

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Auckland 179
5362169

BETWEEN	AMELIA BROUGHTON Applicant
AND	PORTAGE LICENSING TRUST Respondent

Member of Authority:	R A Monaghan
Representatives:	P Teei, counsel for applicant J Douglas, counsel for respondent
Investigation Meeting:	11 April 2012
Additional information provided:	16 April 2012
Determination:	30 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Amelia Broughton says her former employer, Portage Licensing Trust (the trust) dismissed her unjustifiably. She was dismissed because, while she was on duty as the duty manager, she left the premises of a bar operated by the trust in order to attend to a personal matter.

[2] The trust says Ms Broughton's absence was a breach of her legal obligations as duty manager and amounted to serious misconduct. Her dismissal was justified, and was imposed following a full and fair investigation.

Background

[3] The trust operates the Spiders Bar (Spiders) in Avondale. It employed Ms Broughton as a bar person in 1996, and in 2001 Ms Broughton obtained a duty manager's qualification under the Sale of Liquor Act 1989. From 2002 she took on the additional duties of a duty manager when she was rostered on in that capacity.

[4] Also in 2002 the parties signed a written employment agreement. Annex A of the agreement set out the trust's work rules, which included:

SERIOUS MISCONDUCT

The following items constitute serious misconduct and are liable for instant dismissal

- 1. ...*
20. Failure to comply with liquor licensing laws

[5] Section 115 of the Sale of Liquor Act, provides:

- (1) At all times when liquor is being sold or supplied to the public on any licensed premises a manager must be on duty.*
(2) A manager on duty in respect of licensed premises is responsible for –
- (a) ... The compliance with and enforcement of –*
- (i) the provisions of this Act; and*
(ii) the conditions of the license in force in respect of the premises; and
(iii) the conduct of the premises with the aim of contributing to the reduction of liquor abuse.
- (3) At all times while a manager is on duty in respect of any licensed premises, the name of the manager must be prominently displayed inside the premises so as to be easily read by persons using the premises; and the person so named at any time is to be treated for the purposes of this Act as the manager at that time*

[6] A liquor licence, or managers' certificates issued under the Sale of Liquor Act, can be suspended or cancelled for, respectively, breaching the Act¹ or failing to conduct licensed premises in a proper manner.²

¹ s 132 Sale of Liquor Act

² s 135

[7] The trust also held a licence under the Gambling Act 2003 in respect of the pokie machines at Spiders. The Gambling (Harm Prevention and Minimisation) Regulations 2004 promulgated pursuant to that Act provide:

12 Requirement to provide problem gambling awareness training

*(1) The holder of a class 4 venue licence ... must, in relation to a venue at which it conducts gambling, provide problem gambling awareness training –
(a) in the case of a class 4 venue, to the venue manager and any other venue personnel so as to ensure that there is always a trained person at the venue when class 4 gambling is available:*

[8] Ms Broughton had undertaken the required training.

[9] A class 4 licence can be suspended or cancelled for failures including failure to comply with the terms of a licence or with minimum standards.³

[10] On the evening of 15 August 2011 Ms Broughton purchased meals from a takeaway outlet across the road from Spiders. She had no cash with her to pay for the food, and was unable to obtain any. She was permitted to take the food in reliance on her promise to pay as soon as the takeaway opened the next day.

[11] Ms Broughton was rostered for work as duty manager at Spiders from 9 am – 4 pm on the next day, 16 August. She had sole charge of the venue during the day.

[12] The takeaway opened at or about mid-day. Ms Broughton, who was anxious to make the payment, left the Spiders premises to do so as soon as she saw the takeaway was open. It was common ground that the absence was for no more than a few minutes, but no other qualified duty manager was on the premises at the time and the trust says the absence created a breach of s 115 of the Sale of Liquor Act. Similarly Ms Broughton's absence left the pokie machines without supervision by a person trained in problem gambling awareness, breaching the gambling regulations.

[13] While Ms Broughton was absent, a customer entered Spiders and found it unattended. The customer also saw Ms Broughton at the takeaway and complained to the trust.

³ Gambling Act s 58

[14] The complaint was referred to Richard Griggs, the hospitality operations manager, who referred it to Martha Gibbons, the human resources manager. Mr Griggs spoke to Ms Broughton on 18 August, describing the content of the complaint and seeking a preliminary response. Ms Broughton advised that she had left the premises for personal reasons. She said she had asked a person employed in the liquor wholesaler next door, which was also operated by the trust, to look after Spiders during her absence. Mr Griggs responded that the absence was considered a major issue because of the trust's obligations under both liquor licensing and gambling legislation to supervise customers. He told Ms Broughton her reason for leaving the premises was not acceptable and her absence placed the trust's licence at risk. A disciplinary process would commence.

[15] Later that day Mr Griggs spoke to the person employed in the liquor wholesaler. The employee confirmed that he had been asked to look after Spiders, and added that he had done so before. He said his role was simply to keep an eye on the bar and advise any customers that someone would be back soon. Otherwise he was untrained in the operation of the bar and had not completed the problem gambling awareness training.

[16] By letter dated 22 August 2011 Mr Griggs sought Ms Broughton's attendance at a disciplinary meeting on 24 August. He warned that the termination of her employment was possible, and encouraged her to bring a support person.

[17] The disciplinary meeting duly went ahead on 24 August. Ms Gibbons conducted the meeting, with Mr Griggs in attendance. Ms Broughton attended with a support person.

[18] During the meeting Ms Broughton provided more detailed information about her purchase of food on the evening of 15 August and her undertaking to make the necessary payment when the takeaway opened on 16 August. She was asked why she did not call the takeaway to advise that she was unable to leave Spiders to make the payment at the required time, and replied that she was not thinking. She acted as she did because the staff at the takeaway had said the Police would be called if she did not go over to make the payment.

[19] Ms Broughton also said she did not realise at the time that leaving the premises could place her job in jeopardy, although she acknowledged that she understood the requirements of the sale of liquor and gambling legislation.

[20] There was a further discussion about the alternatives to leaving the premises which were available to Ms Broughton, and the risk to the trust's licences her actions had caused. Ms Broughton repeated that she had acted without thinking and accepted she had made an error of judgment, but said she loved her job and pointed out that she was a long-standing employee who had not been disciplined before. She said she would not act that way again, and asked for another chance.

[21] The meeting was adjourned while the trust considered its response. Ms Gibbons and Mr Griggs concluded that, in the knowledge of her obligation to remain on the premises, Ms Broughton had made a conscious choice to act as she had. Her actions created a risk for the trust's licences and amounted to a serious breach of trust and confidence. Her employment was therefore to be terminated immediately.

Whether the dismissal was justified

[22] The test of justification for the dismissal is set out in s 103A of the Employment Relations Act 2000. It concerns whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[23] The issues raised in this employment relationship problem concern whether the conclusion that Ms Broughton's conduct was serious misconduct was one a fair and reasonable employer could have reached. Ms Broughton says her conduct did not amount to serious misconduct, and in turn that the trust's conclusion on the point was not one a fair and reasonable employer could have reached, in that she:

- (i) was absent from the premises only briefly;
- (ii) was obliged from time to time to leave the bar in order to receive deliveries and the absence on this occasion was no different in kind;

- (iii) had taken reasonable steps to cover her absence from the premises by asking the employee from the liquor wholesaler to watch the bar;
- (iv) was rostered to work from 9 am to 4 pm without a break and had not otherwise taken a break at the time she left the premises, so that the employer's breach of obligation in that respect contributed to her conduct; and
- (v) the conduct did not amount to serious misconduct as defined in the employment agreement.

1. Brief absence from premises

[24] The absence was indeed brief, but the brevity itself does not determine whether the conduct was serious misconduct. Rather it is a factor to be considered in an overall assessment of the seriousness of the conduct.

2. Leaving bar to receive deliveries

[25] During the investigation meeting in the Authority Ms Broughton sought to compare her leaving the premises to pay the takeaway with leaving the bar area from time to time to attend to deliveries, which she said occurred. The trust did not necessarily accept that leaving the bar area as Ms Broughton described was a satisfactory practice, but pointed out in any event that Ms Broughton had left the premises rather than merely the bar area. In addition it distinguished actions of the kind Ms Broughton described from a departure from the premises for personal reasons. The latter was conduct it considered likely to put its license at risk.

[26] The trust's response is reasonable and I do not find Ms Broughton's comparison of assistance.

3. Reasonable steps taken to cover absence

[27] The arrangement with the employer at the wholesaler was raised with the trust at the time, in effect as an argument that Ms Broughton's absence did not amount to serious misconduct because reasonable steps to provide cover had been arranged.

However the trust's concern was not just that Ms Broughton had left the premises, but that she had done so as the duty manager who was under a legal obligation to remain present. Even if otherwise reasonable steps were taken to provide cover, this did not affect Ms Broughton's legal obligation.

[28] Further, the trust did not accept that the arrangement was otherwise reasonable, in that the employee from the wholesaler did not have a full view of the bar area. That matter was debated in the evidence, and I accept that the ability of the other employee to supervise the Spiders premises adequately was limited. Moreover that additional task reduced the employee's ability to maintain proper oversight of the wholesale outlet.

[29] The trust was entitled to conclude that the explanation that reasonable steps had been taken to arrange cover for the absence was not satisfactory.

4. No rostered breaks

[30] The employment agreement provided:

8.6 After no more than 5 hours work a 30-minute meal break shall be taken by the employee. Tea/coffee breaks will be allowed after 3 hours continuous work. Tea and coffee will be provided.

[31] No concern about an inability to take a break, or the absence of a rostered break, was raised as a reason for Ms Broughton's leaving the premises as she did on 16 August. Her explanation was that she needed to leave the premises to make the payment as soon as the takeaway opened at mid-day, and she gave no thought to any alternatives including contacting the takeaway about making payment at any other time. The trust was entitled to rely on the explanation it was given at the time.

[32] In any event, Ms Broughton's argument in respect of rostered breaks assumes not only an obligation to provide breaks, but an obligation that the breaks be rostered formally. The trust's obligations do not necessarily extend that far.

[33] Rosters from the relevant time recorded start and finish times for the Spiders' staff, but breaks were not rostered. The trust's evidence was that, because of the

nature of the industry, staff take their breaks when they are able to. For example, if an employee is serving a customer when a break might otherwise have fallen due, the expectation is that service will continue rather than being halted so a break can be taken. Staff can and do take their breaks at quieter times when such a problem is unlikely to arise. There was no disagreement with that evidence in general.

[34] Further if Ms Broughton had relied, as she now does, on the lack of a rostered break to explain or excuse her conduct on 16 August, then in order to assist her any break would have to be rostered to commence at mid-day, when the takeaway opened. Whether clause 8.6 meant meal or tea breaks had to be rostered to commence after precisely five or three hours respectively of continuous work was not discussed in submissions, and Part 6D of the Act⁴ does not impose such a narrow obligation.

[35] However if clause 8.6 has such a narrow meaning, then because Ms Broughton was rostered to start work at 9 am she could have expected a tea break at midday. Subject to other operational needs she could have had a break at mid-day if she chose – the difficulty was that she could not leave the premises unless another duty manager was present. I do not accept that the obligation to allow a break extends to an obligation to permit an employee to leave the workplace in order to take the break.

[36] In addition it was the evidence of Tracey Rogers, the acting manager of the Spiders venue at the time and also a qualified duty manager, that she had alerted Ms Broughton earlier in the day that she would be ‘in around lunch time’. Ms Broughton did not advise Ms Rogers of the arrangement she had made with the takeaway bar. There was debate about the precise time of Ms Rogers’ arrival, but it was probably at or about 1.30 pm. Ms Broughton could have taken steps to plan her meal break and leave the premises to make her payment upon Ms Rogers’ arrival.

[37] Finally, if there was a breach of obligation by the trust in respect of breaks, the breach did not cause Ms Broughton to act as she did on 16 August. Her decision was not affected by the availability of a break. It was affected by her concern that the staff at the takeaway had said the Police would be called if payment was not made. She acted as she did without considering the alternatives available.

⁴ This Part of the Act addresses rest breaks.

[38] Accordingly I do not accept this factor excuses or mitigates Ms Broughton's conduct.

5. Conduct not serious misconduct as defined in the employment agreement

[39] It was submitted that there was no serious misconduct as defined in the employment agreement because there was no failure to comply with liquor licensing laws.

[40] In particular it was suggested on behalf of Ms Broughton that s 115 of the Sale of Liquor Act does not oblige a duty manager to remain on the premises. For example counsel suggested that a duty manager may from time to time be expected as part of the responsibility as a 'good host' to leave the premises briefly to assist a drunk patron to enter a taxi, and that such action would be unlikely to breach the terms of a liquor licence. Ms Broughton's conduct was said to be comparable in that she also left the premises briefly, and accordingly the conduct would be unlikely to breach the terms of a liquor licence and did not amount to serious misconduct.

[41] The Employment Relations Authority cannot stand in the shoes of the Liquor Licensing Authority. In the present context the role of the Employment Relations Authority is to determine whether:

- the trust believed on reasonable grounds both that the conduct in question occurred, and that it amounted to serious misconduct; and
- the conduct was at a level of seriousness that deeply impaired or was destructive of the basic confidence or trust that is essential in an employment relationship.⁵

[42] The occurrence of the conduct was not disputed. The trust's belief that the conduct amounted to serious misconduct was based on its work rules together with its view of its statutory obligations including those under s 115 of the Sale of Liquor Act. It said the Liquor Licensing Authority regards as a breach of s 115 the absence from

⁵ *NDU v BP Oil* [1992] 3 ERNZ 483, 487

licensed premises of the manager whose name is displayed as the duty manager under s 115(3), and it believed Ms Broughton's actions put its licence at risk.

[43] The trust's view of its obligations under the Sale of Liquor Act was influenced by its experience of action taken against it and an associated trust under the Act. One such action had been taken against the associated trust two years earlier, when the licenses of two of that trust's off-licensed outlets were suspended for 24 hours after breaches involving the sale of liquor to a minor during a controlled purchase operation.⁶ The duty manager at one of the outlets was found to have been off-site at the time, was dismissed (although not for that reason alone), and agreed to the voluntary suspension of her general manager's certificate. Ms Gibbons gave evidence in that matter. For his part Mr Griggs said he had been involved in the aftermath of controlled purchase operations, during which the level of supervision being exercised by the duty manager even while on the premises was questioned.

[44] Further to whether an absence from licensed premises of the duty manager is a breach of the Act, decisions of the Liquor Licensing Authority include an often-cited passage to the effect that the continuous physical presence of the duty manager is not required provided communication with the manager is possible and the manager could still perform his or her obligations under s 115,⁷ although it has also been found that the continuous physical presence of the manager is necessary.⁸ Ultimately such questions may be determined as matters of fact and degree.⁹

[45] Further to the level of risk to the trust's licence when such a breach has occurred, it was said in the decision of the Liquor Licensing Authority on the matter in which Ms Gibbons had given evidence that the imposition of sanctions is discretionary. The discretion is exercised with reference to the manner most likely to promote the object of the Sale of Liquor Act. That is, to establish a reasonable system of control over the sale and supply of liquor with the aim of contributing to the reduction of liquor abuse as far as can be achieved by legislative means. In each case

⁶ *Thornley & Anor v Waitakere Licensing Trust & Ors* [2009] NZLLA 828.

⁷ *Police v Tillermans Restaurant Limited* [2001] DCR 984, 989

⁸ *Whittle v O'Hagans Limited* [2008] NZLLA 845, although the breach in question was said to be technical in nature.

⁹ *Reynolds v Irish Bar Company Limited* [2005] NZLLA 473, where a comment to this effect was made.

the facts are looked at before a decision is made about whether the suspension of a licence would be too heavy handed.¹⁰

[46] The above considerations mean I accept that the trust believed on reasonable grounds that Ms Broughton's absence amounted to a failure to comply with liquor licensing laws, and of the relevant gambling regulations. I also accept that the trust believed on reasonable grounds that the absence put its liquor licence at risk. I cannot go further and comment on the likelihood of its beliefs being proved correct in any finding the Liquor Licensing Authority might make.

[47] I also accept that express reference in the work rules to a failure to comply with liquor licensing laws gives the strength to the trust's view that such a failure amounts to serious misconduct. At the same time the inclusion of the provision in the employment agreement, while significant, is not determinative of whether Ms Broughton's conduct amounted to serious misconduct. The legal test of whether the conduct was sufficiently serious to deeply impair or be destructive of the basic confidence or trust between the parties continues to apply.¹¹

[48] The trust's representatives said further that, as a community organisation, which returns the proceeds of its venues to community groups, the trust must be beyond reproach in its compliance with liquor licensing and gaming laws. It strives to act accordingly, as is reflected by comments the Liquor Licensing Authority has made about the trust's reputation and the way it operates its liquor licenses.¹² In taking this approach the trust sets high standards for its employees.

[49] Ms Broughton's absence from the premises was brief, it occurred during a quiet time, and she made an attempt to provide cover for her absence. On their own, those factors might suggest summary dismissal was harsh. However Ms Broughton also acted with knowledge of her obligations as duty manager under the Sale of Liquor Act, and exercised poor judgement in the decision to do so. In the context of the trust's obligations as a community body, and the importance of adhering to the statutory regimes for controlling alcohol and gambling, I find the trust's conclusion

¹⁰ Ibid no 6, at [35]

¹¹ This point was made in a comment in *Swann v ACI New Zealand Limited* (1990) ERNZ Sel Cas 909, for example

¹² Ibid no 6 at [34]

that Ms Broughton's actions were sufficiently serious to deeply impair the basic confidence and trust between the parties was fair and reasonable.

6. Conclusion

[50] For the above reasons I conclude that the dismissal was justified.

Costs

[51] Costs are reserved.

[52] The parties are invited to reach agreement on the matter. If either party seeks a determination from the Authority there shall be 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority