

[4] Ms Taipari says that she was instructed by Mr Stewart to administer the bar out of bar takings. This included payment for bar expenditure such as rent and wages. Ms Taipari says that often there was not enough money to pay all the expenses out of the bar takings and so she would meet the outgoing expenses by using funds from the TAB and gaming machine floats. Mr Stewart would then refund the appropriate float.

[5] It was common ground that Ms Taipari raised with Mr Stewart issues around discrepancies in the gaming machine banking for Lion Foundation. Mr Stewart confirmed in his oral evidence that Ms Taipari had told him she thought there was money missing but to his knowledge there wasn't. He told me at the investigation meeting that he was satisfied that any discrepancies were as a result of the way Ms Taipari was misapplying the money from the TAB and gaming machine floats to ensure the bar expenses were being met, and not as a result of any fraudulent or other activity.

[6] On or about September 2007 Pub Charities took over the gaming machines from Lion Foundation. An audit by Pub Charities in December 2007 found money had not been properly accounted for.

[7] At about this same time (October 2007) Ms Taipari advised Mr Stewart that she no longer wished to be responsible for the payroll and office duties and asked that he employ someone else to run the office. Mr Stewart saw this request as an opportunity to employ a new bar manager. Mr Stewart in his written evidence says:

...took this as a blessing as there had been shortfalls which at the very least indicated to me that the TAB and gaming machines were not being managed properly. If that was the case it fell to Tracy in terms of her management abilities and Tracy saying that she didn't want that responsibility anymore meant that I could get a new manager without having to take any other steps.

[8] Mr Robin Thurston, a regular at McGinty's, gained Ms Taipari's confidence that he may be able to shed some light on the money that Ms Taipari was convinced had gone missing from the bar. After her attempts to have the bar audited through Mr Stewart failed, Ms Taipari invited Mr Thurston to investigate the source of the inconsistencies in the financial accounting with respect to the gaming machines. Mr Thurston was provided with relevant financial information from the bar to enable him to complete his investigation. Mr Stewart was aware Mr Thurston was undertaking these investigations.

[9] Between October 2007 and January 2008 Mr Stewart says he was looking for someone to take over the management of the bar but was unsuccessful. During this time Mr Stewart did not inform Ms Taipari that he considered she had resigned from her position and did not disclose his search efforts to find a new bar manager to her.

[10] A new bar manager was eventually sourced and appointed with effect from 7 January 2008. Ms Taipari claims the appointment of a new bar manager and a request from Mr Stewart that she resign from her employment resulted in her dismissal. She claims that dismissal was unjustified and seeks remedies.

[11] Pursuant to section 103A the Authority must scrutinise the respondents actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[12] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer¹.

[13] Although the Authority does not have unbridled licence to substitute its decision for that of the employer² it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome³.

7 January 2008

[14] On Monday 7 January 2008 Mr Stewart telephoned Ms Taipari and requested she meet him at the bar. Mr Stewart had come to the bar to interview Mr Max Persen for the role of bar manager. Mr Stewart says he was acting on the advice from Ms Taipari in October that she no longer wished to undertake the full bar manager function which included payroll and other office duties. Mr Stewart says Mr Person

¹ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

² *X v Auckland District Health Board* [2007] 1 ERNZ 66.

³ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

was to take over the office duties and would be responsible for the rostering of the bar. The rostering of the bar staff has always been the domain of the bar manager.

[15] Ms Taipari says Mr Stewart advised her he had run out of money, that the bar would be closed for a week and he was getting an independent auditor in to do an audit. She says Mr Stewart asked for her resignation and advised her that she could apply for her position the following Monday. Mr Stewart confirmed in his oral evidence that Ms Taipari was told she would have to apply for her hours but denies she was told she would have to apply for her position.

[16] I am satisfied Ms Taipari's position was no longer available to her. This is consistent with Mr Stewart's evidence that he had employed a new bar manager. I find it is more likely than not that Ms Taipari was advised that she would have to apply for her hours which was intended to show that Ms Taipari was no longer employed as bar manager and would work as a bar person after negotiating her hours with Mr Persen.

[17] I accept that Ms Taipari had been clear with Mr Stewart that she no longer wished to undertake the administrative functions of her role and I accept also that Ms Taipari's role included those administrative tasks. However, Ms Taipari continued in her full bar managers' role from October to January without any hint that Mr Stewart had considered that she had resigned from her role in October. As I stated earlier, Mr Stewart failed to communicate with Ms Taipari that his intention was to replace her completely and not just take the administrative function off her, which is what she had asked him to do.

[18] I find Ms Taipari was asked to resign from her position as bar manager. I also find that she refused to do so and advised Mr Stewart of this. In any event, Ms Taipari was not required to resign as I find she had been dismissed. This finding is supported by other evidence adduced at the investigation meeting that Mr Stewart promised Ms Taipari that she would be reinstated the following week when he asked Ms Taipari for her keys and requested that she return the company van. If Ms Taipari was not dismissed, she would not need to be reinstated.

[19] If Mr Stewart's intention, that Ms Taipari was no longer considered to be an employee was unclear on 7 January 2008, then his communications with another employee two days later confirms his intention.

[20] Mr Stewart acknowledged at the investigation meeting that he had sent text messages to another employee whose employment was terminated at the same time as Ms Taipari. On 16 January Mr Stewart made contact with the employee and advised her he had a job for her if she wanted it. In his next text message Mr Stewart made the comment that he could not reemploy Ms Taipari. Mr Stewart denies sending three further text messages in which he is quoted as saying:

No not u. Robin cleared u of any stealing & thought u a very honest person. That's why I paid u for work done. This is not about u ...

And

U have been cleared. B happy that's a gd thing. Tracy will do jail. Rowarth also has also been cleared by Robin.

[21] I am satisfied it is more likely than not that Mr Stewart did send these text messages. These messages are consistent with the respondent's statement in reply where it states:

... the respondent discovered significant financial losses attributable to the applicant as a result of a breach by the applicant ...

[22] I find on balance, that Ms Taipari was unjustifiably dismissed from her employment on 7 January and that this dismissal was as a result of Mr Stewart becoming aware of discrepancies in the accounting for monies. If Mr Stewart was concerned about the discrepancies then he was obligated to put this to Ms Taipari. He failed to do this, preferring to simply replace her with Mr Persen. Ms Taipari is entitled to remedies for her unjustifiable dismissal.

Arrears of Wages

[23] Ms Taipari claims she has not been paid her wages for the three weeks prior to her dismissal, or her holiday pay. The respondent has provided a breakdown of the amount of wages including holiday pay it says is still outstanding. The amount is \$8,098.93 gross.

Marty's Limited trading as McGinty's Turf Bar is ordered to pay Ms Taipari the sum of \$8,098.93 gross pursuant to s 131 of the Employment Relations Act 2000, within 28 days of the date of this determination.

Remedies

Contribution - accusations of theft

[24] As required by s 124 of the Act I have considered whether Ms Taipari's actions contributed to her personal grievance. The statement in reply and the communications

between Ms Taipari's representative and Mr Stewart, prior to the investigation meeting all indicate that Mr Stewart was convinced Ms Taipari had stolen money from the business. There was no evidence produced to the Authority to support this allegation. Indeed Mr Stewart went to great lengths at the investigation meeting to convince the Authority that he was not concerned about any missing money. In any event, I am satisfied the allegation was unfounded. I have concluded Ms Taipari did not contribute to the action giving rise to her personal grievance.

Lost Wages

[25] Ms Taipari gave compelling evidence with respect to the affects the dismissal had on her and her inability to obtain alternative employment as a result of the rumours about her having stolen money from the bar. Ms Taipari was dismissed on 7 January, by 19 January Ms Taipari was put on a sickness benefit and has been unable to work since that date. There is no evidence before the Authority on which I can safely conclude that Ms Taipari's illness was caused directly by the unjustified dismissal. Medical advice received by the Authority by way of a medical certificate dated 18 January 2008 indicates Ms Taipari was suffering from exzema and stress with no further details.

[26] Once Ms Taipari went on the sickness benefit she was no longer in a position to search for new work opportunities. Any lost wages after 19 January is therefore attributable to being on the sickness benefit.

[27] Ms Taipari is eligible for reimbursement of lost wages from 7 January to 19 January which is two weeks. I have used the information provided by McGinty's to calculate Ms Taipari's average weekly earnings which equates to \$964.33.

Marty's Limited trading as McGinty's Turf Bar is ordered to pay Ms Taipari the sum of \$1,928.66 gross pursuant to s 123(1)(b) of the Employment Relations Act 2000, within 28 days of the date of this determination.

Compensation

[28] Ms Taipari says that following her dismissal, Mr Stewart made untrue allegations that she had stolen money from the bar. Further that Mr Thurston reported to her that she was a thief and a liar.

[29] At the investigation meeting Mr Stewart denied making any allegations about Ms Taipari. However, I find, on balance, Mr Stewart did make allegations about Ms Taipari, albeit it was Mr Thurston who felt it necessary to communicate these

allegations to the wider population. In the small community where Ms Taipari resides this has had a considerable affect on her personally. On balance, I am satisfied that the allegations Mr Thurston made about Ms Taipari are completely without foundation and are unsubstantiated.

[30] No proof that Ms Taipari had stolen money from her employer has been produced to the Authority. There was however, significant evidence that Ms Taipari had not been trained in the administrative function of her role and was struggling to balance the books. There was also evidence that Ms Taipari had raised with Mr Stewart concerns over missing money from the time she took over the administrative role. These concerns seem to have been completely disregarded by Mr Stewart.

[31] Ms Stewart gave compelling evidence about the affect her dismissal has had on her. Ms Taipari is to receive compensation in the sum of \$5,000.

Marty's Limited trading as McGinty's Turf Bar is ordered to pay Ms Taipari the sum of \$5,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, within 28 days of the date of this determination.

Costs

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Taipari may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority