ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 80
3020378

	BETWEEN	Q Applicant
	AND	BATTERSEA INVESTMENTS LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Michael McDonald, Advocate for the Applicant Laurence McLean, Advocate for the Respondent
Investigation meeting:	15 December 2017
Submissions and evidence received:	Further evidence was received on 8 & 24 January and 7 February 2018. Submissions were made at the investigation meeting, and further submissions received on 7 February, 21 February, 19 April and 3 May 2018.
Determination:	29 May 2018

DETERMINATION OF THE AUTHORITY

A. Battersea Investments Limited unjustifiably disadvantaged and unjustifiably dismissed Ms Q.

B. Battersea Investments Limited must pay Ms Q:

(i) $3,294 gross wages over suspension,

(ii) $4,896 gross lost wages,

(iii) $655.20 gross holiday pay, and

(iv) $17,000 compensation for humiliation, loss of dignity

and injury to her feelings.

C. Battersea Investments Limited must pay a penalty of $1,000 to the Employment Relations Authority for transfer to a Crown bank account.

Employment relationship problem

[1] Ms Q was the general manager of a bar owned by Battersea Investments Limited (BIL). On 15 December 2016, Ms Q claims that BIL unjustifiably disadvantaged her by closing the bar without notice. Ms Q argues she was effectively dismissed from that date, although she did not receive a letter communicating the termination of her employment until 16 January 2017. Ms Q says that the dismissal was unjustified.

[2] Ms Q also claims that she was underpaid her wages and other entitlements, such as holiday pay. She also claims that BIL did not provide her with a written employment agreement and that BIL should pay a penalty for that.

[3] In addition, Ms Q claims BIL breached its duty of good faith to her by failing to be communicative and responsive during the employment relationship. She seeks a penalty for that breach.

[4] **Under clause 10, Schedule 2 of the Employment Relations Act 2000 (the Act) I prohibit from publication the name of the bar and any information that could identify Ms Q, Ms G or Ms K.**

[5] BIL denies it treated Ms Q unfairly or in breach of its duty of good faith. It denies it owes her any wage arrears or holiday pay. It says that it did have a written employment agreement for Ms Q but that it cannot now locate it. BIL says its dismissal of Ms Q was justified.

[6] At the investigation meeting I heard sworn or affirmed evidence from Ms Q, Mr McLean and Traan McLean. Traan McLean is Mr McLean's daughter, and the person who did the bar's payroll and accounting work. Ms McLean is now the bar manager.

Issues

[7] To determine this matter I will need to consider the following questions:

(a) In relation to the unjustified disadvantage by way of suspension claim, I need to ask if BIL acted as a fair and reasonable employer could have in all the circumstances at the time? If not, Ms Q will be entitled to remedies.

(b) In relation to the unjustified dismissal claim, I need to ask if BIL acted as a fair and reasonable employer could have in all the circumstances at the time?

(c) If not, Ms Q will be entitled to remedies. Is Ms Q entitled to lost wages and other money lost as result of the grievance/s?

(d) Is Ms Q entitled to compensation for humiliation, loss of dignity and injury to her feelings?

(e) Did Ms Q's behaviour contribute towards the situation that gave rise to the personal grievance/s? If so, was her contribution so blameworthy that her remedies should be reduced?

(f) Did BIL fail to provide Ms Q with a written individual employment agreement? If so, should I impose a penalty?

(g) Did BIL breach its duty of good faith to Ms Q? If so, should I impose a penalty?

What happened?

Prior to 15 December 2016

[8] Ms Q has significant hospitality experience and also runs an entertainment management and booking business. She worked at the bar before BIL bought it. Mr McLean asked Ms Q to come back and help the business in exchange for a shareholding and becoming a director of the company.

[9] Ms Q was joint general manager of the business with Ms G. Ms G was also a shareholder and director of the company. They were both based in Christchurch. Mr McLean was based in Wellington.

[10] Amongst other things, Ms Q held the licence for the bar and also booked and managed the entertainment side of the business. She worked very long hours, such as between 56-62 hours per week.

[11] There were differences between Ms Q and Mr McLean in how they thought the business should be run. Mr McLean had no experience of running a hospitality business such as the bar.

[12] While Ms Q and Ms G were managers, directors and shareholders, Mr McLean owned a greater shareholding, acted as the "owner'" of the business and was Ms Q's boss.

[13] In July 2016, Ms Q asked for two weeks of annual leave and to have a further two weeks of annual leave paid out to allow her to undertake a two-week tour with her entertainment business in September. She left on that tour under the understanding that she would have two weeks off work and be paid for four weeks of annual leave, and return to work after the two weeks of the tour. She understood that Mr McLean agreed to that.

[14] On 29 August 2016, Employment Contract Services Limited wrote Ms Q a letter on Mr McLean's behalf asking her a number of questions about her hours and timesheets. The letter asked for an urgent response as:

> …the business is not being run profitably at present and that will have to change.

[15] Ms Q replied to the queries informing Mr McLean that, among other things, she also did other work for the business that she had not sought to be paid for.

[16] On 8 September 2016, Ms McLean paid Ms Q for four week's annual leave.

[17] During Ms Q's time away from work on the tour, Mr McLean came to see her in Wellington. That was on the 11th day of her planned 14 days off. He informed her that she would have to stay away from work for the four weeks, not the two weeks she had planned.

[18] On 10 September 2016, Acca Dacca performed a sold out show at the bar.

[19] On 21 September 2016, a $1,500 payment BIL had made to Acca Dacca in advance was refunded by Acca Dacca's booking manager to Ms Q's personal bank account, not to the BIL account that it had been paid out of.

[20] On 23 September 2106, Ms Q texted Ms G telling her she had the deposit back from Acca Dacca and that she would drop it in for Ms G to bank. However, Ms Q's account was in

unauthorised overdraft, which she says meant only $800 was available for her to return to BIL immediately.

[21] She withdrew $800 on 28 September 2016 and it is her evidence that she took it into the bar in the envelope with "Acca Dacca Deposit" written on it. She says she explained the situation to Ms G and decided that because she had Mitre 10 receipts totalling $400 that she considered BIL should reimburse her for, she only owed a further $300. Ms G and Ms Q agreed that she would pay the $300 back at $100 per week from her next three weeks of pay.

[22] Neither Ms Q nor Ms G let Mr McLean know about the arrangement at that stage.

[23] On 23 September 2016, Ms Q wrote to Mr McLean asking for reasons for his decision to make her take the four weeks off, instead of paying her out for two weeks. She also pointed out that she had only been paid for 8 hours the week before she went on leave, although she had worked more hours than that. She wrote she also worked two other shifts and wanted to know why she had not been paid for them.

[24] Also on 23 September, Ms Q emailed Mr McLean asking if he had seen her earlier email and asking why her pay had not gone through yet.

[25] And again on 5 October 2016, Ms Q emailed Mr McLean stating that she had not been paid and it was the fourth week in a row she had not been paid. She asked for a response to her email and to be paid what she was owed.

[26] She emailed him again on 6 October alleging she was being discriminated against and that BIL owed her pay for 4 weeks.

[27] Mr McLean sent an email in response, which contained his response to the answers she had given to the questions in the Employment Contract Services Limited's letter.

[28] He made a number of directions, and wrote that Ms Q could contact him if circumstances required her to ask him if she could change any of the directions in specific instances. Principally, he directed that she was to limit her hours worked per week to 40 without his prior approval to work more hours being sought, which he must give her in advance. They were to communicate about this by text or email only.

[29] Mr McLean also demanded more control over the events and bands booked. He made specific demands for daily reporting and prohibited any cash payments being made from the till, including to "re-float the float". He stated that he had to agree to and verify all expenditure in writing in advance of any spending. He prohibited Ms Q using the van for personal or private use.

[30] On 19 October 2016, Ms Q responded to his directions. She stated that his directions were not in line with what he had agreed when Ms G and Ms Q accepted their roles as general managers. She stated that his:

> …constant disbelief and distrust in us and the staff, is undermining, wrong and uncalled for. Your opinion of me, and some of the staff is appalling and unjustified.

[31] Ms Q wrote that she did not agree to working only 40 hours. She did not agree that all future band bookings and events had to be signed off by Mr McLean or that she had to send him the contract details. She said that her contracts were the intellectual property of her separate entertainment business. She was unhappy about the direction not to use the van and took it "as a personal grudge against me".

[32] After that, Ms Q continued to work more than 40 hours per week and put those hours on her timesheets. However, usually she was not paid for more than 40 hours per week.

[33] On 27 October 2016, Ms Q emailed Mr McLean pointing out that given the amount of work she had done she had been paid below minimum wage for each hour she actually worked. She asked if he refused to pay her for the administrative work she did.

[34] Mr McLean says that he was first aware of the Acca Dacca money having been paid to Ms Q's account on 9 November 2016 after he emailed Acca Dacca's management asking where the money was. Acca Dacca's booking agent replied that he had returned the deposit to Ms Q on 21 September 2016. Ms Q was copied into the reply.

[35] The level of distrust between the parties did not dissipate.

[36] On 11 November 2016, Ms Q wrote a letter to Ms G, as the other general manager of the bar, alleging that she was being "discriminated" against by Mr McLean. The context of

her letter makes it clear that she was being treated differently and less favourably than Ms G. She also complained about her pay not being correct "since the beginning of September". She also stated that she deserved fair treatment and not to be threatened or bullied in her workplace. Ms G passed the letter on to Mr McLean.

[37] On 15 November 2016, Ms Q emptied the cash out of the poker machines in the gaming room after the bar closed at about 10.15pm. Unfortunately, she left an amount of cash in dollar notes on a chair in front of one of the machines. She did not notice that and left the gaming room with the rest of the cash which she put in the safe in the kitchen. When the bar opened the next day, a male customer walked into the gaming room and finding the cash on the chair took it and left the premises.

[38] Ms G became aware the following day that she did not have $790 that had been collected from one of the machines. She informed Mr McLean about it.

[39] Ms Q was not told that had happened. BIL reviewed the CCTV footage to verify what had happened. BIL made a complaint to the police and gave the police a copy of the footage. The offender was identified and charged and I understand that the stolen money was recovered.

[40] On 16 November 2016, Ms Q was removed as a director of BIL.

[41] On 13 December 2016, Mr McLean wrote a letter inviting Ms Q to a disciplinary meeting on 15 December 2016. He wrote that BIL had recently become aware of a "number of allegations of serious misconduct … brought to our attention." He outlined two allegations:

> i. On 15 November it is alleged that you failed to follow Company procedure resulting in the theft of 790NZD [off] Company premises. More particularly you did not follow Company procedure when emptying the Pokies machines. After identifying there was discrepancy between the Pokies registry machine and the cash flow, the Company watched the CCTV footage. On the footage you were observed at 10.15pm to place the money on the chair and count it. You were then observed to split the money up and place one bundle of cash on one chair and place another bundle of cash on another chair. You were then observed to leave the room. Following this at 10.01am an unknown man was observed entering the Pokies room and taking the money. Such conduct is a breach of your employment obligation and has the potential to undermine the trust and confidence essential to the employment relationship. Further to this such conduct has the

> potential to cause serious risk to the reputation, viability and profitability of the Company; and
>
> ii. On 21 September 2016, it is alleged that a sum of $1,500 was deposited directly into your bank account by the band Acca Dacca, following their performance at the Club on 10 September 2016. An email from you sent to David Bradley, the band's booking agent confirms that the sum was returned to you on 21 September 2016. Furthermore, it is alleged that although the Company has made numerous attempts to enquire as to the whereabouts of this sum the sum remains unaccounted for. We would like to note that the Company originally paid this sum to the band, via bank transfer on 2 May 2016, and this sum, therefore remains the property of the Company. This conduct is in breach of your employment obligations and has the potential to undermine the trust and confidence essential to the employment relationship;
>
> If proven these matters are viewed as serious misconduct, which may result in the termination of your employment without notice.
>
> Prior to any decision being made, and to enable a full and detailed investigation of this matter, we request your attendance at a disciplinary meeting which has been specifically convened to provide a suitable opportunity for you to respond to these particular allegations.

[42] The letter also advised Ms Q that she "was welcome to bring a support person or representative to the meeting should you choose." The meeting was proposed to take place on 15 December 2016. Mr McLean advised that he would be conducting the meeting and making any decision arising out of it.

[43] Ms Q asked for the proposed meeting to be postponed so she could see some evidence and find a support person. Mr McLean agreed and said that the meeting would instead be held on 30 December 2016.

At the bar on 15 December 2016

[44] Ms McLean had intended to be present at Ms Q's disciplinary meeting and her travel and accommodation had already been arranged. Therefore, on 15 December 2016, Ms McLean and a friend of hers, who had experience managing a bar with gambling machines, travelled to Christchurch from Wellington. Ms McLean's purpose was to undertake an audit of all money onsite, do a stocktake and generally look around as she had not been there before.

[45] Ms McLean and her friend had been in the bar in the afternoon, when Ms Q was not there. While there, Ms McLean spoke to Ms G, and was introduced to Ms K. Ms K, was the bar manager on duty that evening.

[46] Ms McLean did not check the poker machine hoppers at the time as there were customers playing on them, but Ms G gave her a print-out from the poker machines.

[47] When counting cash in the safe and tills, Ms McLean found an envelope in the drop safe with "Acca Dacca refund $800" written on it. The envelope contained IOU notes (totalling $430.00), receipts (totalling $159.91) and $275 in cash. In total, that amounted to $864.91. That is $64.91 over the amount of $800 Ms Q says she put in there, but $159.91 less than $800 if the receipts are not counted.

[48] Ms McLean took all the TAB and gaming money and banked it.

[49] Ms Q arrived at the bar at about 5 pm. Ms McLean and her friend left shortly after that. They did not interact with Ms Q.

[50] Ms Q noticed that there was no cash in the gaming machine banking and she needed to top up the gaming float as the bar had made a number of pay-outs on jackpots that day. She rang Mr McLean to ask him to transfer some money onto the bar Eftpos card so they could pay out on the gaming machines if anyone hit a jackpot. He refused and said that she should shut down the gaming room or ask the gambler to come back to the bar tomorrow to collect their winnings if they hit a jackpot. Ms Q explained to him that they could not do either of those things. He told her he would not release any more money because he did not trust her.

[51] Ms Q then rang the bar's contact on the gaming trust to seek his advice. He recommended that she clear the banknotes from all the machines once the gaming room had no more people in it. He said to count the money from each machine and use that to top up the gaming float. That is known as "doing a raid" on the machines.

[52] Mr McLean can monitor the bar in real time from Wellington using CCTV footage. Ms McLean says that a little before 7pm, Mr McLean rang Ms McLean and told her Ms Q was removing money from the poker machines in the gaming room. Ms McLean said she was on her way to the bar and that she would check that the money was correctly accounted for.

[53] When the gaming room emptied, Ms Q closed it by shutting the curtain across the doorway and putting a chair in front of the doorway. That was to signal that the room was closed and patrons should not enter. Ms Q went to the toilet, and then got the keys and paperwork she needed to empty the machines.

[54] Ms Q and Ms McLean had not previously met. However, earlier in the day Ms Q had noticed Ms McLean talking to Ms K and asked who she was. Ms K told her she was Mr McLean's daughter. Ms McLean and Ms Q agree that when they first encountered each other Ms McLean asked Ms Q whether she was ready for her meeting. Ms Q told her she was not because it had been rescheduled.

[55] Ms McLean challenged Ms Q as to what she was doing with the poker machines and Ms Q told her she had permission to empty the machines. Ms McLean's friend rang the gaming trust rep, who confirmed Ms Q had his permission. Ms McLean instructed her to stop and said that she and her friend would finish. Ms Q refused saying that because she was already facing serious misconduct allegations she would not stop until all the money was in the safe.

[56] Ms Q says that Ms McLean told her stop again and to leave the building immediately. Ms Q refused and they argued. Ms Q told Ms McLean to "fuck off" and to "get stuffed". She went and secured the cash in the kitchen safe.

[57] Not long after that Mr McLean instructed Ms McLean to shut the bar. Ms Q packed up some goods that she owned from the office and left the pub. She was in her car when Ms McLean approached her and asked for the keys back. Ms Q refused and told Ms McLean she was on a shift the following day and she would need the keys to close up.

[58] During that time, Mr McLean sent Ms Q two texts. The first accused her of committing theft, in reference to goods she was removing from the office. The second text told her she was trespassed.

[59] The following day, Ms Q went to the bar for her shift but there were signs on the windows saying the pub was closed until further notice, and that the locks had been changed.

[60] She tried contacting Mr McLean by phone over the next few days.

[61] On 21 December 2016, Mr McLean emailed Ms Q telling her that the business was being restructured and he did not know how long that would take.

[62] On 23 December, Ms Q received one week's pay and was paid for annual leave and a day in lieu owing. She had not asked to take annual leave or her lieu day, or to be paid for them.

[63] On 24 December 2016, Mr McLean sent Ms Q some still photos taken from the video footage of the gaming room related to the first allegation. Ms Q received and viewed those, but did not see any video footage.

Disciplinary meeting on 30 December 2016

[64] Ms Q attended the meeting without a support person and without having viewed the USB footage that BIL had sent to her. She was aware that a courier had attempted to deliver a package the previous day, but Ms Q no longer lived at that address. The package had not yet been delivered to her new address and she had not been able to pick up the package from the courier company by then.

[65] The meeting was recorded, with Ms Q's agreement. Ms McLean also took some notes. The notes record the questions Mr McLean asked Ms Q and her answers. However, the recording has also been transcribed. Ms Q accepts that it is a largely accurate record of the meeting.

[66] At the beginning of the meeting, before Mr McLean asked her any questions, Ms Q pointed out that she had not yet seen the video footage. Mr McLean told her that should not make any difference:

> because the footage just backs up what we're asking about .. so whether you've seen it or not you have it in your possession , you can view it later.

[67] Mr McLean asked Ms Q eight pre-prepared questions to which he appeared to require mainly "yes" or "no" answers. Mr McLean asked Ms Q about the $1,500 deposit. She answered him but he repeated the question three times. He appears to want her to admit that she only told him she had received the refund into her personal account after he emailed Acca

Dacca. Ms Q was clear that she told him the deposit was in the drop safe before he sent his email to Acca Dacca.

[68] Ms Q said she was not sure why Acca Dacca put the money in her personal account and not BIL's account. Ms Q said she owed BIL $700 to make up the full amount that had been deposited in her bank account.

[69] Towards the end of the meeting the following exchange took place between Mr McLean and Ms Q:

> Mr McLean: Alright we will be in contact with the outcome of this + unfortunately we can't discuss anything else it's the way the process works, if you wanted to have a walk with me, we can go outside + have a talk.
>
> Q: I've wanted to Bob, You're the one that's said [no] to mediation and all that so.
>
> Mr McLean: Again, you don't listen, if you want to talk we can step outside and have a talk.
>
> Q: So when's the pub reopening?
>
> Mr McLean: None of your concern.
>
> Q: Well, I'm a staff member.
>
> Mr McLean: It's nobody's concern because … nothings been made up alright, no decision has been made so nobody's got any input into it until a decision has been made.
>
> Q: I know that but don't you think we need to have a rough idea so we can budget our finances and get money from somewhere Bob, we can't just live on …
>
> Mr McLean: See, you don't listen, I asked you if you wanted to discuss anything we will step outside, this meeting is officially over, ok?
>
> Q: OK, yep.
>
> Mr McLean: That's the process.
>
> Q: Yep.

[70] Mr McLean and Ms Q did not have any 'off the record' discussion that day.

[71] Ms Q requested a copy of the notes once Ms McLean had typed them up and Ms McLean promised to send the notes to her.

After the disciplinary meeting

[72] That evening at around 8 pm, Mr McLean contacted Ms Q by phone to ask where the bar's courtesy van was. Ms Q replied that she had it. Mr McLean told her she had half an hour to return it to the bar. She says she attempted to get someone to come with her when she returned it but had not yet done so when Mr McLean texted her at 9 pm asking where the van was.

[73] She replied that she was bringing the van back. He replied that it was too late and that he had reported to the police that she had stolen it.

[74] On 7 January 2017, Ms Q met a number of staff at the bar. She had brought the van back. The staff knew that Mr McLean would be there and wanted to ask him what was happening with their jobs. Ms Q handed Mr McLean the van keys and asked what was happening with her job. He replied that he had emailed her. She told him she did not have a current internet connection and asked for a hard copy of the email. He told her to go and see a friend so she could see the email he had sent.

[75] On 10 January 2017, Mr McLean emailed Ms Q telling her he had sent her an email on 5 January 2017 with a proposed outcome of the disciplinary process. The 5 January letter had asked for her feedback by 6 January 2017. The email gave Ms Q until 11 January to provide her response or BIL would make a decision without her feedback.

[76] BIL's 5 January email contained:

> The allegations, together with our findings, are noted following:
>
> [a repetition of the two instances of potential serious misconduct that had been outlined in the 13 December letter]
>
> After a thorough investigation, consideration of your responses in the disciplinary meeting, and review of your previous disciplinary record, the Company is proposing to terminate your employment without notice in respect of the misconduct outlined above.

[77] Ms Q texted Mr McLean saying she would respond to his email once she had legal advice.

[78] On 11 January 2017, Employsure wrote to Ms Q on behalf of BIL in reference to her 11 November 2016 letter to Mr McLean, in which she, amongst other things, complained that Mr McLean was harassing and bullying her. Employsure wrote that BIL considered all the matters she had raised in her letter had been finalised.

[79] Also on 11 January 2017, Ms Q texted Mr McLean asking:

> … why the locals are telling us the pub reopens tomorrow and yet staff haven't been informed?

[80] Mr McLean responded that the pub "is no longer your concern".

[81] On 14 January 2017, Ms Q wrote to Mr McLean:

> As I expressed to you in person and via txt my living arrangements have changed and due to no wages being paid by you to me during your apparent restructure of your business, I have been unable to check my emails as I had had no internet connection, until very recently.
>
> I did request a hard copy of your email so I could pick it up and read it.
>
> You failed to provide me with a hard copy and it has only been now that I have seen your proposed outcome.
>
> I also requested a copy of the questions you raised and answers I had given the day of the meeting …
>
> Your daughter Traan, who was taking the minutes for the meeting on the day said she will type it all out and email it to me.
>
> I am yet to receive this, along with the USB stick that has your alleged allegation on. Please provide me with these.
>
> As you conducted these meetings right in the middle of the Christmas break, my lawyer and his office were closed.
>
> The office has just re-opened and I am in the process of touching base with my lawyer and we will be in touch as soon as possible.
>
> In the meantime could you please pay me all the monies owed to me.

[82] On 16 January 2017, BIL wrote to Ms Q terminating her employment because it found that she had committed serious misconduct in relation to the poker machine money and the Acca Dacca deposit. In relation to the deposit, BIL said that although Ms Q had claimed a sum of money was returned to the Company drop safe in September 2016 "to date, the money remains unaccounted for."

[83] BIL reported Ms Q to the police for theft of just over $1000, being what it considered to be the missing balance of the Acca Dacca deposit. In April 2017, the police spoke to Ms Q about that complaint. However, no charges have been laid.

[84] At the investigation meeting, Ms Q said that she accepted that she still owed BIL some money from the Acca Dacca deposit. BIL has not made a claim with the Authority for Ms Q to pay it any of the Acca Dacca deposit.

Unjustified disadvantage claim

[85] BIL stopped Ms Q working out her shift on 15 December when it shut the bar early. That was clearly a suspension. At first, Ms Q only understood that the bar was closed for the night. However, after that Mr McLean sent her a text saying that she was trespassed and decided to keep the bar shut indefinitely. That too was a suspension.

[86] Any suspension causes disadvantage to an employee, especially if it is an unpaid one. It is up to BIL to satisfy me that what it did and the way it did it was justified in all the circumstances at the time it made its decisions.

Did BIL act as a fair and reasonable employer could have when it shut the bar on 15 December?

[87] BIL has to prove that its decision to shut the bar, and the way it reached that decision, was what a fair and reasonable employer could have done in all the circumstances at the time it made the decision.

[88] Mr McLean was effectively acting as BIL. He had to have had a significant enough reason to shut the bar for the evening.

[89] In addition, s 103A(3) of the Employment Relations Act 2000 (the Act) sets out the minimum procedural requirements that I must consider in determining whether BIL's actions were justified.

[90] BIL had already agreed that Ms Q's meeting would be held on 30 December, yet Ms McLean still attended the bar without notice with an intention to scrutinise Ms Q's work.

There was conflict between Ms Q and Ms McLean after Ms McLean attempted to direct Ms Q to let her and her friend, who as far as Ms Q knew did not have Mr McLean's authority, to handle the money from the gaming machines.

[91] Ms McLean also surprised Ms Q while she was at work by asking her if she was ready to have the disciplinary meeting when BIL had already agreed that it would take place at a later date.

[92] I accept that Ms Q had sworn at Ms McLean and told her to fuck off. However, I do not accept that her behaviour necessitated an immediate suspension.

[93] In addition, the two allegations related to matters that had occurred many weeks earlier. There was no immediate need to suspend Ms Q to stop any such events happening again. If that had been the motive, suspension and a disciplinary process would have been carried out sooner.

[94] Generally, a right to suspend an employee is a contractual right. BIL had not provided Ms Q with a written individual employment agreement, therefore there was no contractual right to suspend her. In addition, even when a contractual right to suspend exists an employer must consult with an employee about a proposed suspension before deciding to suspend.

[95] In this case, there was no attempt at a fair process and BIL did not tell Ms Q that if she did not co-operate BIL would suspend her and/or close the bar for the rest of the night effectively suspending all rostered staff.

[96] In all the circumstances, including that BIL had no contractual right to suspend Ms Q, I do not consider that closing the bar and therefore suspending her, was a decision a fair and reasonable employer could have made in all the circumstances at the time. The suspension amounted to an unjustified disadvantage to Ms Q in her employment.

Did BIL act as a fair and reasonable employer could have when it decided to keep the bar closed for a review?

[97] The ongoing closure of the bar was an ongoing suspension of Ms Q. There had been no holiday closedown planned. Ms Q expected to work on a number of shifts over Christmas/New Year, in a usually busy period in hospitality, and on into 2017.

[98] Mr McLean told me at the investigation meeting that after 15 December he and Ms McLean decided to do a thorough review of the business in order to decide whether to close the bar permanently or to re-open it, probably without some existing staff. BIL did not consult its staff or communicate its decision about the review and possible restructuring of the business to the staff.

[99] BIL had a duty of good faith to its employees, which means that it was required to be active and constructive in establishing and maintaining a productive employment relationship and being "constructive and communicative".[1] Mr McLean's failure to tell Ms Q what was happening with her work was unjustified.

[100] Again, I note that BIL had no contractual right to suspend Ms Q. And, again, there was no consultation with Ms Q about the proposal to keep the bar closed indefinitely. Nor did BIL seek her input.

[101] Mr McLean's text to Ms Q on 15 December telling her she was "trespassed" suggests to me that BIL had already determined that it would exclude her from the premises for longer than that evening.

[102] BIL's failure to communicate with Ms Q between 15 and 24 December was not a minor defect of process. The decision to keep the bar closed without any discussion or consultation with Ms Q was not the action of a fair and reasonable employer. Ms Q's suspension continued for a month. BIL did not act as a fair and reasonable employer in all the circumstances at the time. BIL unjustifiably disadvantaged Ms Q in her work.

[1] Section 4(1A) of the Employment Relations Act 2000.

Unjustified dismissal claim

[103] BIL is required to prove that in dismissing Ms Q it acted as a fair and reasonable employer could in all the circumstances at the time.

Procedural fairness?

[104] Part of that involves a consideration of whether BIL used a fair process in deciding to dismiss Ms Q. Factors I need to consider in deciding whether the process was fair include whether BIL:

- sufficiently investigated the allegations against Ms Q having regard to the resources available to it?
- raised its concerns with Ms Q before deciding to dismiss her?
- gave Ms Q a reasonable opportunity to respond to its concerns?
- genuinely considered Ms Q's explanation before deciding to dismiss her?

[105] I can also consider any other factors I consider relevant. However, I must not decide that BIL's action was unjustified if there were only minor defects in the process that did not result in Ms Q being treated unfairly.

Was there unreasonable delay in raising the allegations?

[106] In relation to both allegations, I consider there to have been an unexplained and unnecessary delay between Mr McLean becoming aware of the events and raising them for the first time on 13 December. He was aware, at the latest, on 9 November 2016, after the first Acca Dacca email that the deposit was refunded to Ms Q's personal account. BIL did not raise that as an allegation until almost five weeks later.

[107] Ms Q was aware of the email exchange between Mr McLean and Acca Dacca. Yet Mr McLean did not ask her in the intervening weeks about why that had happened and why she had not yet paid the money back. BIL did not ask her to pay the money back out of her account either.

[108] No allegation was raised with Ms Q about the missing poker machine cash until four weeks after the event.

Sufficient investigation?

Acca Dacca deposit

[109] The two allegations were serious and it was appropriate to put the concerns to Ms Q. However, it is unclear to me that BIL investigated the claim about the Acca Dacca deposit sufficiently.

[110] Ms Q's response at the disciplinary meeting on 30 December was that she was not sure why it was paid into her account. She also said she was "on the road" and she:

> didn't have time to get the bank the pubs bank account and next minute it was in mine.

[111] Ms Q also said that once she realised that she could not withdraw the entire amount of $1,500 from her own account she took the $800 in to the bar and told Ms G about it. She said a number of times during the meeting that the money was in the "drop safe" and that when Mr McLean asked her, before he contacted Acca Dacca in November, she told him it was in the drop safe.

[112] She also said that she owes BIL $700, but that since she came back from her leave in September she had not been paid properly. She said that the $800 was supposed to sit there until she got paid properly and she was going to put the money into the drop safe and then "[Ms G] was gonna do whatever with it."

[113] She told Mr McLean that she did not know how much of the $800 cash was still in the drop safe because they had needed to put receipts in there so they "could get money into the refloats cause we have no money in the refloats".

[114] Ms Q says that together, she and Ms G decided that the $800 would remain there and that the hardware store receipts could be claimed against that amount by Ms Q. They were both directors of BIL at the time and joint general managers.

[115] There was no evidence that before making the decision to dismiss BIL checked with Ms G about what Ms Q said to her about the deposit when the $800 had been put in the drop safe. Ms G was not asked to convey when she became aware of the deposit issue.

[116] In addition, before making the decision to dismiss BIL did not enquire of Acca Dacca's management why it paid the deposit into Ms Q's personal account when it had come out of a BIL account.

[117] It is not clear whether BIL decided that Ms Q had deliberately given Acca Dacca her account in preference to BIL's account number, and deliberately failed to pay the money back.

Missing poker machine money

[118] Mr McLean's allegation against Ms Q in relation to the theft of the poker machine money was that she failed to use a particular policy and procedure for emptying the machines and counting the money, and that failure led to the theft of the money. However, what the established policy or procedure she allegedly departed from was not outlined for her in advance of the meeting.

[119] That meant that she did not have a reasonable opportunity to answer that allegation.

[120] It was Ms Q's evidence that the type of process Mr McLean seemed to be talking about had been used quite some time ago but that the procedure had changed in recent months. Ms Q said the process used changed in consultation with Ms G. I note that BIL brought no evidence in these proceedings about what it alleged the correct procedure was and how Ms Q's process departed from that.

[121] If BIL's real concern about the poker machine money was to ensure that the correct procedure was followed to prevent such accidental loss as happened in November 2016, I would have thought that it would have immediately notified Ms Q of what had happened and instructed her to follow the correct procedure.

[122] In addition, BIL did not follow up with Ms G after the 30 December 2016 meeting to check whether Ms Q's explanation that the box process was no longer used was correct.

Did Ms Q have a reasonable opportunity to respond to the allegations?

[123] The 30 December meeting notes reveal that Mr McLean had specific closed questions he wanted Ms Q to give specific responses to, such as this exchange:

> Mr M: Do you acknowledge that after an email from myself to Acca Dacca that you admitted to having received the refund on 20th September 2016?
>
> Ms Q: I had emailed you cause you have asked me about the deposit before you contacted them + I have told you its in the drop safe + I can find the email + re-forward it to you if you want
>
> Mr M: Can you just answer the question please?
>
> Ms Q: I just did
>
> Mr M: Is that a yes? Do you acknowledge that after an email from myself to Acca Dacca that you admitted to having received the refund on 20th September 2016?
>
> Ms Q: I told you it was in the drop safe before you sent
>
> Mr M: Can you, can you just answer the question please
>
> Ms Q: I just did
>
> Mr M: so that's a yes?
>
> Ms Q; I'm saying you knew that before you sent the email to them, it was in the drop safe it had been right from when I came back
>
> Mr M: [Ms Q]
>
> Ms Q; I just answered the question. Next question.
>
> Mr M: Question 4, again. Do you acknowledge that that after an email from myself to Acca Dacca that you admitted to having received the refund on 20th September 2016?
>
> Ms Q: I admitted before you emailed. I told you before you emailed Acca Dacca that it was in the drop safe.
>
> Mr M: [Ms Q] I'm asking you whether you have admitted to having received the refund on the 20th of the 9th, it doesn't matter whether I knew about it, can you please answer the question.
>
> Ms Q: Yeah well of course it's in there in black + white in the email, but I'm saying you knew it was in the drop safe before you emailed them.

[124] The way Mr McLean conducted the meeting meant that Ms Q was not given a reasonable opportunity to put her explanation to BIL in relation to the Acca Dacca money. For example, Mr McLean did not ask her in the meeting what she did once she realised the money had gone into her account and she did not have enough in the account to transfer it directly to BIL's account, and why she acted that way.

[125] In addition, the allegation about the poker money, that was essentially that she did not follow established procedure, was not put to her before the meeting. Therefore, she had no reasonable opportunity to prepare for the meeting or to give her explanation. For example, had she known what the allegation was she could have sought to have Ms G explain what process they had been following.

[126] Ms Q did not have a chance to view the USB containing the video footage of her on 15 November emptying the poker machines and leaving the money on a chair. BIL had sent it but the delivery had been attempted only the previous day. Even had Ms Q been able to receive the USB that is unlikely to have been enough time for her to view the footage and seek advice and representation.

[127] I do not consider the meeting should have gone ahead at that stage. If it had, it should have been reconvened once Ms Q had seen the video footage.

Did BIL adequately take into account Ms Q's explanations when making the decision to dismiss?

[128] Mr McLean did not write the letter with his findings and his proposal for dismissal until 5 January 2017. He did not write the letter dismissing Ms Q until 16 January 2017.

[129] However, during the 30 December meeting, when Ms Q enquired when the bar was opening again, he told her it was "none of your concern". He followed that by telling her it was nobody's concern as no decision had been made by then. In addition, in a text on 11 January 2017 apparently prior to the final decision to dismiss being made, upon Ms Q's query about whether the bar was opening the following day Mr McLean texted her that "the [bar] … is no longer your concern".

[130] I consider the above two comments, particularly when considered in the context of the "trespass" text already sent on 15 December 2016, to indicate that BIL had already concluded that it did not intend Ms Q to return to her role.

[131] In addition, the wording of the 5 January 2017 letter "the Company is proposing to terminate your employment" in all the circumstances meant that, in effect, nothing that Ms Q

or a representative said after that point would have made a difference to the proposed outcome.

Did BIL adequately deal with Ms Q's allegations of bullying and discrimination?

[132] As at the date BIL raised its allegations of misconduct it already had been notified by Ms Q that she had serious concerns about how she was being treated by Mr McLean. Other than the letter written by Employsure to Ms Q on 11 January 2017 saying that BIL considered all issues raised by her in November 2016 had been resolved, there is no evidence that BIL actually investigated Ms Q's claims or dealt with them in any way.

