

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 183
5362222**

BETWEEN CARLA McKENZIE
Applicant

AND DAWSONS CATERING
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: David Law, Advocate for Applicant
Andrew Swan, Counsel for Respondent

Investigation Meeting: 19 April 2012 at Auckland

Submissions received: 23 April 2012 from Applicant and Respondent

Determination: 31 May 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Carla McKenzie, was employed by Dawsons Catering Limited (“Dawsons”) as Operations Manager for the Cloud, a functions venue established and operating throughout the period of the Rugby World Cup during September and October 2011. Ms McKenzie was employed in accordance with a fixed term employment agreement for the period 22 August until 28 October 2011.

[2] On the evening of 5 October 2011 Ms McKenzie, who was off duty, went to socialise at the Cloud. Ms Sarah Biel, who was acting as the Operations Manager that evening, had reported to Ms Robyn Maguire, Human Resources Manager for Dawsons, that Ms McKenzie had been in a state of intoxication and acting inappropriately.

[3] In response, Ms Maguire and Mr Martin Smith, Sales Director of Dawsons and Ms McKenzie’s Manager, had attended the Cloud and carried out an investigation into Ms Biel’s allegations relating to Ms McKenzie’s inappropriate behaviour.

[4] As a result of the investigation, Ms McKenzie was placed on suspension on 6 October 2011, and following a meeting with Mr Alex Ross, a Director of Dawsons, had been dismissed on the basis of serious misconduct.

[5] Ms McKenzie claims that she has been unjustifiably dismissed by the Respondent, Dawsons Catering Limited (“Dawsons”). Ms McKenzie also claims that there had been disparity of treatment.

[6] Dawsons denies that Ms McKenzie was unjustifiably dismissed and claims that Ms McKenzie was justifiably dismissed in accordance with a fair procedure.

Issues

[7] The issues for determination are whether:

- Dawsons had substantive justification for dismissing Ms McKenzie.
- Dawsons followed a fair procedure in dismissing Ms McKenzie.
- There was disparity in the treatment of Ms McKenzie such as to render the decision to dismiss her one which was not available to Dawsons as a fair and reasonable employer.

Background Facts

[8] Dawsons had obtained a catering contract at the Cloud. Dawsons employs approximately 80 employees; however this number increased to a maximum of 200 employees during the Rugby World Cup period. These additional employees were employed on either fixed term employment agreements, or on a casual basis.

[9] Ms McKenzie, who was employed to co-ordinate the operation of the Cloud in conjunction with Ms Biel, commenced employment with Dawsons on 22 August 2011 and was provided with a written fixed term employment agreement in accordance with which her employment would terminate on 28 October 2011.

[10] Ms Biel was a permanent employee of Dawsons and worked as the Administration Manager, but had additional responsibilities during the Rugby World Cup period as part-time Operations Manager at the Cloud.

[11] Ms Biel said, and Ms Maguire confirmed, that on the evening of 28 August 2011 Ms McKenzie had assisted her to co-ordinate putting copies of company policies and procedures, together with other information, into green folders for use at an impending induction meeting for newly engaged employees who would be working at the Cloud.

[12] Ms Biel said that at the group induction meeting held at the Cloud she had explained the company policies and procedures, and the employees were each provided with a green folder containing copies of the policies and procedures together with other documents. Ms Biel said that the employees were asked to sign and return the policies.

[13] Ms Biel said that Ms McKenzie had been present throughout the whole presentation. Ms McKenzie, who denied that she had been present throughout the whole presentation, agreed that she had been given a green folder and that she had been told to read the policies. However Ms McKenzie said she had been told to pass the folder on and did not recall being asked to sign and return the policies. After the Cloud had opened, Ms McKenzie said that she had been too busy to read the policies.

[14] On the evening of 5 October 2011 Ms Biel, who was acting Operations Manager that evening, said Ms McKenzie, who was off-duty, had arrived at the Cloud in an intoxicated state.

[15] Ms Biel explained that she had been on duty in the media lounge when one of the security guards had been to see her to ask if Ms McKenzie could enter the media lounge. Ms Biel said that the security guard had complained to her that Ms McKenzie had yelled at and abused him when he had denied her access.

