

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 111/08
5100621

BETWEEN JEREMY RODGERS
 Applicant

AND THE AVENUE HOTEL AND
 CONFERENCE CENTRE
 LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Fergie Mackay for Applicant
 Gordon Paine for Respondent

Investigation Meeting: 10 June 2008 at Wanganui

Further information From Respondent's representative 16 June 2008
 The Applicant's representative decided no reply was
 required

Determination: 25 August 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant has claimed he has a personal grievance when he was dismissed on 16 April 2007. He is seeking \$20,000 compensation, lost wages, a penalty and costs.

[2] The respondent has denied the claim and remedies.

Issues

[3] The main issue is would a fair and reasonable employer have dismissed Mr Rodgers for serious misconduct? The respondent has relied on an incident involving a

complaint and in the context of some problems in the parties' employment relationship that had not been the subject to prior disciplinary procedures.

[4] Was the procedure fair?

[5] I must scrutinise and determine on an objective basis whether the employer's actions, and how the employer acted, were what a fair and reasonable would have done in the circumstances at the time the dismissal occurred (*Air New Zealand Ltd v Hudson* (2006) 3 NZELR 155 applied).

[6] I am guided by the Judgment of his Honour the Chief Judge G L Colgan in *The Chief Executive of Unitec Institute of Technology v Kathleen Joan Henderson* (unreported) 19 March 2007 AC 12/07, in applying s 103 A of the Act:

Section 103A requires the Court to consider both elements to standards of fairness and reasonableness although I do not understand Parliament to have altered the long-established case law that fairness and reasonableness must be assessed broadly and not by the application of inflexible principles by minute and pedantic scrutiny. Put another way, even if in some instances over a long process, the employer might be found to have failed to meet all the ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified and that remedies should be awarded accordingly.

...the new section 103A test does not mean that the Court will substitute its own decisions for those of the employer...

The Facts

[7] Mr Rodgers started work at the Avenue Hotel as a bar manager and duty manager on 2 March 2004. Mr Rodgers had a signed off individual employment agreement for the position. This agreement made provision for a job description to be provided and Mr Rodgers says that such a job description was never provided. During his employment, Mr Rodgers' duties changed and he took on more responsibility in the position of night manager and function manager. His earlier employment agreement was not updated. Mr Rodgers, and the hotel's owners: Dorothy McKinnon, a director, and Richard Moore, shareholder; lived at the hotel.

[8] The employment agreement – “the Avenue Hotel and Conference Centre individual employment agreement” (the agreement) - signed off by the parties on 31 March 2004, made provision for summary dismissal as follows:

7.4 *Summary Dismissal*

7.4.1 *The employer may dismiss the employee without notice for serious misconduct.*

7.4.2 *The procedure for summary dismissal will be as follows:*

- (a) *The employee must be advised of his/her right of assistance and/or representation at any stage.*
- (b) *The employer will advise the employee of the specific allegation, and the seriousness of the situation, and provide the employee with an opportunity to refute the allegation or explain the misconduct. If the explanation is not satisfactory to the employer, the employer will inform the employee that the allegations will be investigated further. The employee may be suspended, on pay, to allow a full investigation to take place.*
- (c) *When the employer is satisfied that the matter has been fully investigated, the employer will arrange a meeting with the employee and make the findings of the investigation. The employee will be allowed a reasonable and adequate opportunity to make further representations to the employer.*
- (d) *If the employer is satisfied there is just cause to dismiss, the employee must be informed of the decision to dismiss.*

[9] The hotel's house rules, a separate document, makes provision for misconduct and serious misconduct as follows:

For the avoidance of confusion the following acts listed may contravene your conditions of employment and may result in disciplinary action being taken. Continued contravention may result in dismissal.

- *Absenteeism or lateness.*
- *Absence from your place of work during rostered hours.*
- *Failure to complete assigned duties.*
- *Failure to safeguard the establishment's property.*
- *Unacceptable appearance.*
- ***Unacceptable behaviour towards customers or other staff** (My emphasis).*

The following acts are considered serious misconduct and may result in summary dismissal

- *Removal of any food, beverages, equipment from the premises at any time.*
- *Dishonesty of any kind.*
- *Unauthorised possession of property belonging to the establishment, customers or other staff.*
- *Consuming, using or being under the influence of alcohol, non-prescribed or illegal drugs while on duty or while present on the premises for any other reason.*
- *Insubordination, threatening or abusive behaviour.*
- *Wilful damage to property belonging to the establishment, customers or other staff members.*
- *Falsification of time sheets or any other document pertaining to the establishment.*

[10] The two documents were available, but not relied upon by the employer at the time.

[11] On 8 April 2007 Ms McKinnon received a complaint from a guest about Mr Rodgers' response to an urgent medical crisis with one of the guests. Ms McKinnon wrote up the complaint on one of the hotel's forms. The outcome the guests wanted was training and policies developed.

[12] Ms McKinnon and Mr Moore decided to suspend Mr Rodgers to investigate the matter. It has been claimed that Mr Rodgers was suspended without notice and not given an opportunity to have any input. Mr Moore says he could not contact Mr Rodgers before Mr Rodgers was due to return to work and the decision was taken to save Mr Rodgers any embarrassment. The response was put in writing and Mr Rodgers was provided with the complaint. He was informed of his suspension without having an opportunity for any comment and input:

Monday 9 April 2007

Dear Jeremy

I have tried to contact you on several occasions. I enclose the complaint from the [name withheld] sisters, which Dot discussed with you on Sunday morning.

The issues in the complaint are very serious. We may have to deal with Millennium, HANZ and we are not sure what negative publicity may also occur. Also as one of the sisters made the

point that if the health situation had deteriorated even further, we may have been dealing with the police.

I am investigating all the issues tomorrow and wish to have a meeting with you after I have more information. I strongly recommend that you bring to that meeting a representative as the issues we have to discuss are very serious.

Whilst I am investigating these matters, I consider it is better that you have no work duties at the Avenue. You are still on full pay but suspended from working, pending the investigation of the serious issues.

I am aware you are due to commence work tomorrow Tuesday at 9am. Dot will attend to your workload during the time you are suspended from work. This includes the night shift.

I anticipate completing my investigations by Tuesday. I suggest a meeting time of 10.am Wednesday at the Avenue, room 863. Please contact me at work...

[13] It is common ground that the respondent met the obligation to advise the applicant of the nature of the allegation and he was given an opportunity to obtain a support person for the disciplinary meeting to discuss the allegation. However, it is claimed the applicant was not informed of the possible outcome. It was not referred to in the correspondence.

[14] The parties met on 10 April, and although, it was suggested to Mr Rodgers that he have a representative present, Mr Rodgers decided to proceed without one.

[15] Mr Rodgers signed a statement of his version of the events of the evening.

[16] The next meeting occurred on 11 April where there was a discussion on the events and the meeting adjourned to enable Mr Moore to get further information from the ambulance service. Another meeting was held without Ms McKinnon present on 13 April and Mr Moore reported back to Mr Rodgers the information that he had received from the ambulance service. The information included that:

- a. The call Mr Rodgers received was from the 111 Centre based in Wellington. Mr Rodgers says he thought he was dealing with the ambulance directly.

- b. The emergency service did not receive the message from the guest as to how to get in the front door, which Mr Rodgers says he unlocked and then went back to bed where he fell asleep.
- c. The ambulance was a diesel vehicle.
- d. The diesel motor was not turned off when the ambulance officers went to the guests' assistance at the back door, which was locked.

[17] It was agreed at that meeting that all matters had been discussed and no further investigation was required. Thus the above information was put to Mr Rodgers. However, the next step of Mr Rodgers being informed of the likely and tentative outcome was not conveyed.

[18] Mr Moore agreed to provide Ms McKinnon with the minutes of the meeting over the weekend. Further it is common ground that a decision would be made over the weekend as to the future action concerning the incident and it would be relayed to Mr Rodgers on Monday morning. Mr Rodgers says he had no idea that such a decision would involve his dismissal.

[19] On 16 April Mr Rodgers was dismissed. The reasons for the dismissal were written up as follows by Ms McKinnon and Mr Moore:

Jeremy's failure to provide a proper level of assistance to a guest who was in a potential life-threatening situation amounted to serious misconduct.

The particular circumstances relating to the failure of Jeremy which occurred on Sunday 8 April 2007 are well documented in minutes dated 10, 11 and 13 April 2007.

In addition, there had been the Hos incident in which Jeremy refused to address a guest problem and other complaints detailed in correspondence of 13 December 2006 and 14 February 2007.

Jeremy has apologised in each case and accepted responsibility for these matters.

A combination of all these incidents, culminating in the 8 April incident, resulted in the Kingsgate Hotel management and staff losing confidence in Jeremy's ability to continue his employment.

Kingsgate Hotel the Avenue Wanganui

[20] Ms McKinnon decided that Mr Rodgers' employment could not continue and concluded that she could no longer have any confidence that Mr Rodgers could do his job at the Avenue taking into account the incident and some previous incidents that Mr Rodgers was aware of. A termination package was given to Mr Rodgers to consider that included:

- a. Four weeks pay without being required to work.
- b. Four weeks continued use of his accommodation that was open to be extended.
- c. A reference would be provided.
- d. Any counselling that the Avenue would pay for.

[21] Mr Rodgers was asked for any other suggestions on the termination package. He was given a written reference, which was a statement of fact concerning his employment.

[22] A personal grievance was subsequently raised and the parties attended mediation services provided by the Department of Labour. It falls on the Authority to make a determination.

Determination

[23] First I accept the submission that the employer was not bound to apply the suggestion on the outcome made by the complainant. Any decision was entirely a matter for the respondent.

[24] Second I have considered the employer's action on making a decision to suspend Mr Rodgers from work on full pay. This is a matter of background only. The suspension was not the subject of the claim for personal grievance since it was not referred to as the employment relationship problem in the statement of problem, and the personal grievance was raised as an unjustified dismissal claim. As an aside the suspension was made without Mr Rodgers having the opportunity to comment and provide his input before the decision was made. There was clearly a serious complaint made that gives rise to an employment relationship problem. Mr Rodgers was not disadvantaged because he was suspended on full pay and had an opportunity to raise the matter during the investigation, but did not do so. The substantive complaint and

the serious misconduct allegation became the primary focus of attention as one would expect.

[25] Mr Rodgers was put on notice of that a complaint from a guest was being taken seriously. It emerged that he had not made a call for the ambulance services when he was contacted by the guest, he unlocked the front door without waiting for the ambulance to arrive and then went back to bed and fell asleep, and he failed to provide assistance as required and failed to switch the phones while he was supposed to wait in the reception area. He did not relock the doors as required for safety after the ambulance left the premises.

[26] Ms McKinnon and Mr Moore acknowledged that the other problems in the relationship had been raised previously with Mr Rodgers only to talk about and there was no disciplinary procedure invoked prior to the latest incident.

[27] Ms McKinnon and Mr Moore assumed that Mr Rodgers would have known the seriousness of the situation and that his job was in jeopardy. The employer relied upon the written notice dated Monday 9 April 2007 given to Mr Rodgers at the time in regard to his suspension and the investigation of the complaint.

[28] The letter did not explicitly tell him his employment may be in jeopardy. I find that Mr Rodgers would have known that his employment was in jeopardy given the seriousness of the matter conveyed to him by his employer in that letter and that he had been suspended, and that he was given an opportunity to decide to have a representative present.

[29] Mr Rodgers knew that a decision would be made over the weekend concerning the incident upon the completion of the employer's investigation. He was given some information but this fell short of the findings. He did not challenge that at the time. He should have had an opportunity to have some input and opportunity to comment on the findings, including a preliminary outcome, before the final decision was made. The process under the employment agreement and house rules that a fair and reasonable employer would have followed involves: *"When the employer is satisfied that the matter has been fully investigated, the employer will arrange a meeting with the employee and make the findings of the investigation. The employee will be allowed a*

reasonable and adequate opportunity to make further representations to the employer.”

It then follows Mr Rodgers had to be informed in writing of any decision to dismiss him under the procedure. It is clear that the former part of the process did not occur until he was informed of the decision to dismiss him.

[30] The employer could have relied on at least two provisions of misconduct under the house rules, but that document was not relied upon at the time. The two categories that were relevant seem to fall below the category of serious misconduct that could have related to the incident. The closest grounds the employer could rely upon were:

- a. *Failure to safeguard the establishment's property.*
- b. *Unacceptable behaviour towards customers or other staff.*

[31] Instead the employer arrived at another conclusion that it had no confidence in Mr Rodgers' ability to continue his employment. The question is whether or not the employer's reasons relied upon to justify the dismissal amount to serious misconduct?

[32] It was open to a fair and reasonable employer to consider the single incident as serious misconduct was significant and substantial based on the complaint from the guest, and because the lists of matters for misconduct and serious misconduct under the house rules were not inclusive.

[33] Once the employer had completed its investigation it was bound to apply the procedure of informing Mr Rodgers of the findings of the investigation. There was nothing to prevent the employer from making the findings and telling Mr Rodgers of a tentative decision to enable him to have an opportunity to mitigate. That did not happen. Sometimes such an omission will not be fatal, but in this instance the problem is that the employer is exposed because other matters were included in the reasoning that Mr Rodgers should have been properly given the opportunity to comment on, such as:

...
In addition, there had been the Hos incident in which Jeremy refused to address a guest problem and other complaints detailed in correspondence of 13 December 2006 and 14 February 2007.

Jeremy has apologised in each case and accepted responsibility for these matters.

*A combination of all these incidents, culminating in the 8 April incident, resulted in the Kingsgate Hotel management **and staff losing***

confidence in Jeremy's ability to continue his employment. (Emphasis added)

[34] Mr Rodgers should have been entitled to comment and have some input especially on the reference to staff losing confidence in his ability. It was also unfair to include the matters that had been previously disposed of without telling Mr Rodgers in coming to the decision to dismiss him. In such a situation the employer's reference to the inability of Mr Rodger's to carry out his work was more a matter of performance, and as such would be more a matter to do with disciplinary procedures for poor performance and could not be related to serious misconduct.

[35] Ordinarily the decision to pay an extra four weeks pay would be a sign that the conduct was less than serious misconduct and more to do with a matter of performance, but for the actual incident. However, in this instance Mr Rodgers had accommodation on the hotel premises and a fair and reasonable employer would have decided on a favourable package to assist Mr Rodgers' orderly departure. It is within the range of decisions open to an employer to pay more, but in essence that did not change the summary nature of the dismissal for serious misconduct given the incident relied upon and because it related to his dismissal.

Conclusion

[36] It is my decision that Mr Rodger's has a personal grievance, but only because there has been a procedural failure. Mr Rodgers failed to remain and wait for the ambulance at the main door and failed to switch the phones over while he was waiting and he did not relock the front doors. He also failed to provide assistance to the guest. It would have been entirely reasonable for his employer to have expected him, in his role to have carried out these functions, and for him to be available to provide assistance instead of him going back to his room to sleep. These are significant factors impacting on any remedies that would be awarded to him. The requirements of his job as the night manager were such that these acts and omissions are contributory conduct leading directly to his dismissal. Even although he was not directly told of the employer's tentative decision I find he should have understood the consequence of how seriously the employer considered the matter to make dismissal at least foreseeable given Ms McKinnon's letter dated 9 April 2007 and that he was given an opportunity to have a representative involved. It might have been possible that Mr Rodgers would

have insisted on the presence of a representative if he had known he faced the possibility of being dismissed. However, Mr Rodgers did not actively pursue representation on other matters in his employment relationship early and I find that he was able to confidently represent himself, that he had advance notice of the allegation and the complaint and that he was informed of the seriousness of the situation. I have found he would have known that his employment may have been in jeopardy, especially given that he had been suspended. He decided not to get representation despite being given the opportunity, and it is not a mandatory requirement to be represented. Thus I conclude his failure to get representation is not a fault of the employer.

[37] The decision and considerations in the letter dated 9 April 2007 were never put to Mr Rodgers for comment and mitigation. These were factors that were open to the employer to consider in its determination of an outcome, but deficient in this instance because of the lack of any detail in regard to the reference to other staff. It was unfair to put matters that had been disposed of previously and not the subject of any warning. Putting that to one side Mr Rodgers' acts and omissions in regard to the incident relied upon by the employer were serious and enough on their own to amount to serious misconduct of a significant and substantial nature.

[38] The failure of the employer to up date the employment agreement is not a matter for a penalty since Mr Rodgers at least had the basis of an existing employment agreement.

[39] I find Mr Rodgers has a personal grievance. The procedure followed by the employer was defective and lacking in sophistication, but Mr Rodger's contribution means that there is no award for remedies because his actions and omissions would be 100% of any remedies because they would have constituted serious misconduct.

[40] Costs are reserved.