[133] Beginning a serious disciplinary process leading to a decision to dismiss made by the person Ms Q had complained about without having dealt with Ms Q's complaint was not something a fair and reasonable employer could do.

[134] The breaches of process were not minor and resulted in Ms Q being treated unfairly. BIL did not act as a fair and reasonable employer could have acted in all the circumstances at the time.

Was there a sufficient substantive basis to dismiss Ms Q?

Poker machine money

[135] This event was an unusual one. Ms Q did not take the money and there is no suggestion she deliberately left the money on a stool to allow someone else to take it the following morning. The procedure Ms Q used was apparently agreed between her and Ms G, the other general manager who was in charge of banking the poker machine money.

[136] If anything, the accidental leaving of the money on a stool was a lapse of judgment and/or memory.

[137] In the absence of an employment agreement, there were no examples of serious misconduct given by BIL against which to measure Ms Q's lapse.

[138] In addition, there was no clear policy or procedure set out by BIL anywhere that Ms Q had failed to follow. However, BIL acted as if there was such a policy and/or procedure in making its decision. In the absence of any other issue, I do not consider this lapse to have

been of sufficient gravity to lead BIL to the conclusion that it had absolutely lost trust and confidence in Ms Q to the point that it needed to terminate her employment.

Acca Dacca deposit

[139] The events associated with the deposit are also unusual. However, in the absence of a sufficient pre-dismissal investigation BIL had insufficient proof that Ms Q had deliberately caused the money to be paid into her personal account with the aim of depriving BIL of the money.

[140] Ms Q was a director of the company and alerted another director, Ms G, to the issue of her inability to repay the full amount immediately. Ms Q has never denied that she owes BIL the balance of the money.

[141] BIL did not interview Ms G about what she knew of the deposit, or if it did, it did not make any information about what Ms G had said available to Ms Q to allow her to respond to what Ms G said.

[142] BIL did not ask Ms Q to pay the money back to it either before or during the disciplinary enquiry and process.

[143] In those circumstances, I do not consider BIL had sufficient evidence at the time it made its decision to dismiss to conclude Ms Q had committed serious misconduct.

Conclusion on dismissal

[144] A fair and reasonable employer could not have acted as BIL did in all the circumstances. BIL unjustifiably dismissed Ms Q.

Remedies

Underpaid wages

[145] Ms Q claims an unquantified amount of unpaid wages for the hours she worked over and above 40 hours for the last few months of her employment.

[146] Ms Q sought wages and time records from BIL before and during these proceedings. BIL provided some payroll records after the investigation meeting.

[147] On 6 October 2016, Mr McLean directed Ms Q not to work more than 40 hours a week without his prior written approval. Ms Q continued to work in excess of 40 hours a week without Mr McLean's approval. She submitted time sheets reflecting her actual hours, which continued to be over 40 per week. However, BIL did not always pay her for those hours over 40. There is one pay slip for the period ending 16 October 2016 for which Ms Q was paid for 51 hours.

[148] I am not satisfied that Ms Q is owed more money for those hours over 40. I accept it was her view that the bar would not run properly unless she continued to work extended hours. However, she worked them knowing that she risked not being paid for them. Therefore, I do not award any underpaid wages to be paid for the period leading up to 15 December 2016.

Payment during suspension

[149] Given that the suspension was unjustified, BIL should have paid Ms Q for 40 hours per week during the suspension. Therefore, BIL should pay Ms Q for the week of 15 December 2016 until and including 16 January 2017 at 40 hours per week x $18. BIL owes Ms Q a further 55 hours pay[2], or $990 gross, for the period ending 25 December 2016. It also owes her three weeks and one day pay up to and including 16 January 2017. That is $18 per hour x 128 hours = $2,304 gross. $990 + $2,304 = $3,294 gross.

Wages lost as a result of the unjustified dismissal

[150] Ms Q also claims for wages lost as a result of the unjustified dismissal. Ms Q was unemployed for a period of eight weeks and calculates her loss of wages as $8,568 gross. However, by my calculation I consider it to be $18 x 40 x 8 = $5,760 gross.

[151] I find that BIL owes Ms Q for the eight-week period she was unemployed. I am satisfied that in the circumstances she adequately mitigated her loss.

Holiday pay

[152] BIL also owes Ms Q holiday pay on the unpaid wages and wages lost because of the dismissal. I do not agree with Ms Q's claim to be owed 4 weeks of annual leave as she had

[2] I have taken into account the hours BIL already paid Ms Q up to 25 December 2016.

4 weeks of annual leave in September 2016, and was paid for annual leave during the suspension in December 2016.

[153] The amounts of lost wages and holiday pay are subject to any deduction made for contribution. I deal with the question of contribution below.

Compensation

[154] Ms Q gave significant oral evidence at the investigation meeting about the impact on her of the suspension and the dismissal. She said that she had a total physical and mental collapse after the suspension and, in particular, after the dismissal. She says she was unable to get out of bed for several days and lost her ability to talk.

[155] Ms Q also shared some other personal information about the effect on her. However, I do not consider it necessary to give details in this determination.

[156] Ms Q became homeless due to an inability to pay her rent when BIL stopped paying her. During this same period, Ms Q suffered a home invasion.

[157] Her confidence was severely affected by the allegations, the way they were handled and the dismissal.

[158] Her own music promotion business was significantly negatively affected by the closure of the bar and her ongoing inability to use that as a venue. She had bookings using the bar as a venue until August 2017; however, once she was dismissed she was no longer able to honour those bookings.

[159] Ms Q also said that her reputation for honesty was ruined in the music industry by Mr McLean's emails to Acca Dacca's management.

[160] She only regained employment when she decided she would move out of Christchurch. She is working for the previous owners of the bar.

[161] I conclude that Ms Q was severely personally affected by the unjustified disadvantage and unjustified dismissal. I put to one side the trauma and any ongoing negative effect of the home invasion on Ms Q.

[162] In considering the level of award to make, I have taken account of the clear upward trend in compensation awards in the Authority and the Employment Court. I have also considered the Court of Appeal's comments on upper limits in the case of *Police Commissioner v Hawkins*.[3]

[163] Subject to my consideration of contribution, below, BIL must pay Ms Q $20,000 as compensation for humiliation, loss of dignity and injury to her feelings under s 123(1)(c)(i) of the Act.

Contribution

[164] When the Authority determines that an employee has a personal grievance, s 124 of the Act requires the Authority to consider the extent to which any actions of the employee contributed to the situation that gave rise to the personal grievance. Then, if those actions so require, the Authority must reduce the remedies that would otherwise have been awarded.

[165] BIL says that Ms Q's behaviour was so blameworthy that any remedies should be reduced by 100%.

Acca Dacca deposit

[166] Mr McLean followed up with Acca Dacca's management on 16 January 2017, only after he had made the decision that Ms Q had committed serious misconduct in relation to the deposit. He asked why the deposit was paid into Ms Q's personal account instead of BIL's account. Acca Dacca's management replied on 17 January, the day after Ms Q was dismissed, that because he was dealing with Ms Q in relation to the booking he did not realise she was not the owner/operator of the venue. He also said he "followed her instructions in regard to the deposit refund".

[167] However, at the investigation meeting Ms Q disputed that she had given such instructions.

[3] [2009] NZCA 209

[168] I consider that Ms Q did contribute to the situation leading to her unjustified dismissal. Even if she had not instructed Acca Dacca's management to pay the deposit into her personal account she contributed by not telling Mr McLean as soon as she discovered it in her and account and telling him as soon as she knew she was unable to pay it all to BIL immediately.

[169] However, there is no evidence of planned dishonesty.

Poker machine money

[170] Although I accept that Ms Q's actions in leaving money on the stool were negligent not deliberate, I do consider that her actions were blameworthy and contributed to the situation. Ms Q should have done a last check on the whole room to ensure that she did not leave anything behind.

[171] Overall, taking into account the two issues, I consider a reduction in remedies of 15% is warranted.

[172] The remedies to be reduced are the lost wages from 16 January 2017 – now $4896 gross and to the compensation for humiliation, loss of dignity and injury to Ms Q's feelings – now $17,000.

Penalties

[173] Ms Q claims that the Authority should impose penalties on BIL for:

- breaches of good faith, and
- failure to provide a written employment agreement.

Did BIL breach its duty of good faith to Ms Q, and if so, should I impose a penalty?

[174] As part of my consideration of Ms Q's personal grievances, I have found that BIL did breach its duty of good faith to Ms Q, for example in its failure to communicate with her during the suspension. Also, any employer who does not follow the fair procedure steps set out in s 103A(3) of the Act has breached its duty of good faith.

[175] I consider the failure to be responsive and communicative was deliberate, serious and sustained. The failure was intended to undermine the employment relationship between BIL and Ms Q.

[176] I consider that a penalty should be imposed for this failure.

Should I impose a penalty for BIL's failure to supply Ms Q with a written employment agreement?

[177] Sections 63A and 65 of the Act require an employer to provide a new employee with a copy of an intended written employment agreement, and to keep a copy of all written employment agreements.

[178] BIL should have provided Ms Q with a written individual employment agreement, but it did not.

[179] There has been a clear breach of s 63A(2) and s 65 of the Act and I find that this case is an appropriate case for the imposition of a penalty.

Quantum of penalties

[180] Section 135 of the Act provides that every person who is liable to a penalty under the Act is liable, in the case of a company, such as BIL, to a penalty not exceeding $20,000 for each breach.

[181] The purpose of a penalty is to punish the wrongdoer and deter them, and any other employers (in this case), from failing to provide written employment agreements to employees.

[182] In *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*[4] the Employment Court set out a four-step procedure that the Authority should follow when assessing a penalty.

[183] Section 133A of the Act sets out factors that the Authority must take into account when considering the quantum of penalty for a breach of the Act. These factors are:

[4] [2016] NZEmpC 143

> (a) the object stated in section 3; and
>
> (b) the nature and extent of the breach or involvement in the breach; and
>
> (c) whether the breach was intentional, inadvertent, or negligent; and
>
> (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
>
> (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
>
> (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
>
> (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[184] Adopting the four-step approach of *Preet*, I find as follows.

Step 1

[185] As BIL, a company, was Ms Q's employer, the maximum penalty that may be imposed for the two breaches is $40,000. The failure to supply a written employment agreement is one breach, although it could be considered under either section.

Step 2

[186] The first part of Step 2 involves assessing the severity of the breach. The failure to provide the employment agreement was not the most severe as it seems BIL was negligent rather than intentionally failing to provide it.

[187] The second aspect of Step 2 involves an assessment of whether there are any mitigating circumstances. I accept that there was no intent to deny Ms Q an agreement and that its absence was inadvertent. My consideration of the two parts of Step 2 leads me to the conclusion that the penalty, at this point, should be $5,000.

Step 3

[188] Step 3 requires me to assess BIL's financial position. I have received a copy of its financial records. Without revealing details of BIL's financial position, its financial

statements for the year ended March 2017 show that the company made losses in 2016 and in 2017. It is in a poor financial position. That leads me to consider that the penalty should be reduced to $1,000.

Step 4

[189] Step 4 involves an assessment of whether the resulting penalty is proportionate. Step 4 requires the Authority to step back and assess what would be a just penalty overall. One approach is to compare other decisions of the Authority that are comparable.

[190] In all the circumstances of this case, compared with other recent cases including that of *Ball v Battersea Investments Limited* [2018] NZERA 78, and taking into account that I do not want to impose a penalty so high as to ensure it cannot be paid, I conclude that a penalty of $1,000 should be imposed on BIL for the breaches, to be paid to the Authority for transfer to a Crown bank account.

Costs

[191] Costs are reserved. Usually, BIL as the unsuccessful party would be expected to make a reasonable contribution to Ms Q's costs of representation.

[192] I encourage the parties to agree on costs. If that is not possible Ms Q may make submissions on costs within 28 days of this determination. BIL will have a further 14 days to respond.

[193] I will approach costs based on the $4,500 per day nominal tariff. Parties should make submissions on whether they consider there are reasons to award more or less than the daily tariff amount.

Christine Hickey
Member of the Employment Relations Authority