[16] Ms Biel said that she had told the security guard that Ms McKenzie was not to be admitted as she was not appropriately dressed; however subsequently a client at the Cloud had insisted that Ms McKenzie be allowed access to the media lounge.

[17] Ms Biel said a short time later she had been in the kitchen area when Ms Shandi McNabb, another employee, had informed her that Ms McKenzie had demanded she serve her with a drink, however Ms McNabb had refused in accordance with the licensing guidelines on the basis that Ms McKenzie was intoxicated.

[18] Ms Biel explained that she had become concerned because on a previous occasion in September 2011 when she had again been acting as Operations Manager, Ms McKenzie had

[19] been at the Cloud in her off-duty time, and intoxicated. On that occasion Ms Biel said that Ms McKenzie had been confrontational, abusive and aggressive. Ms Biel said that she had been concerned that a similar situation would develop, and she had called Ms Maguire for assistance.

[20] Ms Maguire said that on the previous occasion, which had occurred on 27 September 2011, she and Mr Smith had both spoken by telephone to Ms McKenzie. Ms Maguire said Ms McKenzie had been argumentative in response to Mr Smith, and so she had then spoken to Ms McKenzie. Ms Maguire stated that she had asked Ms McKenzie to leave the Cloud, and had made it clear that she should do her socialising away from the Cloud in the future.

[21] Ms Maguire said that on this second occasion she and Mr Smith had gone to the Cloud in response to Ms Biel's concern. When they had arrived, Ms Maguire said Ms McKenzie had already left, however she and Mr Smith interviewed four employees who were at the Cloud, and they had also spoken to the security guard regarding the alleged verbal abuse he had received from Ms McKenzie.

[22] Ms Maguire said following the staff interviews, they had decided that the allegations made concerning Ms McKenzie required further investigation, and the following morning she and Mr Smith returned to the Cloud and met with four more employees.

[23] Ms Maguire said that during the interviews the other employees had made various allegations about Ms McKenzie's behaviour, including drinking on duty, opening bar accounts without authorisation and abusive behaviour towards them.

[24] Ms Maguire said that whilst she carrying out the interviews Ms McKenzie had arrived at the Cloud, although she was not expected to start work until 2 p.m. Ms Maguire said she had asked Ms McKenzie to leave and return at 2 p.m., but Ms McKenzie had refused to do so and had started yelling at Mr Smith.

[25] Ms Maguire said she had told Ms McKenzie that this left her with no alternative but to suspend her. As the interviews had not concluded by 2 p.m., Ms Maguire said she had telephoned Ms McKenzie and advised her that the suspension was to continue and it would be on full pay.

[26] Ms McKenzie said she had been informed that the suspension was connected to an investigation that she had been drunk whilst on duty and to allegations of abuse, but that the

suspension had not been confirmed in writing despite her requesting this in three emails, nor had she been given any indication of how long the suspension was to last.

[27] Ms McKenzie subsequently engaged Mr Law to represent her, and he had made contact with Mr Ross on Saturday 8 October 2011. Mr Ross said he had informed Mr Law that the allegations concerning Ms McKenzie, which included being intoxicated on the premises, were extremely serious, and that once the investigation was completed, a disciplinary meeting would be held.

[28] Mr Law confirmed that, on being informed about the allegations which included being drunk, drinking on duty, and being abusive to customers and staff, he had asked for them to be confirmed in writing. Mr Law stated that Mr Ross responded by saying that all the issues would be raised at a meeting yet to be confirmed. Subsequently Mr Law said he had been informed that the meeting would take place on Monday 10 October 2011.

[29] Ms McKenzie, Mr Ross, Mr Law and Mr Swan, who was representing Dawsons, were present at the meeting on 10 October 2011.

[30] Ms McKenzie said Mr Ross had not informed her at any stage during the meeting on 10 October 2011 that it was a disciplinary meeting, or that dismissal was a possible outcome, although she said she had appreciated from the fact of her suspension that being 'drunk on duty' was a serious allegation. Ms McKenzie said she had believed the meeting was to have been an investigation meeting to 'follow up' on the original allegation and on a number of other serious allegations which had come to light following Dawson's investigation.

[31] Mr Ross said that in addition to his having informed Mr Law by telephone on 8 October 2011 that it was to be a disciplinary meeting, he had also informed Ms McKenzie of this fact at the commencement of the meeting and additionally had informed her that her job was in jeopardy as a consequence of the serious nature of the allegations.

[32] During the course of the meeting Mr Ross said he had put a number of questions to Ms McKenzie. The notes of the meeting included the following questions and answers:

Question – Have you ever drunk alcohol while on duty?

Answer – Yes, but only when offered or consented to by senior staff as has been the case with all bar staff.

Question – Have you ever been drunk while on duty?

Answer – No, never. I have never been drunk while on duty.

Question – Have you ever been drunk while off duty?

Answer – Yes

Question – Have you ever been drunk while off duty but on site?

Answer – Yes.

Question – It has been alleged that you were abusive to security contractors, what do you have to say to that?

Answer – No, never.

Question: - It has been alleged that you used the radio while on duty in an inappropriate manner, what do you have to say about that?

Answer – Yes I did. I had called for a cart to take me to my car as security had offered to do so previously before. I was talked to by Queens Wharf operations after my night off duty drinking that I was not to do it again as it radios the police as well. They were happy to leave it there with a friendly warning.

Question – Did you open up an account with the company and who authorised you to do so?

Answer – Yes I did and no one authorised me to do so.

[33] Mr Ross said that after asking and receiving the responses to the questions, he had called for an adjournment so that Ms McKenzie and Mr Law could consider her position, and so he could give due consideration to her responses.

[34] Mr Ross said that the adjournment had ended when Ms McKenzie and Mr Law returned to the meeting after a five minute interval. Mr Ross said neither Ms McKenzie nor Mr Law had requested a further adjournment or further information. On this basis Mr Ross said he had advised Ms McKenzie that in the circumstances her employment was being terminated with immediate effect.

[35] The dismissal decision had been confirmed in a letter dated 11 October 2011 which stated:

The grounds for Carla's termination was serious misconduct which included:

- 1. Drinking on duty.*
- 2. Being intoxicated on site whilst off duty.*

3. *Inappropriate and unprofessional conduct whilst using a two way radio.*
4. *Unauthorised opening of a bar account for personal use.*

Determination

The Law

[36] The decision to dismiss Ms McKenzie on the basis of serious misconduct, must be a justifiable decision in accordance with the test as set out in s 103A of the Employment Relations Act 2000 (“the Act”). Section 103A of the Act states:

S103A Test of Justification

- i. *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. *The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

Did Dawsons have substantive justification for dismissing Ms McKenzie?

[37] Dawsons policies regarding alcohol were set out in the Code of Conduct included in the green folder provided to all employees at the induction meeting at the Cloud. Ms McKenzie did not sign or return her copy of the Code of Conduct, however she did confirm that she had received a green folder and been told to read it.

[38] I accept Ms Biel’s evidence as supported by that of Ms Maguire that Ms McKenzie had assisted in the compilation of the green folder contents. I also accept Ms Biel’s evidence that Ms McKenzie was present throughout the induction meeting when the policies and procedures were explained to the new employees.

[39] I am satisfied that Ms McKenzie was aware of the existence of the Code of Conduct and other policies and procedures. Moreover in her position as Operations Manager of the Cloud with responsibility for ensuring that the employees responsible to her acted in accordance with Dawsons policies and procedures, I consider that Ms McKenzie would have been familiar with them.

[40] Clause 9 of Ms McKenzie's employment agreement states: "*The Employee must abide by the rules set out in the Employer's House Rules. A copy of the House Rules is available from the Employer.*" I accept that the reference to House Rules referred to the policies and procedures, including the Code of Conduct, and that an employee would understand this.

[41] The Company Policies document states under the section headed '**DISCIPLINARY PROCEDURES**':

The company considers the following breaches of company rules as 'serious misconduct' The result of which may be dismissal in accordance with the Employment Act 2000.

...

Drugs & Alcohol

(a) Any employee who shows signs of being affected by alcohol and/or illicit drugs while on company premises or while carrying out company business.

[42] The Code of Conduct at paragraph II A states: *All transactions concerning the accounts should be clearly authorised by the Director(s) and properly and promptly recorded.*

[43] Ms McKenzie was dismissed on the basis of four allegations, collectively referred to as serious misconduct. Of these I find that only one, that of '*Being intoxicated on site whilst off duty*' constitutes serious misconduct as set out in the policies and procedures. I consider that Dawsons had fully investigated this allegation and that they had reasonable grounds for concluding that Ms McKenzie had been intoxicated whilst off duty at the Cloud on the evening of 5 October 2011.

[44] In regards to first of the other allegations, that of drinking alcohol on duty, Ms McKenzie had admitted to doing this, but only occasionally and only when invited to do so by senior management. Drinking alcohol on duty was not *per se* covered under the serious misconduct definition in the Company Policies, the prohibition was on the employee "shows signs of being affected by alcohol" and Ms McKenzie had denied when questioned that she had ever been drunk on duty.

[45] In regards to the other two allegations, Ms McKenzie had admitted when questioned that she had opened an unauthorised bar account, and had used the radio while on duty in an

inappropriate manner, however whilst these actions would constitute misconduct in accordance with the policies and procedures, they were not covered under the serious misconduct definition in the Company Policies.

[46] I find that whilst only one of the allegations constituted serious misconduct in accordance with Dawsons policies and procedures, a fair and reasonable employer could have acted in respect of that allegation as Dawsons had done by dismissing Ms McKenzie, especially in light of the circumstances at the time the incident occurred, these being Ms McKenzie's position as Operations Manager of the Cloud, representing Dawsons to the customers at the Cloud.

[47] I determine that Dawsons had substantive justification for dismissing Ms McKenzie.

Did Dawsons follow a fair procedure in dismissing Ms McKenzie?

[48] The fair and reasonable employer will make the employee aware of the nature of the allegations against him or her in accordance with s 103A (3)(b) of the Act which states:

In applying the test in subsection (2), the Authority or the court must consider –

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee;

[49] Ms McKenzie had been suspended by Ms Maguire on the morning of 6 October 2011 and informed that the allegations against her were that she had been drunk on duty and abusive.

[50] Ms McKenzie was suspended pending an investigation into potentially serious misconduct that might, and in fact did, have an adverse effect on the continuation of employment.

[51] The law is clear that Ms McKenzie should have been provided with access to pertinent information about the decision to suspend her, and the opportunity to comment on this information prior to the decision to suspend her being made by Dawsons. However this did not occur despite Ms McKenzie requesting this information in three emails.

[52] These initial allegations were expanded on by Mr Ross in his telephone conversation with Mr Law on 8 October 2011 to include allegations of being intoxicated on the premises; however the allegations of opening an unauthorised bar account and inappropriate use of the radio were not mentioned. Mr Law requested that details of the allegations made against Ms McKenzie were confirmed in writing; however Mr Ross failed to do so.

[53] I consider that the fair and reasonable employer would have provided Ms McKenzie with full information concerning the allegations against her, both at the time of her suspension and prior to the disciplinary meeting being held.

[54] I accept that Dawsons properly investigated the allegations against Ms McKenzie. I also accept that Ms McKenzie, who was represented by Mr Law, was aware that the nature of the meeting to which she had been called was disciplinary in nature, that the allegations against her were serious and could affect her ongoing employment and that she would have known that she could request a further adjournment of the meeting

[55] I find that the failure to carry out Ms McKenzie's suspension in accordance with the principles of natural justice, and the failure to provide Ms McKenzie with the full details of all the allegations against her in advance of the disciplinary meeting were more than minor.

[56] I determine that Dawsons did not follow a fair procedure in dismissing Ms McKenzie and that Ms McKenzie was unjustifiably dismissed.

