of Heineken beer to customers without evidently receiving payment for all them. As a result, they conducted a stock take which confirmed to them that 5 bottles of Heineken were in fact unaccounted for. They also discovered that over the period

since Mr Ruane's sister had left, some 67 bottles of Heineken were not accounted for either in the usual ways, i.e. through sales on the till or being written off through the promotions account.

[16] Given Mr Ruane's concern about the irregularities he had already discovered, he was very angry about this matter. As a result Mr Ruane and Ms Wells went to the City Council to ascertain how to obtain temporary licensed premises managers certificates. This was clearly because they no longer trusted Ms Martin to run the tavern.

[17] That evening (10 February) Ms Wells, Mr Ruane and various business associates went to the tavern for a client evening, based around watching a Super 14 rugby match. Ms Martin was in charge of the tavern that night.

[18] Over the course of the evening Mr Ruane had a bit to drink, although I do not accept Ms Martin's evidence that he was so intoxicated that he was slurring his words. Mr Ruane is an extremely tall and heavily built man and I do not consider, even on the basis of the amount of liquor Ms Martin suggests he had drunk, that he would have got into such a state over a 3 or 4 hour period.

[19] Mr Ruane was also became concerned about the treatment of another staff member who had been asked to finish up early to be replaced by one of Ms Martin's friends. I find that Ms Martin got a negative 'vibe' from Mr Ruane and that as a result Ms Martin's treatment towards Mr Ruane and his guests was less than ideal. Examples were that she was not particularly polite to the client group, took half finished drinks from their table and sought to close the tavern early when there were still customers there.

[20] This was the final straw for Mr Ruane, who approached her and asked her whether she was happy with everything she had done at the tavern. Ms Martin replied in the affirmative. There was then a discussion about whether Mr Ruane was accusing her of stealing, to which he replied that it was not appropriate to put personal items on the company account without authorisation. Mr Ruane also asked Ms Martin whether, if there was a camera there, it would show anything serious.

[21] Mr Ruane told Ms Martin that he did not have time for people who stole from him and demanded that she hand over her keys and leave. As Mr Ruane stated in evidence, he overreacted on the night to what he felt were personal attacks on him by Ms Martin, e.g. by not respecting his role as the owner, but the real reason that he dismissed her was for taking money and goods from the tavern without authorisation.

[22] Ms Martin left in shock and in tears. She asked her mother to come and get her, even though she was only 5 minutes walk from home. She then sent a text message to Ms Wells asking

for a meeting to discuss any issues Mr Ruane might have. Ms Wells' response was that there was no need for a meeting.

[23] Ms Martin did not return the keys as promised and the tavern was soon afterwards subject to a quite incorrect claim that it was being run by someone without a manager's certificate and was trading outside licensed hours. The parties made a number of attempts later to meet to discuss issues, but no doubt because Ms Martin had already been dismissed and that situation was not going to change, no such meeting took place.

[24] Needless to say, Ms Wells and Mr Ruane carried on investigating the financial irregularities which had plagued the tavern. In April a statement was obtained from Mr Ruane's sister, in which she appeared to admit giving away free alcohol, using the store for personal purchasers and taking money from the float. She also appeared to implicate Ms Martin for doing the same thing, but independently of her. Mr Ruane's sister has later recanted from that statement, despite it being signed by her and witnessed by a detective sergeant in the Police.

[25] The Police originally charged Ms Martin with various criminal offences based on these allegations, but those charges had been withdrawn before the investigation meeting. The charges were said to be withdrawn without prejudice to further information becoming available. It was Mr Ruane's and Ms Wells' evidence that as a result of further information they have discovered in relation to the fraudulent use of vouchers to clear money owing on client accounts, the Police may soon be charging Ms Martin again.

[26] Ms Martin was out of work for three weeks until she found another job as a Bar Manager, but this time in Wellington.

[27] I am not satisfied to the requisite standard of proof, because Ms Martin made one payment to Ms Ruane's wife and may well have made other payments to Mr Ruane's sister, that the large number of undoubtedly personal items rung up on the tavern's account at the store by Ms Martin, resulted from her deliberately taking product without authorisation.

[28] I accept that a number of the eftpos transactions where there were no resulting sales being rung up on the till, took place when Ms Martin was the only staff member of the tavern rostered on duty (although many were not). I am not satisfied to the level of proof required, however, that Ms Martin was personally responsible, as a number of restaurant staff had access to the till as well as her.

[29] While Mr Ruane and Ms Wells also had good cause to be concerned about the loss of stock and the apparent giving away of Heineken beer by Ms Martin on 9 February, I am again not satisfied that there is sufficient proof for me to be satisfied that Ms Martin was responsible in a culpable sense, because the employee making the allegation against Ms Martin did not give evidence and it was unlikely that she would have been able to monitor the sales of the Heineken over an evening as closely as she said. Furthermore, because of the number of staff with access to the bar, including restaurant staff, and the possibility of Heineken being mis-labelled as other types of beer, I conclude that there is insufficient evidence for Ms Martin to be held to account for all the loss of missing stock over the period after Mr Ruane's sister left.

[30] Finally, while I accept that there were fraudulent vouchers raised in the tavern, Ms Martin gave unchallenged evidence that Mr Ruane's sister was the only one to deal with vouchers.

[31] For the reasons given below relating to the degree of certainty required, with such serious charges as theft are being levelled against Ms Martin, I conclude, on the balance of probabilities, that none of those claims can be sustained by the Authority. That is not to say, however, that the Police may not draw different conclusions. They are able to pursue these matters in their own right, and may have a lot more information than was supplied to the Authority.

[32] The parties have been to mediation but have been unable to resolve the matters between them. It therefore falls to the Authority to make a determination.

### **The Law**

[33] The test for unjustifiable dismissal is set out in s.103A of the Act. Justification must be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[34] In discussing this test, it was held in *X v. Auckland District Health Board* (unreported, Colgan CJ, AC10/07, 23 February 2007 at para.[97]):

*... that there be two separate considerations, first of what the employer did (the substantive dismissal or justification and the grounds for it) and, second, how the employer acted (the process leading to those outcomes). In both cases, substance and procedure, the Court and Authority must be satisfied that what the employer did and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or disadvantage occurred ... So even if relevant events may later come to light or the employer may consider that there were other grounds for the dismissal based on things known at the time, these cannot affect considerations of justification for dismissal.*

[35] The standard a fair and reasonable employer is to be held to as to how it acted is set out concisely in *NZ Food Processing IUW v. Unilever* [1990] 1 NZILR 35 at 46 as follows:

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
3. *An unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre determination and uninfluenced by relevant considerations.*

*Failure to observe any of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of a disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standard of a fair minded but not over indulgent person.*

[36] In assessing both justification and the facts upon which the Authority bases its determination, account must be taken of the seriousness of the allegations made against any party or witness. This is because the more serious the allegation the more convincing proof of it must be, because of the potential consequences for those upon whom the allegations are being made. This was highlighted in *Kostic v. Dodd & Milligan* (unreported, Couch J, CC14/07, 11 July 2007) at para.79 where it was held:

*In making a finding of fact on this issue, I have regard to the decision of the Court of Appeal in Whanganui College Board of Trustees v. Lewis [2000] 1 ERNZ 397 where, at para.[20] they described the standard of proof to be applied in employment proceedings as "the balance of probabilities flexibly applied according to the gravity of the matter".*

*That description was specifically used in Lewis to describe the standard of proof applicable to justification of a dismissal but it is equally applicable to proof in the Employment Court of other facts relating to a personal grievance. In this case, the allegation that Mr Kostic assaulted Mr Dodd is one of considerable gravity. Assault is a crime and regarded as morally reprehensible. To find such an allegation proved, I must be clearly satisfied on the balance of probabilities that it occurred.*

## **Determination**

[37] As can be seen from the above, how the tavern acted was not how a fair and reasonable employer would act when pursuing genuine concerns about missing stock and money. Mr Ruane

conceded that, but quite genuinely, I find, does not consider that he has treated someone whom he believes has stolen from him unfairly.

[38] The difficulty in this analysis is, as I have set out above, that while Mr Ruane's concerns are genuine and he has reasonable grounds for being concerned, the tavern has been unable to satisfy me that Ms Martin has been guilty of any of the allegations raised against her. Combined with the absolute failure to apply any disciplinary process before Ms Martin was dismissed, it therefore follows that she has been unjustifiably dismissed.

[39] In the absence of any proven misconduct by her it is also clear that she has not contributed to the situation which gave rise to the grievance. While her behaviour on the night of 10 February may have warranted a strong reprimand and counselling, her behaviour that night was not the reason she was dismissed.

[40] Ms Martin was in shock and has been unable to put this matter behind her. On the other hand, there was no independent evidence to support her claim for \$15,000 compensation and she got another job three weeks after she was dismissed. I consider that in all the circumstances compensation of \$4,000, plus three weeks lost wages (\$1,800 gross) is appropriate. Ms Martin also claims for costs incurred in defending the criminal charges laid against her. Such costs are not recoverable in these circumstances. The criminal charges did not result from the personal grievance, but rather by an independent decision by the Police to charge Ms Martin. Such costs are to be dealt with under the Costs in Criminal Cases Act 1967.

[41] I therefore order the respondent, Lifeboat Investments Limited, to pay to the applicant, Ms Alexandra Martin, the sum of \$4,000 compensation under s.123(1)(c)(i) and \$1,800 gross in lost remuneration.

### **Costs**

[42] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**