

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 152  
5298760

BETWEEN                      LOUISE ESM'E MARSTERS  
   Applicant  
  
AND                                WAITEMATA RUGBY  
   UNION & SPORTS CLUB  
   INC,  
   Respondent

Member of Authority:        James Wilson

Representatives:             Louise Marsters in person  
   Paul Chambers for the respondent

Investigation Meeting:       29 October 2010

Determination:                14 April 2011

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1]     Louise Marsters ("Ms Marsters") was employed as Club Administrator at the Waitemata Rugby Union & Sports Club Inc ("the Club") from May 2007 until her dismissal, for serious misconduct, in December 2009. Ms Marsters says that her dismissal was predetermined and unjustified. The Club says that Ms Marsters was dismissed after a fair and detailed investigation.

[2]     In an amended statement in reply the Club raised a number of counter claims against Ms Marsters, seeking to recover a total of \$985.00 which they said was owing to them. I understand that the amounts sought have now been accounted for and the Club is no longer seeking reimbursement.

**The issues for determination.**

[3] In the words of s. 103A of the Employment Relations Act (the Act) I am required to determine whether the actions of the Club and how the Club acted, in dismissing Ms Marsters *were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal*. If they were not then Ms Marsters has a personal grievance against the Club and I will then be required to determine what remedies should be awarded to her.

**The events leading to Ms Marsters dismissal**

[4] As a result of a downturn in bar takings, some stocktaking discrepancies and the discovery by the Club Captain of a shredded bar sheet, the Club's committee decided to engage the services of a private investigation company. On the advice of that company the Club committee decided, at the end of October 2009, to install surveillance cameras in the bar and storeroom. In mid November 2009 the company which had installed the cameras downloaded the video recordings for the previous two weeks. A security company employee reviewed these recordings and extracted excerpts which he deemed to be "of interest" to the Club's investigation. The security company also prepared a written log of what was viewed on the video surveillance and both the video recording and the written log were passed to the Club Chairman Mr Ron Jones and the Club Captain, Mr Lindsay Ellery.

[5] On 18 November 2009 Mr Jones wrote to Ms Marsters inviting her to a meeting on Thursday, 19 November 2009 to *discuss information which has come to the company's (sic) attention which if proved correct, would seriously put in doubt your employment with the club*. The letter went on to say:

*Detailed information about our concerns will be made available to you at that time. In essence though, it involves what appears to be evidence of you taking drinks, alcohol both whilst on duty behind the bar and off duty and breaching club procedures in relation to the serving of drinks.*

[6] At the meeting scheduled for 19 November the Club was represented by Mr Ron Jones, Club Chairman, and Mr Phil Jones an employee of the investigation company which had arranged for the video recordings. Ms Marsters was

accompanied by Mr Perry Davis. At the commencement of the meeting the Club proposed that the attendees view the video recording and that the Club then ask Ms Marsters a number of questions with the answers to be recorded. However Ms Marsters objected to this arrangement and, according to the Club, Mr Davis and Ms Marsters advised that they did not wish to view the tape but wanted the Club to put the accusations in writing and that a formal response would be prepared for presentation at a future meeting.

[7] An important difference between the parties is what opportunities Ms Marsters and her representative were given to view the video surveillance footage. Ms Marsters says that she requested a copy of the recording but that this was never forthcoming. The Club says that they offered Ms Marsters the opportunity to view footage at the club rooms as it was technically difficult/impossible to provide a copy of the recording. Whatever the truth regarding this issue Ms Marsters did not view the video recordings until they were eventually made available as part of the Authority's investigation.

[8] On 20 November 2009 the Club wrote to Ms Marsters setting out a schedule of the various incidents listed on the video about which the Club had concerns. By way of example two of the incidents noted to were:

*14/11/09 - 18:44 hrs - (Ms Marsters) seen to pour a spirit and a coke into a glass jug behind the bar and makes no attempt to pay for it.*

*3/11/09 18:07 hrs Takes can of coke, no attempt to pay.*

[9] After some confusion regarding the availability and preparedness of various parties to attend, a new meeting was held on 3 December 2009. At this meeting Ms Marsters provided detailed typed responses to the various correspondence and issues raised by the Club.

[10] On 8 December 2009 the Club Chairman, Ron Jones, wrote to Ms Marsters advising that she was summarily dismissed for serious misconduct. While it is not necessary to set out this letter in full, it set out in detail the Club's findings in relation to the various issues and incidents. Again by way of example:

- a. *You further state that in another incident on camera yourself and two others were working in the bar. That you opened the bar to help the bar manager by counting the weekend's takings, and doing the banking. Whilst doing this you had two rums and you are unsure if you paid for them. You have repeatedly been told that since the bar manager was hired you were not to perform bar related duties in the manner you describe.*
- b. *I find that you did enter the bar and consume alcohol without authority.*

The letter also said:

*As outlined above, the inconsistent or incomplete nature of your explanations surrounding the majority of allegations against you, the lack of evidence to support your statements, and the overwhelming evidence that substantiate wrongdoing of this seriousness have left me no choice but to sustain the allegations of serious misconduct against you.*

## **Discussion**

[11] During the course of the Authority's investigation Ms Marsters spent a good deal of effort, and produced a substantial amount of evidence, to demonstrate that she was not guilty of the various acts and omissions which led to her dismissal. As I explained to Ms Marsters at the Authority investigation meeting, it is not the Authority's role to determine "guilt" or "innocence". Rather the Authority is required to determine whether, having carried out a full and fair investigation the employer reasonably concluded, on the balance of probabilities and on the evidence it had at the time that the employee was guilty of serious misconduct. The Authority must then assess whether the employers actions in dismissing the employee were what a fair and reasonable employer would have done in all the circumstances.

*Was the Club's investigation full and fair?*

[12] There are two elements of the Clubs investigation which are of concern. Firstly the lack of access to the video recording. Under usual circumstances it would be fair for the employer to provide the employee with a copy of all of the evidence it is considering - including unfettered access to any video recordings. In this instance the Club insists that it did offer Ms Marsters the opportunity to view the tape at the club rooms (there is a dispute regarding whether this was to be supervised by the club representative.) It is arguable whether Ms Marsters was disadvantaged by not seeing the tape – she did receive a fully documented breakdown of the events about which

the Club required an explanation. She in fact gave a detailed explanation of each event. However, on balance, I find that Ms Marsters was disadvantaged by not seeing the tapes before she was required to provide her explanations. The tapes themselves are revealing in what they do not show. They are from static cameras and to an untrained observer are almost impossible to interpret. Had she seen them Ms Marsters could have, for example, identified the various staff and members and what they, and she, were doing. A good example is the Club's belief that Ms Marsters was disposing of till records (supposedly to hide discrepancies) where Ms Marsters says that she was simply training another staff member how to balance the till receipts and the tapes disposed of were practice tapes. Even observing the video this is not obvious but could easily (and should have been) verified by the other staff member.

[13] My second concern regarding the Clubs investigation is the failure to advise Ms Marsters of the results of the further enquiries they made, and seek her further comment, before the Chairman made his decision to dismiss. Again by way of example – Ms Marsters said that she had sought “permission” from another staff member before taking two dozen beer from the storeroom. Mr Jones says in his letter of dismissal that “S” denies having allowed Ms Marsters to take the beer. Ms Marsters, if that had been put to her, would have advised Mr Jones that it was not “S” but another staff member that she had spoken to. She was not given this opportunity.

[14] Ms Marsters also said that in a number of instances the Club had not taken into account the explanation she had given for her behaviour. For example she says that although the Club insisted that she had been told not to work behind the bar, and not to allow Club members to go behind the bar, Mr Jones himself had both allowed her to work behind the bar and at times gone behind the bar himself. There is a clear conflict of evidence on these issues. The Club insists that the policies and instructions were clear – Ms Marsters says that the instructions were at best vague, had been countermanded and/or ignored. Although some light could have shed on this point by the immediate past president, the Club did not discuss the issue with him at the time. (He was eventually interviewed by me as part of my investigation and was able to provide some useful insights into Ms Marsters' employment history at the Club and the operating policies during his tenure as Chairman.)

[15] It is fair to point out that, since her dismissal and in some cases as a result of information produced as part of the Authority's investigation, a number of the perceived discrepancies investigated by the Club, have been clarified and resolved. I find that **the Club did not undertake a full and fair investigation regarding its concerns about Ms Marsters before deciding that she was guilty of serious misconduct.**

**Determination: Was Ms Marsters unjustifiably dismissed?**

[16] At the risk of being overly pedantic, it follows from my finding that the Club did not undertake a full and fair enquiry, that they could not establish, on the balance of probabilities, that Ms Marsters was guilty of serious misconduct. Under these circumstances there was no properly established basis for her dismissal. **Ms Marsters was unjustifiably dismissed and she has a personal grievance against the Club**

**Remedies**

*Contribution*

[17] Before considering what remedies should be awarded to Ms Marsters I am required in terms of section 124 of the Employment Relations Act (the Act) to consider whether or not she *contributed to the circumstances which gave rise to (her) personal grievance*. If she did I am required to reduce any remedies accordingly.

[18] I wish to emphasise that I do not believe that Ms Marsters was dishonest, or benefited financially from her actions. In fact I have no doubt that she contributed "above and beyond the call of duty" and in what she considered were the best interests of the Club. However having considered all of the evidence I have come to the conclusion that Ms Marsters simply did what she thought was best regardless of what the Club or its Chairman instructed. She behaved as though the Club was hers to run as she thought fit. Some of her actions, while well meaning, were "sloppy". On several issues she appears to have simply ignored the instruction of the Chairman because what he wanted was inconvenient.

[19] It is this laissez-fair attitude which led to the Club's concerns and was a major contributing factor to the circumstances that led to her dismissal. **I find that Ms Marsters made a 50% contribution to the circumstances that led to her dismissal and the remedies awarded are reduced accordingly**

*Recovery of wages lost*

[20] Ms Marsters was dismissed on 8 December 2009. She filed her statement of problem in the Authority on 1 March 2010. For various reasons the Authority's investigation meeting did not take place until late October 2010. As at early November 2010 Ms Marsters had still not been able to secure a new position despite *sending her CV to several dozen companies through "seek"*. I accept that her age (late 50's), the prevailing economic climate and the close proximity of the Christmas break at the time of her dismissal, made it difficult for Ms Marsters to obtain employment. If it had not been for my finding that Ms Marsters' contributed to the circumstances that gave rise to her personal grievance I would have ordered that she be paid 6 months salary. However taking into account her 50% contribution, **the Waitemata Rugby Union & Sports Club Inc is to pay Ms Marsters 3 months (13 weeks) wages, less tax, as reimbursement of wages she lost as a result of her unjustified dismissal.**

## **Compensation for hurt and humiliation**

[21] Ms Marsters gave evidence about the embarrassment her dismissal caused her. She says that she was deeply involved in Club activities, was well known and liked by the members and her dismissal has cast a shadow on her reputation and integrity. I accept that her dismissal has caused her stress and humiliation. On the other hand Ms Marsters struck me as a robust personality who has been able to cope with the stress a little better than some others might have. I must also take into account Ms Marsters contribution to the circumstances that led to her dismissal. Taking into account Ms Marsters 50% contribution, **the Waitemata Rugby Union & Sports Club Inc is to pay Ms Marsters, in terms of s. 123(1)(c)(i) of the Act, \$2500.00 without deduction as compensation for the hurt and humiliation her unjustified dismissal has caused her.**

## Costs

[22] As Ms Marsters was not legally represented there is no question of an award of costs. However **she is entitled to be reimbursed for the \$70.00 Authority filing fee and I order that the Club reimburse her for that amount.**

## Summary of findings and orders

[23] By way of summary of the findings and orders set out above I have found that:

- **The Waitemata Rugby Union & Sports Club Inc did not undertake a full and fair investigation regarding its concerns about Ms Marsters before deciding that she was guilty of serious misconduct.**
- **Ms Marsters was unjustifiably dismissed and she has a personal grievance against the Club; but that**
- **Ms Marsters made a 50% contribution to the circumstances that led to her dismissal and the remedies awarded are reduced accordingly**

And I have ordered that:

- **the Waitemata Rugby Union & Sports Club Inc is to pay Ms Marsters 3 months (13 weeks) wages, less tax, as reimbursement of wages she lost as a result of her unjustified dismissal.**
- **The Club is to pay Ms Marsters, in terms of s. 123(1)(c)(i) of the Act, \$2500.00 without deduction as compensation for the hurt and humiliation her unjustified dismissal has caused her.**
- **The Club is to reimburse Ms Marsters the \$70.00 Authority filing fee.**

James Wilson

Member of the Employment Relations Authority