Was there disparity in the treatment of Ms McKenzie such as to render the decision to dismiss her one which was not available to Dawsons as a fair and reasonable employer?

[57] Ms McKenzie claims that she has been treated differently to Ms Biel and to Ms McNabb, both of whom had been intoxicated whilst off duty and on company premises, but neither of whom had been dismissed.

[58] Even where grounds for dismissal have been established, the Employment Court¹ has confirmed that it is the prerogative of the employer to decide whether to dismiss or not. However this right must be exercised in accordance with the principles of fairness and reasonableness.

¹ *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

[59] In *Chief Executive of the Dept of Inland Revenue v Buchanan*² the Court of Appeal outlined three separate issues to be considered in relation to the question of disparity of treatment:

- i. *Is there disparity of treatment?*
- ii. *If so, is there an adequate explanation for the disparity?*
- iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*³

[60] The first issue is the establishment of disparity of treatment. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[61] In *Samu v Air New Zealand*⁴ the Court of Appeal stated:

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[62] Dawsons claims that it was unaware that Ms McNabb had been intoxicated whilst off-duty but on company premises at the Cloud and furthermore Ms McKenzie had not reported any such incident.

[63] An employer cannot be expected to act in response to an allegation unless they have been made aware of it, and in respect of Ms McNabb Dawsons had not been made aware of the incident alleged by Ms McKenzie.

[64] I do not find disparity in regards to the treatment of Ms McNabb.

² [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

³ Ibid at para [45]

⁴ [1995] 1 ERNZ 636 (CA)

[65] Ms Biel had been found to have been intoxicated whilst off-duty at the Cloud. Dawsons had accepted her remorseful apology and had taken disciplinary action against her. Dawsons had considered that Ms Biel, on the basis of her attitude to her inappropriate behaviour, had merited disciplinary action short of dismissal.

[66] There is no indication that there had been any previous incident of this nature on the part of Ms Biel, and Dawsons had considered Ms McKenzie's conduct and attitude to have been of a different calibre to that of Ms Biel. I consider that this was a decision open to Dawsons as a fair and reasonable employer.

[67] I determine that there is an adequate reason for the disparity of treatment between Ms Biel and Ms McKenzie, and consequently that the decision to dismiss Ms McKenzie was available to Dawsons as a fair and reasonable employer.

Remedies

[68] I have found Ms McKenzie to have been unjustifiably dismissed and she is entitled to remedies.

Reimbursement of Lost Wages

[69] Ms McKenzie was employed subject to a fixed term contract which was due to terminate on 28 October 2011. However following her dismissal on 10 October 2011 Ms McKenzie said that she had been able to obtain employment immediately and there is consequently no claim for lost wages.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[70] Ms McKenzie is entitled to compensation for humiliation and distress. I find that Ms McKenzie has experienced humiliation, loss of dignity and injury to feelings.

[71] In respect of the dismissal grievance, Dawsons is to pay to Ms McKenzie the sum of \$3,000, pursuant to s 123(1) (c) (i).

Contribution

[72] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[73] Ms McKenzie as Operations Manager of the Cloud was in a responsible and professional role in which she had responsibility for subordinate employees.

[74] The contract which it had obtained at the Cloud was extremely important to Dawsons, and it involved considerable contact with the general public. Accordingly Dawsons expected its employees to conduct themselves with integrity, honesty and respect for others as set out in the Code of Conduct.

[75] Ms Maguire had made Ms McKenzie aware as a result of the incident on 27 September 2011 that Dawsons preferred her to do her socialising away from the Cloud, however she had failed to have due regard to this request.

[76] Ms McKenzie admitted that she had been intoxicated while off-duty at the Cloud on 5 October 2011, which was against Dawsons' policies and procedures, and which applied not only to Ms McKenzie but also to those employees for whom she had responsibility.

[77] I find contributory fault on the part of Ms McKenzie and reduce the sum awarded in respect of the compensation for hurt and humiliation by 90 %. As a consequence Dawsons' is ordered to pay Ms McKenzie the sum of \$300.00.

Costs

[78] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority