IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 401/08
5128448

	BETWEEN	DARREN SAMUELS Applicant
	AND	SKYCITY MANAGEMENT Ltd Respondent

Member of Authority:	James Wilson
Representatives:	Helen White for the applicant Shan Wilson for the respondent
Investigation Meeting:	5 & 8 September 2008
Submissions received:	15 September 2008 from the applicant 19 September 2008 from the respondent
Determination:	24 November 2008

DETERMINATION OF THE AUTHORITY

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[1] Darren Samuels was employed as a gaming table supervisor at the SkyCity Casino (SkyCity) in Auckland, from 1996 until his dismissal in April 2008. On 22 March 2008 Mr Samuels failed to detect a mistake made by a dealer that he was supervising. This incident was investigated by SkyCity and, at the conclusion of a formal disciplinary process, Mr Samuels was dismissed. SkyCity's operations Manager on duty at the time of the incident, Jimmy Gifford, says when deciding to dismiss Mr Samuels he took into account Mr Samuels' employment history, including a series of file notes and formal warnings for similar incidents of inattention over a long period of time.

[2] Following the decision to dismiss Mr Samuels, his union approached the HR Manager - Hotel Group for SkyCity, Ms Michelle Hamilton. At the union's request Ms Hamilton reviewed the decision to dismiss Mr Samuels but confirmed the decision.

[3] Mr Samuels says that his dismissal was unjustified because it was not *what a fair and reasonable employer would have done in all the circumstances* (refer s.103A of the Employment Relations Act). He says that the support provided to him, following earlier warnings, was inadequate and the incident which gave rise to his dismissal was not consistent with the incident which had given rise to the previously issued a final warning. Mr Samuels is seeking reinstatement to his position, recovery of lost wages and compensation for the hurt and humiliation his dismissal caused him.

[4] SkyCity says that having followed a fair and thorough investigation it came to the conclusion that, under all the circumstances, it was fair and reasonable to dismiss Mr Samuels.

[5] The main issue for determination in this matter is whether or not SkyCity, in dismissing Mr Samuels, acted in a way that *a fair and reasonable employer would have done in all circumstances*. If they did not do so then Mr Samuels' dismissal was unjustified and the secondary question to be determined is whether or not Mr Samuels should be reinstated to his position and what, if any, compensation he should be paid for the unjustified actions of his employer.

Was Mr Samuels dismissal what a fair in reasonable employer would have done?

The disciplinary process

[6] On 28 March 2008 SkyCity wrote to Mr Samuels advising him that it wished to convene a formal disciplinary meeting to discuss the 22 March incident. This letter clearly set out Mr Samuels' rights and invited him to attend a meeting on 1 April 2008 *to tell (SkyCity) his side of the story.*. At this meeting Mr Samuels was accompanied by a union delegate and was given an opportunity to present his side of what had happened on 22 of March. During this meeting Mr Samuels accepted that he had

missed the dealers error but argued that *nine out of 10 supervisors* would have missed the same mistake. Following an adjournment SkyCity informed Mr Samuels that it was seriously considering his dismissal and inviting him to attend a further meeting to put forward any other issues or arguments that he wished the company to consider. Following this first disciplinary meeting Mr Gifford says that he took the opportunity to enquire into the possibility of demoting Mr Samuels (as an alternative to dismissal, as suggested by the union) and to further discuss the incident of the 22 March with the dealer concerned.

[7] A further meeting was held on 2 April 2008. At this meeting Mr Samuels was represented by Mr Mike Treen from the Unite Union. Mr Treen argued that the 22 March incident should be regarded in isolation and the company should not take into account previous infractions. He also reiterated Mr Samuels argument that the same mistake would have been missed by 90% of other supervisors, that to dismiss Mr Samuels would be out of proportion to the incident and that perhaps the company should impose a lesser sanction, such as demotion. He also drew the company's attention to some personal difficulties which Mr Samuels had been struggling with over the past few months.

[8] Mr Gifford says that having completed the disciplinary investigation he agonised over the decision but came to the conclusion that the right outcome was to dismiss Mr Samuels. Mr Gifford says that he simply does not accept that 9 out of 10 supervisors would have missed a similar mistake and that Mr Samuels had received a clear final warning in June 2007 that, if further incidents occurred due to his inattention, dismissal could be a potential outcome. Mr Gifford says he did not feel that the right outcome was to issue yet another final written warning and the point had come to conclude that Mr Samuels simply did not have the level of attention required to be supervisor in table games. He says that he explored the suggestion that Mr Samuels should be demoted but that this option was inappropriate because, *if someone has attention issues as a supervisor they are obviously not cut out to be a dealer either because it is equally important in both roles that the employee can pay attention to the game.*

Destruction of video surveillance tape

[9] During the course of my investigation it became apparent that the incident on 22 March had been recorded on video surveillance. Unfortunately, due to the intervention of the Easter weekend this was, as was normal practice, overwritten within a few days and before it could be preserved and reviewed as part of the disciplinary process. However while there is some difference of opinion about the exact details of the incident, Mr Samuels has accepted that a mistake was made by the dealer and that he failed to detect it. Mr Samuels argument is not that an error did not occur but that, because of the actions of the dealer, the mistake was particularly difficult to pick up. (According to Mr Samuels the dealer did not verbally state "no more bets" which would have alerted him to pay particular attention to the game in progress). I am satisfied that the destruction of the video tape did not adversely affect Mr Samuels rights during the company's investigation of the 22 March incident. Mr Samuels was not dismissed for the error but for his lack of attention and failure to notice the error. There is no dispute that Mr Samuels did not notice the error.

Mr Samuels' work history

[10] SkyCity says that in deciding to dismiss Mr Samuels they took into account what they referred to as his *checkered employment history*. In particular SkyCity pointed to a series of scorecards and staff comment cards dating back to 2004 including comments such as

- *.. does not concentrate on his game, seems to be a TV gazer (April '04)*
- *Gives the impression that he doesn't know or care what is going on in his section. (October '04)*
- *Too much TV gazing and seems to have lost enthusiasm to go any further. (December '04)*
- *Needs to concentrate more on the tables and not give impression that (he is) not watching … games. (May '05)*
- *…has been told repeatedly by his managers to watch his tables … don't watch TV etc and blatantly ignores them. Time to shape up. (July '05)*
- *…often being corrected for lack of concentration and being easily distracted with conversations. (November '05)*
- *… allowed the wrong cards to be sent out. These areas can be easily avoided if duty and attention maintained. (staff comment card April '06)*

- *…moved away from a live game or turned his back on a live game to watch something in the slots area. (staff comment card June '06)*
- *Has been caught napping on the job several times in this review period. (August '06)*

[11] In August 2006 Mr Samuels was formerly counselled regarding his poor attendance and advised that any recurrence or similar incidents or any *further breach of company policies and procedures* might result in further disciplinary action.

[12] In January 2007 Mr Samuels was issued with a final written warning for *damaging or defacing company properly* and again advised that any recurrence of this incident or *any further breach of company policy and procedure* might result in further disciplinary action.

[13] In June 2007 an incident occurred which led the company to institute further disciplinary procedures against Mr Samuels. This incident was described in a letter to Mr Samuels as:

> *"While supervising a game of Baccarat you appear (as shown in our surveillance footage) to be looking away from the table at the television, you then walk away from the table and continue watching television. This occurred at a critical phase of the deal, where the requirement for close monitoring is at a high point. In this instance the dealer made an error, the error was not picked up by you and the resulting cost to SkyCity was $XXX*

[14] After investigating the June 2007 incident SkyCity accepted that these events were not the same as those for which Mr Samuels had already received a final written warning. Rather than dismissing him therefore they elected to give him what they referred to as an *addition to final warning*. This addition to final warning once again included a comment that should any recurrence of this incident or any further breach of company policy etc may result in further disciplinary action up to and including the termination of Mr Samuels employment.

Was Mr Samuels given adequate support?

[15] Mr Samuels says that, following the *addition to final warning,* he was not given adequate support to ensure that he was able to maintain his concentration and avoid further incidents. He says that, following the 2007 addition to final warning, SkyCity did nothing to help him manage distractions. While no evidence was produced of specific assistance given to Mr Samuels in particular, Mr Gifford spelt out a range of initiatives which had been taken, and were ongoing, to assist supervisors in maintaining the level of attention. Mr Samuels was given support consistent with the level of support given to other supervisors. His failings had been clearly spelled out to him and the consequences of continued failure made abundantly clear. The standard expected was neither unreasonable nor inconsistent with that required, and achieved, by other staff. SkyCity did have an obligation to support Mr Samuels and, I find, fulfilled this obligation. Mr Samuelson also had obligation to his employer to ensure that he met the necessary standard.

"The 22 March 2008 incident should be seen in isolation"

[16] Mr Samuels' representative has argued that the incident which occurred on 22 March 2008 should not be linked in any way to the incident which gave rise to the addition to final written warning of June 2007. Ms White argues that the incident in 2007 was one where Mr Samuels had walked away from the gaming table and was found guilty of inattention to the game he was supposed to be supervising, whereas there is no evidence that the incident in 2008 involved Mr Samuels wandering off or being distracted by television. She argues that there was evidence that Mr Samuels had heeded the warning he had been given in 2007 and the 2008 incident was not of a similar nature.

[17] I do not accept this argument The reason the law requires an employer to give an employee who is not meeting a performance standard a series of warnings is to give that employee an opportunity to improve the performance. Such warnings are on the clear understanding that failure to improve may result in disciplinary action and as a last resort, dismissal. Mr Samuels had been reminded on many occasions that he must pay attention to the games he was supervising. The addition to final warning of 2007, as with many of the notes to file and scorecard comments, repeated this instruction. The incident in March 2008 was the result of Mr Samuels inattention. He had been reminded and finally formally warned that unless he improved his

performance in this area his employment was in jeopardy. Mr Samuels can have been in absolutely no doubt that his repeated failure in this regard could eventually result in his dismissal.

"9 out of 10 supervisors would have missed the mistake"

[18] Mr Samuels, and his representatives, have argued that the error he failed to notice would not have been noticed by 9 out of 10 other supervisors. . Mr Gifford, who has previously himself been a table supervisor and has had many years experience at the casino, rejected this assertion. His evidence in this regard was both credible and unambiguous. Having heard evidence from other supervisors and having observed the environment in which these games take place, I accept Mr Gifford's assessment. While it is true that there may be a number of distractions which may make it difficult for supervisors to concentrate, these distractions did not appear to me to be overwhelming. At the time the 22 March incident occurred Mr Samuels was supervising only one dealer in an area of the casino which is relatively quiet. It is a fundamental aspect of a gaming supervisors role that they pay close attention to the game they are supervising. Mr Samuels failed, as he had done on a number of occasions previously, to meet this standard.

Legal considerations

[19] It is now well established law (Ref for example, *Trotter v Telecom Corp of NZ Ltd* [1993] 2 ERNZ 659 at 681) that an employer, when considering dismissing an employee for matters relating to performance, must ensure:

- That the standards of performance and consequences of not meeting those standards have been made clear.
- That the expected standards are reasonable and achievable.
- That the employee is given proper training and support to achieve the standards required.
- That employee is given a proper opportunity, i.e. training, support and time, to achieve the required standard.

When considering whether what the employer did in dismissing an employee for failing to meet a performance standards, is "*what a fair and reasonable employer would have done*, it is these well established principles which must be used as the benchmark.

[20] Equally, before making the final decision, the employer must give the employee a proper opportunity to persuade the employer that they should not be dismissed. The employer must consider the employees arguments with an open mind and must genuinely consider possible alternative sanctions.

Determination

[21] **I am satisfied that SkyCity's actions in dismissing Mr Samuels were *what a fair and reasonable employer would have done in all circumstances.*** Mr Samuels was given very clear guidance as to the standards expected and his employer persisted over a lengthy period of time to attempt to persuade him to achieve that standard. While law requires that an employer give an employee every opportunity to improve there comes a point where the employer is entitled to say *enough is enough.* This is one of those instances. Mr Gifford do not make the decision to dismiss Mr Samuels likely and I accept that he agonised over it. The disciplinary process he, and the company followed met to the required standard of fairness and openness. I accept Mr Gifford's assertion that he considered the option of downgrading Mr Samuels with an open mind but rejected that alternative as impractical.

[22] **Mr Samuels' dismissal was justified and he does not have a personal grievance against his former employer, SkyCity Management Ltd**

Costs

[23] The parties are encouraged to settle the question of costs between themselves and in the meantime costs are reserved. Should the parties not be able to reach agreement then SkyCity may file and serve submissions in respect of costs within 28 days of the date of this determination. Mr Samuels will then have 14 days in which to respond.

James Wilson
Member of the Employment Relations Authority