

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 424
5440582

BETWEEN WAYNE WU
 Applicant

A N D SKYCITY MANAGEMENT
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Nathan Santesso, Advocate for the Applicant
 Kylie Dunn, Counsel for the Respondent

Investigation Meeting: 26 September 2014 at Auckland

Submissions Received: 26 September 2014 from the Applicant
 26 September 2014 from the Respondent

Date of Determination: 14 October 2014

DETERMINATION OF THE AUTHORITY

- A. Mr Wu was not constructively dismissed.**
- B. Costs are reserved.**

Employment relationship problem

[1] The respondent, Sky City Management Limited (Sky City) employs staff for Skycity Auckland Casino (the Casino). The Casino is subject to the Gambling Act 2003 (the Gambling Act). The Casino is monitored by the Department of Internal Affairs to ensure it complies with the Gambling Act, including game rules and licence conditions.

[2] Mr Wu was employed by Sky City for approximately six years until his resignation on 29 August 2013. Mr Wu was initially employed as a dealer in the



Casino, dealing games, including Baccarat. From March 2011 Mr Wu was employed as a surveillance operator in the surveillance department.

[3] On 25 August 2013 Mr Wu was monitoring a game of Baccarat when a player removed a card from the table, walked out of sight with it and then returned a card to the table. This was a serious breach of the rules which Mr Wu should have reported, but did not. Mr Wu acknowledged the player's conduct was a serious breach of the game rules and that he should have reported it but was very busy, so did not.

[4] Mr Wu was requested to participate in a disciplinary process, but before the process was concluded, Mr Wu resigned.

[5] Mr Wu says he was forced by Sky City to resign his position and that his resignation amounted to a constructive dismissal which was unjustified.

[6] Mr Wu says the way in which he was treated during the disciplinary process, and the disciplinary process itself, led to his resignation, which he says amounted to a constructive dismissal which in the circumstances was not justified. Mr Wu seeks remedies in respect of his alleged unjustified dismissal.

[7] Sky City says Mr Wu clearly breached the gazetted rules of Baccarat and, admitted doing so. Sky City says the disciplinary process was carried out fairly and before a final conclusion was reached, Mr Wu resigned. Sky City says Mr Wu made a choice to resign, he was not forced to do so by any of its actions and therefore no remedies are payable by it.

Issues

[8] The Authority must determine the following issues:

- (a) Was Mr Wu constructively dismissed by Sky City?
- (b) If Mr Wu was constructively dismissed, was the constructive dismissal justified?
- (c) If Mr Wu was unjustifiably constructively dismissed, what remedies should be awarded to him?



First issue

Was Mr Wu constructively dismissed by Sky City?

[9] Mr Wu claims he was constructively dismissed by Sky City. Mr Wu says he was given a choice by Sky City of resigning or being dismissed by it. Alternatively, Mr Wu says Sky City followed a course of conduct with the deliberate and dominant purpose of coercing him to resign. Sky City denies these claims.

[10] These two situations were identified in the Court of Appeal decision of *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*¹ as situations in which an employee who has resigned may claim constructive dismissal.

Employment by Sky City

[11] The main facts in this matter are not in dispute. Mr Wu was initially employed by Sky City as a card dealer. From 3 March 2011, Mr Wu was employed as a surveillance operator and signed Sky City's Surveillance Code of Conduct (Code of Conduct).

[12] In signing the Code of Conduct, Mr Wu acknowledged that he understood that:

- the surveillance team was responsible for ensuring compliance with the rules and procedures that apply to the conduct of table games operations;
- the surveillance team works closely with the Department of Internal Affairs to ensure that any breach of the Gambling Act is reported to the Department of Internal Affairs; and
- the detection of any procedural breach must be reported to the surveillance shift manager.

[13] On 7 July 2013, Mr Wu signed an employment agreement dated 5 July 2013, which includes a position description.

[14] The purpose of the position description is as follows:

¹ [1985] 2 NZLR 372



Responsible for ensuring the safety of Employees and customers, the protection of assets, the integrity of Skycity operations, and ensuring compliance with company policies, procedures, internal controls and gazetted rules through both proactive and reactive monitoring of activities.

[15] The major challenges of the role are described as follows:

- *Operate best practice Casino surveillance systems and processes including CCTV, data storage and analysis and other associated technology, and required to immediately report any failures or issues.*
- *To maintain an excellent understanding of Casino games rules and SKYCITY's policies and internal department procedures.*
- *Assist with the delivery of security control services by acting as backup controller as directed by surveillance management.*
- *Maintain the highest levels of confidentiality and integrity.*

[16] Other tasks listed in the job description include proactively monitoring gaming and cash handling areas, maintaining a high level of observation arising from proactive monitoring, ensuring all incident and special projects reports are accurate and complete, monitoring and reviewing identified illegal/suspicious activity, and monitoring and reviewing *staff and customers to ensure they conduct themselves in accordance with Skycity's policies and procedures, including high action, VIP activity, account procedures, point of sales etc.*

[17] Mr Wu was a valued employee and in 2012 was nominated as surveillance operator of the year.

Incident 25 August 2013

[18] During his shift on 25 August 2013, Mr Wu was monitoring a game of Baccarat. Mr Bill King, surveillance manager at Sky City explained the game of Baccarat as follows:

Baccarat is a card game played between two hands – the player and the banker. Cards are drawn in accordance with a fixed regime and there is no skill or strategy involved. Both the banker and the player start with two cards. These cards determine whether additional cards are drawn. There are Gazetted Rules which govern the game of Baccarat.



[19] The game in question on 25 August was midi Baccarat. During the round of play, known as a *coup*, comprising a player hand and a banker hand, there was an incident which Mr Wu reported to his immediate supervisor.

[20] During the same coup and before the coup had finished a second incident arose. The second incident involved a player removing a card from the table and placing it into his pocket. The player then walked away from the table and out of sight before returning to the table with a card.

[21] Mr Wu failed to support this second incident. At the Authority's investigation meeting Mr Wu said that he had been preoccupied and too busy to report the incident, and that he had made a mistake.

[22] Mr King became aware of the incidents on the morning of 26 August 2013 when the risk analysis manager, Mr Keith Miller, informed him of the incidents. Mr Miller had reviewed the footage of the first incident reported by Mr Wu. Mr Miller continued to watch until the end of the *coup* in question and noticed the further incident which had not been reported by Mr Wu. When Mr Miller raised the matter with Mr King, they both watched the video footage which showed the second incident in which a player removed a card from the table, placed it in his pocket, walked out of sight and then returned with a card.

[23] Mr King was concerned at the incident which he believed to be serious. This was because first, it was a breach of the Gazetted rules, but also because the incident had not been reported, and there was no way to know whether the card which had been taken and then returned to the table was the same card.

[24] Mr King described the seriousness of the second issue as follows:

If an individual removes a card from the table, it could be switched and replaced with another card, or it could be pocketed for use at a later time. Having possession of a card from Skycity is such that it could be used in a game at any time. It is conceivable that a player could win a lot of money by knowing they had a particular card they could play in a particular hand. This card could also be removed from the Casino and duplicated. ... Skycity is extremely vigilant when it comes to card security. From the moment a card is delivered to the Skycity, to the moment it is destroyed, Skycity's cards are subject to tight security.



Suspension - 26 August 2013

[25] Following the meeting with Mr Miller, Mr King decided he needed to speak with Mr Wu about the matter. The meeting took place at the start of Mr Wu's shift on the morning of 26 August.

[26] At the meeting, Mr King showed Mr Wu the report that he had made into the first incident on 25 August, in which a bet was changed. Mr King asked if there was anything else he needed to be told about it. Mr Wu talked about the first incident but did not mention the second incident in which a player removed a card from the table.

[27] After some further discussion, Mr Wu told Mr King that there had been another incident in which a player had removed a card from the table. Mr Wu told Mr King that he had not reported it because he did not think it was really suspicious.

[28] Mr Wu acknowledged at the meeting that he had seen the player take the card but had not thought it was suspicious enough to report. Mr King asked Mr Wu if he had reported this second incident to his team leader and was told "no" by Mr Wu.

[29] Mr Wu says he was not prepared for the meeting and found it uncomfortable.

[30] At the Authority's investigation meeting, when asked when he was going to raise with Mr King the second incident of the player removing a card from the table, Mr Wu said he did not immediately raise the matter because Mr King had not mentioned it.

[31] Mr King was not satisfied with Mr Wu's responses. Mr King contacted his supervisor, Mr Frank Tweedale, the senior surveillance manager and Ms Doreen Carter, business partner employee relations about the situation.

[32] Mr King decided that in the circumstances Mr Wu should be suspended on pay pending the completion of a disciplinary investigation into the matter, which he considered was necessary. Mr Wu was accordingly suspended on pay.

Confirmation of Suspension and Request for Further Meeting

[33] Mr King wrote to Mr Wu on 26 August confirming their earlier discussion and Mr Wu's suspension on pay up until the investigation was completed. Mr King confirmed that:



This action has come about as the result of an incident that occurred on your shift last night when you failed to report viewing a customer removing a card from a gaming table in accordance with departmental process. This action may, if proven, constitute serious misconduct by way of gross negligence and ... conduct that brings Skycity into disrepute, or has the potential to bring Skycity into disrepute as stated in the Disciplinary and Dismissal Policy, copy attached, and would therefore represent a significant breakdown in the trust and confidence in the employment relationship.

[34] The letter from Mr King set out the allegations in respect of the incident on Sunday 25 August 2013. Attached to the letter was a document which set out details of a proposed meeting at 9.30am on Thursday 29 August to discuss the matter. The document informed Mr Wu that Ms Doreen Carter and Mr King would be at the meeting. The letter went on to state:

- 1. You have the right to be represented or to have a witness present. This could be a Union representative, a Union delegate, a solicitor, or someone else of your own choice including one of Skycity's Connect Employee Support Team as a support purpose. A list of Union Delegates on site can be found at the notice board located in 24/7 Alley.*
- 2. You are being given no less than 24 hours notice of this meeting to arrange for representation. If for some reason you or your representative(s) are unable to make this time, please discuss with me directly so I can agree a mutually suitable time. In the event of unreasonable delays, an outcome may be decided in your/your representative(s) absence after carefully considering all the available information.*
- 3. You can and should respond to any allegation made against you. This is your right to tell your side of the story and give an explanation.*
- 4. You can stop the disciplinary meeting at any time so that you can prepare an explanation, or to discuss the situation with your representative.*

... Please note that the Support Team (Connect) is available to you for support and can be found next to the staff café (24/7). For additional information or advice they can be contacted on extension 6187. Similarly the Employee Assistance Programme (EAP) is available to you for confidential support and can be contacted on ...

[35] Mr Wu says on 27 August after receiving the letter that he attempted to change the time of the meeting from 29 August because he had an examination at the University of Auckland on that date. Mr Wu says Mr King flatly refused to change the time of the meeting. Mr King denies this. Mr King says Mr Wu told him that he had



an exam on 29 August. Mr King says he told Mr Wu the matter was important and asked Mr Wu whether he could change the time of the exam. Mr Wu said he would see what he could do. Mr King said he did not hear back from Mr Wu about this.

[36] Mr Wu then telephoned Ms Carter about changing the meeting time. Mr Wu told Ms Carter that Mr King had declined his request to change the meeting time. Ms Carter asked Mr Wu whether he had checked if it was possible to change his exam time. Mr Wu told Ms Carter he had not. Ms Carter suggested he should do so in the first instance. Mr Wu spent much of 28 August changing the time of the exam so he could attend the meeting on 29 August.

[37] I accept Mr King and Ms Carter's evidence which is consistent with Mr Wu's actions.

[38] Mr King suggested that Mr Wu try and change the exam time and Mr Wu went ahead and did so. Mr Wu did not go back to Mr King or Ms Carter and ask that the disciplinary meeting scheduled for 29 August be changed to another date, nor did he inform Mr King or Ms Carter that he had managed to change the time of his exam.

[39] During the course of the investigation meeting, Mr Wu suggested that Mr King and Sky City had acted unjustifiably in the way in which it had dealt with the meeting on 29 August. I do not accept that to be the case.

[40] Mr King said that if Mr Wu was unable to attend the meeting on 29 August it could have occurred on Friday 30 August. This was also clear in the document attached to the letter of 26 August, confirming suspension.

Disciplinary Meeting – 29 August

[41] On 29 August a disciplinary meeting was held. Mr King attended along with Ms Carter. Mr Wu attended without support or representation. In the telephone conversation with Ms Carter on 27 August about Mr Wu changing his exam time, Mr Wu told Ms Carter he was struggling to get a representative. Ms Carter reminded Mr Wu of Sky City's in house employee support team, Connect. Ms Carter gave Mr Wu the Connect team's contact details. Mr Wu says he rang the number but did not leave a message.



[42] Ms Christine Hackshaw, Employee Support Advisor with Sky City's Connect team described Connect services as follows:

Connect Services provides confidential staff support to Sky City employees. Our focus is on ensuring staff welfare. Connect Services is available to all Sky City employees to assist with work or personal issues. This can include assistance or advice regarding disciplinary processes.

[43] Before the 29 August meeting started, Ms Carter asked Mr Wu if he was happy to proceed with the meeting without a support person. Mr Wu confirmed that he was.

[44] Mr Wu acknowledged at the meeting that he had seen the second incident in which a player had removed a card from the table and subsequently returned to the table with a card. Mr Wu confirmed that he had not reported the matter. Ms Carter took notes of the meeting. Mr Wu's answers to the questions about the second incident were vague. His answers varied from not being able to remember, focusing on the first incident and that it was not very suspicious.

[45] After hearing Mr Wu's responses, the meeting was adjourned so that Mr King and Ms Carter could discuss his responses and potential disciplinary action.

[46] At this time, Ms Carter felt that Mr Wu seemed not to be understanding the serious nature of the situation he was in. Ms Carter went to speak with Mr Wu before the meeting reconvened and asked him if he wished to have a support person, his partner or a colleague attend the meeting with him. Mr Wu responded that he did not want a support person. Ms Carter then asked whether he would like somebody from Sky City's Connect Employee Support Team at the meeting and Mr Wu said he would.

[47] Ms Carter then telephoned Ms Hackshaw, an employee support advisor with Sky City's Connect office. Ms Carter says she explained to Ms Hackshaw that she and Mr King were in a disciplinary process with Mr Wu and she was concerned that he did not appear to be understanding the seriousness of the situation. Ms Carter asked Ms Hackshaw if she was available to come and speak with Mr Wu so he understood the seriousness of the situation. She agreed to do so.



[48] Ms Hackshaw says she told Mr Wu she was from Sky City's Connect team and had been asked by Ms Carter to meet with him so he understood the seriousness of his situation. Ms Hackshaw says Mr Wu asked her what his options were. Ms Hackshaw explained that he could either allow the disciplinary meeting to continue to an outcome and then consider his options. Alternatively, he could resign before any outcome. Mr Wu asked Ms Hackshaw for her advice. Ms Hackshaw refused saying she could not give him advice on what he should do. Mr Wu asked Ms Hackshaw to confirm that he would not have a dismissal on his record if he resigned.

[49] Ms Hackshaw confirmed that if he resigned it would be a resignation. Mr Wu then told Ms Hackshaw that he had already been offered a job at another casino. At the investigation meeting Mr Wu said this was not true, he said this "*to save face*".

[50] Mr Wu asked Ms Hackshaw for a pen and paper and wrote out his resignation. There was no mention by Mr Wu of being forced to resign and there was no mention in his letter of resignation of being forced to resign or about being unhappy to resign.

[51] Mr Wu subsequently claimed that his resignation was a constructive dismissal which in the circumstances was unjustified.

[52] I do not accept this to be the case. Mr Wu was participating in a disciplinary process and during the course of it made a decision to resign. This was following an investigation into his conduct. Mr King told Mr Wu that he believed his conduct in failing to report the second incident on 25 August was serious misconduct, as a result he had lost trust and confidence in him, and he proposed terminating Mr Wu's employment. The meeting was adjourned to allow Mr Wu to consider his response.

[53] Mr Wu decided that rather than await the outcome of the disciplinary process and the final decision about his continued employment, he would resign and informed Ms Hackshaw this was what he wanted to do and that he already had another job.

[54] Upon receipt of Mr Wu's resignation, Mr King discontinued the disciplinary process and did not make a decision as to Mr Wu's ongoing employment. However, it was conceded at the Authority meeting, the likely outcome was dismissal.



Constructive Dismissal

[55] The threshold for establishing constructive dismissal is high. An employee has the onus of demonstrating that his or her employer's actions were such that the employment relationship was no longer tenable. The employee therefore had no other option but to resign.

[56] I have already referred to the Court of Appeal decision in *Woolworths*. The Court of Appeal in that case identified three situations in which a constructive dismissal may occur:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty leads an employee to resign.

[57] Mr Wu is attempting to rely on the first two of the above categories.

[58] Mr Wu's resignation did not, in my view, fall within any of the three categories of constructive dismissal set out in *Woolworths*.

[59] Sky City had initiated a disciplinary process following a serious incident involving a card player. The seriousness of the incident and the failure to report it were acknowledged by Mr Wu. Mr Wu did not have a reasonable explanation and was suspended while further investigation took place. Mr Wu was given notice of the disciplinary meeting and was fully informed of his rights before attending the meeting. Mr Wu could have adjourned the meeting and obtained legal advice or a support person, he did not do so.

[60] Mr Wu attended the disciplinary meeting on 29 August unsupported. Sky City was concerned that Mr Wu appeared not to understand the seriousness of the situation. Mr Wu was offered and accepted support from Ms Hackshaw an advisor with Sky City's Connect team. This support was offered following Mr King's decision that Mr Wu's conduct amounted to serious misconduct and the proposed penalty was summary dismissal. Mr Wu chose to resign rather than continue with the disciplinary process.



[61] On the balance of probabilities, I find that Mr Wu resigned and the resignation was not a constructive dismissal. As Mr Wu resigned, he does not have a personal grievance and there is no need for me to determine the other issues.

[62] Even if I am incorrect, it is my view that Sky City carried out a full and fair investigation and determined Mr Wu's failure to report the second incident constituted serious misconduct for which dismissal was appropriate. This in my view was a decision a fair and reasonable employer could make in all the circumstances.

Costs

[63] Costs are reserved. The parties are encouraged to agree costs. However, if that is not possible, Sky City has 14 days from the date of this determination to file and serve a memorandum as to costs. Mr Wu has 14 days from receipt to file and serve a memorandum in response.



Anna Fitzgibbon
Member of the Employment Relations Authority

