

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 138  
5415838

BETWEEN

MARIA TE ARIKI  
Applicant

A N D

OMAET INVESTMENTS  
LIMITED t/a  
THE COMMERCIAL HOTEL  
Respondent

Member of Authority: K J Anderson

Representatives: S Austin, Advocate for Applicant  
S Te Amo, Advocate for Respondent

Investigation Meeting: 15 January 2014 at Whakatane

Date of Determination: 10 April 2014

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicant, Ms Maria Te Ariki, brings two claims to the Authority for determination. First, Ms Te Ariki says that because she was suspended from her employment on 23 January 2013, this was an unjustifiable action by her employer affecting her employment to her disadvantage. And Ms Te Ariki says that the termination of her employment on 8 February 2013 was unjustifiable. Ms Te Ariki asks the Authority to find that she has a personal grievance (or grievances) and award her appropriate remedies.

**Background**

[2] Ms Te Ariki worked as a duty bar manager at The Commercial Hotel (the Hotel), Whakatane, from October 2010 until the date of her dismissal. Ms Te Ariki was accountable to Ms Selena Te Amo, a joint proprietor of the Hotel with her

husband, Mr Pera Te Amo. It seems that while, from time to time, Ms Te Ariki had some personal problems that came to the attention of Ms Te Amo, the employment relationship was reasonably satisfactory until some time in February 2012.

[3] The evidence of Ms Te Amo is that in February 2012, Ms Te Ariki was going through “some serious personal stuff” related to the environment at her home in Whakatane, and also her other home in Wellington. These personal issues were having a “huge effect” on Ms Te Ariki’s work performance according to Ms Te Amo. At the suggestion of Ms Te Amo, Ms Te Ariki took two weeks off work for the purpose of working out her personal issues. Ms Te Amo says that upon Ms Te Ariki returning to work, there was no improvement in her personal/work situation.

[4] The evidence of Ms Te Amo is that because Ms Te Ariki still had personal issues that were affecting her work, some time between March and April 2012, Ms Te Ariki took two weeks’ annual leave; using this time to “sort through” her personal problems, but with little success, apparently.

[5] The further evidence of Ms Te Amo is that by November 2012, the behaviour of Ms Te Ariki in the workplace had substantially deteriorated in that she was: “...losing control of her outbursts and her behaviour was becoming more and more erratic ...”. Ms Te Amo related two other incidents regarding a surprise birthday party arranged for Ms Te Ariki and some negative outcome from that, and also an issue pertaining to Ms Te Ariki putting items on Ms Te Amo’s account at a local coffee shop.

### **The absence of Ms Te Ariki - December 2012**

[6] There was an agreement between Ms Te Ariki and Ms Te Amo that the former would go home to Wellington for the Christmas break. But there is conflict between the evidence of the two women as to the arrangement that was agreed to.

[7] Ms Te Amo says that Ms Te Ariki asked her if she could go home to Wellington over Christmas and while this is the busiest time of the year for the Hotel, Ms Te Amo attests that she thought it would be good for Ms Te Ariki to have three days at home with her family over Christmas. Ms Te Amo says that she required Ms Te Ariki to be back at work for her regular shift on Wednesday, 26 December 2012, as this was the busiest night of the year for the Hotel. Ms Te Amo says that it was her understanding that Ms Te Ariki would be back at work for the evening of

26 December 2012. However, Ms Te Amo says that subsequent to her agreement with Ms Te Ariki, two other staff members, at different times, told her that Ms Te Ariki had told them that she would not be returning to work until 27 December. But despite this information, Ms Te Amo never raised the matter with Ms Te Ariki. It is commonly accepted that Ms Te Ariki did not return to work until 27 December 2012.

[8] The evidence of Ms Te Ariki is that she requested leave from Monday, 24 December to Wednesday, 26 December 2012, inclusive. Ms Te Ariki says that she worked until 3:00 or 4:00a.m. on her afternoon-evening shift of 23/24 December and then flew to Wellington later on 24 December 2012.

[9] Ms Te Ariki attests that she received a text message from Ms Te Amo on 26 December asking why she was not at work that day. Ms Te Ariki says she responded by return text indicating to Ms Te Amo that her leave had been approved and that she would be returning to Whakatane later that day; the flight was scheduled to arrive at Tauranga at 8:00p.m.

### **Warning letter**

[10] The outcome of Ms Te Ariki's return to work on 27 December 2012, rather than 26 December, as anticipated by Ms Te Amo, was that Ms Te Amo prepared a warning letter dated 26 December 2012. The incident pertaining to the Christmas leave taken by Ms Te Ariki has been raised by Ms Te Amo as an example of problems that had arisen regarding the general attitude and performance of Ms Te Ariki. The written warning appears to be relied upon by Ms Te Amo as one of the disciplinary actions that eventually led to the dismissal of Ms Te Ariki.

[11] However, I find that no reliance or weight can be placed on this purported "first written warning". This is because there was no discussion with Ms Te Ariki about the matter of her alleged unauthorised absence. The reality is that Ms Te Amo simply prepared the warning letter without any discussion or notice to Ms Te Ariki that disciplinary action was being contemplated. And further, it seems possible that Ms Te Ariki may have been correct in her understanding of her holiday absence, as the evidence of Ms Te Amo is that she had agreed to Ms Te Ariki being away for "three days". Ms Te Ariki usually worked afternoon-evening shifts: 5:00p.m. until close down. Therefore, the three rostered working days would have been Monday, 24 December, Tuesday, 25 December and Wednesday, 26 December 2012; returning to

work on the evening of 27 December 2012. Finally, it is established that Ms Te Ariki never saw the letter of 26 December as she was not given it personally. It seems that because Ms Te Amo came and went from the Hotel during the day, she did not always see Ms Te Ariki during the evening and any correspondence was simply left outside the office at the Hotel for staff to pick up. The evidence of Ms Te Amo is that Ms Te Ariki had a habit of not picking up papers meant for her, including pay advice slips.

[12] In summary, I find that while Ms Te Ariki may have been aware that Ms Te Amo had an issue about the Christmas leave arrangements, this was never raised with Ms Te Ariki as a disciplinary matter; hence the matter cannot be taken into account as a factor to be considered pertaining to the eventual dismissal.

### **Removal of alcohol**

[13] An incident occurred on 12/13 January 2013 whereby Ms Te Ariki and a colleague, at the end of their shift, took a quantity of alcohol (Jagerbombs) from the Hotel without payment or authorisation. This matter was resolved without disciplinary action when Ms Te Ariki and her colleague agreed to pay for the alcohol. Nonetheless, it was clearly an incident that Ms Te Amo had justifiable concerns about.

### **The second written warning**

[14] On 22 January 2013, Ms Te Amo wrote to Ms Te Ariki. Reference is made in the letter to a performance review that took place on 4 July 2012 and some positive qualities regarding the work of Ms Te Ariki. Further, reference is made to Ms Te Ariki being:

... encouraged to continue to build strong relationships with your workmates as it is these relationships that will make your job fun and a lot easier.

[15] The letter then continues:

In the first few months, you noticeably made huge improvements in areas of your job but just 6 months later, have 10 steps backwards. Our direct concern areas of concern being;

1. Inability to manage staff working with you and under your leadership;
2. Inability to constantly lead by example;
3. Inability to communicate with management;

4. Inability work as a team;
5. Inability to leave personal issues at home;
6. Inability to not discuss personal matters with other members of staff and customers at work;
7. Inability to follow procedures;
8. Inability to perform to your highest expected standard whilst management are not around;
9. Lack of enthusiasm whilst at work;
10. Lack of respect;
11. Using your management role as a tool to not follow protocol;
12. Use of computer for personal use during working hours;
13. Excessive time spent on personal matters +
14. Unauthorised time off work;

I have watched you struggle with life and in your job for over six weeks.

Your decision making as a duty manager has been impaired therefore unfit to perform the job of duty manager to the highest standard.

In turn, everyone around you has suffered. Me, your workmates and customers.

I am more than unhappy with your overall performance over the last 8 weeks and would like to discuss this with you further.

If we can not resolve these issues, then I will have no choice but to commence with disciplinary action.

Please be available to discuss these matters on Tuesday 22nd January 2013 at 10am.

[16] The evidence of Ms Te Ariki is that she never received this letter until it was given to her, still in an envelope, at the meeting that took place on 8 February 2013 (see below). However, Ms Te Ariki confirms that there was an “informal” meeting with Ms Te Amo on 22 January 2013, whereby Ms Te Amo expressed some concerns about Ms Te Ariki’s body language and attitude in the workplace; and there had been complaints from customers. Ms Te Ariki says that Ms Te Amo asked her if she wanted to continue working at the Hotel, to which she gave an affirmative response.

[17] It was subsequently agreed that Ms Te Ariki would meet with Ms Te Amo and Mr Pera Te Amo on 23 January 2013. The evidence of Ms Te Ariki is that at the commencement of this meeting Ms Te Amo enquired if she had “the paperwork”. Ms Te Ariki says that she did not know what Ms Te Amo was referring to. It appears that it was probably the letter dated 22 January 2013.

[18] As an apparent outcome of the meeting on 23 January 2013, Ms Te Amo wrote again to Ms Te Ariki. The letter, dated 24 January 2013, records that the 14

matters set out in the letter of 22 January 2013 (above) were discussed. The letter then continues thus:

You were provided with an opportunity to explain your actions and comment on these matters.

We also explained to you the required standards and necessary performance steps that we require you to take in response to the matters above. We would like to see an immediate improvement along the lines we discussed.

Having considered your responses this letter now constitutes a second written warning that your performance, as outlined above, is below the standard we require at our premises.

We will have a further meeting on Tuesday 29th January to discuss your progress in relation to the matters above. If you would like to discuss any matter with me further please feel free to do so.

[19] The letter is signed by Ms Te Amo and there is provision for it to be signed by Ms Te Ariki, but she says that she never received this letter until the meeting of 8 February 2013.

[20] The evidence about it is rather sparse but it appears that there was some discussion between Ms Te Amo and Ms Te Ariki on 29 January consistent with the letter of 24 January 2013.

### **The dismissal**

[21] On the evening of 30 January 2013, Ms Te Amo and some friends were eating and drinking at another bar in Whakatane. An altercation occurred which resulted in Ms Te Amo being punched and her friends also assaulted. The evidence of Ms Te Amo is that she and her friends left the bar “covered in blood” and it was “one of the ugliest and scariest” experience that she had ever encountered.

[22] Ms Te Amo shared her experience of the fracas at the other bar with Ms Te Ariki and other staff. The evidence of Ms Te Amo is that she subsequently heard back from other staff that Ms Te Ariki had said that it “served [Ms Te Amo] right” and that she “deserved” what had happened to her in regard to the assault.

[23] Ms Te Amo called a meeting of the staff on 2 February 2013, including Ms Te Ariki, where the incident pertaining to the assault at the other bar was raised, as were the comments attributed to Ms Te Ariki. An allegation was made that Ms Te Ariki

had said that what had happened to Ms Te Amo was “karma”. Upon the allegation being put to Ms Te Ariki, she acknowledged that she was of the view that “what goes around – comes around” as far as Ms Te Amo was concerned.

[24] Ms Te Ariki says that upon being asked by Ms Te Amo how she could say such things, Ms Te Ariki responded: “Everyone hates you Selena”. Ms Te Ariki says that she does not remember saying this, but I found the evidence of Ms Te Amo to be more credible.

[25] The meeting on 2 February 2013 came to a sudden halt as Ms Te Amo was most upset and told the staff (three including Ms Te Ariki) to all leave her presence. At it happened this was the last day that Ms Te Ariki worked at the Hotel.

[26] The evidence of Ms Te Amo is that she was so upset about Ms Te Ariki’s view of her that it took her a few days to let her “nerves settle”. Ms Te Amo says that she decided that Ms Te Ariki could not come back to work at the Hotel as she was in a bar management role and often left to work alone. Ms Te Amo attests that she believed that Ms Te Ariki was “a direct threat” to her, the other staff, patrons and the business.

### **Meeting on 8 February 2013**

[27] While the evidence is that a meeting between Ms Te Ariki and Ms Te Amo was anticipated to take place earlier, it eventually took place on 8 February 2013. Ms Te Ariki was supported by a friend and Ms Te Amo had a person with her taking notes.

[28] The evidence of Ms Te Ariki is that she was given several envelopes and an open letter, and Ms Te Amo stated: “It’s all there”. It is established that the unopened envelopes contained respectively the letters dated 26 December 2012, 22 January 2013, 24 January 2013 and 30 January 2013. It is also established that while Ms Te Amo left the four letters, with Ms Te Ariki’s name on them, in a rack or document holder outside or near the Hotel office, Ms Te Ariki never picked them up and the first she saw of them was after the meeting on 8 February 2013, when she consulted her representative. It is also established that Ms Te Amo did not ever draw Ms Te Ariki’s attention to the existence of the letters; nor did she attempt to personally give them to Ms Te Ariki.

[29] The “open” letter that Ms Te Ariki refers to is dated 4 February 2013 and informs her that:

Dear Maria

**RE: TERMINATION**

On Saturday 2nd February, you were called to work for a planning meeting between me and all bar staff. From that meeting, some nasty stuff was aired which presented another element to the situation we are currently in with regards to you and your job.

I asked everyone to go home as I could not deal with the malicious comment that had been directed at me, by you to another member of staff.

We were set to have our first weekly review today but I cancelled due to the new dimension of the problem we are currently having with your attitude towards your job.

After much deliberation, it was decided you have been given enough chances to redeem yourself and make things right by those around you but this proves that you have intention of doing that.

Therefore, due to your inability to meet the required standards necessary to recover and progress, your employment here at The Commercial Hotel is terminated.

Please return your master key, uniform and any other items that is the property of The Commercial Hotel, Whakatane you may have in your possession, immediately.

Yours sincerely

Selena Te Amo, Manager

[30] Ms Te Ariki challenges her dismissal and says that it was unjustified. Ms Te Ariki also alleges that she was suspended from her employment from 23 January 2013 up until the date of her dismissal and that this was an unjustifiable action by her employer that led to a disadvantage to her employment.

**Analysis and conclusions**

[31] The question of whether the dismissal and/or the alleged suspension of Ms Te Ariki was justifiable must be determined by the Authority on an objective basis by applying the following test: 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 and the alleged suspension occurred.<sup>1</sup>

[32] And in applying the above test, the Authority must consider the following criteria:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.<sup>2</sup>

### **Was Ms Te Ariki suspended from her employment on 23 January 2013?**

[33] Ms Te Ariki alleges that she was suspended from her employment from 23 January 2013. But her evidence makes no reference at all to any such circumstances. Ms Te Ariki has given evidence of her meeting with Ms Te Amo and Mr Pera Te Amo on 23 January 2013. Ms Te Ariki refers to the conclusion of the meeting when Mr Te Amo was present and then she discusses a continuation of that meeting with only Ms Te Amo present. The evidence of Ms Te Ariki (para.10) is that:

At the end we confirmed I would be doing my shift that night [23 January] because I had been stood down until we met.

[34] Therefore, based on her own evidence, there is no indication of Ms Te Ariki being suspended from her employment on 23 January 2013; as alleged in the submissions for her. There is a reference in the evidence of Ms Te Ariki [above] to being "stood down" but there is no explanation provided in regard to what is being referred to here.

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<sup>1</sup> Section 103A(2) Employment Relations Act 2000

<sup>2</sup> Section 103A(3) Employment Relations Act 2000

[35] Given that there is no evidence to support the allegation that Ms Te Ariki was unjustifiably suspended from her employment, this claim is dismissed for lack of proof.

**Was the dismissal of Ms Te Ariki unjustifiable?**

[36] On the weight of the evidence before the Authority, I find that the dismissal of Ms Te Ariki was unjustifiable. Even taking into account that Ms Te Amo had few resources available to her, in a human resources sense, it is clear that she failed to inform Ms Te Ariki that her employment was in jeopardy and that the outcome of the meeting held on 8 February 2013 could be that Ms Te Ariki would be dismissed.

[37] Further, Ms Te Ariki was never given any opportunity to give any explanation as to the views that she expressed to Ms Te Amo at the staff meeting held on 2 February 2013. But even if Ms Te Ariki had been given an opportunity to explain herself, it is unlikely that it would have made any difference as it seems that Ms Te Amo had made up her mind, prior to the meeting on 8 February, that Ms Te Ariki was going to be dismissed. This predetermination was evident from the candid evidence of Ms Te Amo and confirmed in a more tangible sense, by the fact that the letter informing Ms Te Ariki of her dismissal was dated 4 February 2013.

[38] In defending the decision to dismiss Ms Te Ariki, Ms Te Amo refers to the letters dated 26 December 2012, 22 January 2013, 24 January 2013 and 30 January 2013 and says that these letters were left for Ms Te Ariki to pick up and read. However, it is established that Ms Te Ariki never uplifted these letters. Given that the evidence of Ms Te Amo is that Ms Te Ariki had a habit of leaving her pay advice envelopes and other work-related communications to accumulate where they were left by Ms Te Amo, it would have been prudent, if not essential, for Ms Te Amo to have personally delivered the letters mentioned to Ms Te Ariki, and then ensured that they were read and understood. Because it is commonly accepted that Ms Te Ariki never read the letters referred to prior to the date of her dismissal, Ms Te Amo cannot rely on those to establish that Ms Te Ariki knew that her employment was in jeopardy. Nonetheless, I will return to this correspondence, and other matters, when determining the remedies that Ms Te Ariki may be entitled to.

## **Remedies**

[39] Having found that the dismissal of Ms Te Ariki was unjustified, she has a personal grievance for which remedies are available under s.123 of the Employment Relations Act 2000 (the Act). The remedies include:

- (b) The reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
- (c) The payment to the employee of compensation by the employee's employer, including compensation for –
  - (i) Humiliation, loss of dignity, in injury to the feelings of the employee;

### ***Reimbursement of lost wages***

[40] Ms Te Ariki seeks an award of wages from 8 February 2013 for a period of three months. There was also some mention in the submissions for her of a loss of wages from 29 January to 8 February 2013, apparently on the basis that the respondent has not been able to show that payment was made for this period. But that is not a matter to be addressed in regard to the calculation of remedies. Rather, it falls into the category of wage arrears. However, no claim has been made under this head and there is no evidence available that suggests that the matter can be addressed by the Authority.

[41] Ms Te Ariki has provided credible evidence regarding her attempts to mitigate her loss of income by seeking other employment, and subject to s.124 of the Act, three months' loss of wages pursuant to s.128(2) of the Act would be appropriate. According to an analysis of the pay advice slips provided, the average weekly wage over 26 weeks was \$678.63 (gross). Therefore, 13 weeks' loss of wages would be the gross sum of \$8,822.18.

### ***Compensation***

[42] Ms Te Ariki seeks an award in the sum of \$16,000. She says that the sudden loss of her employment was "very significant" and Ms Te Ariki gave evidence pertaining to loss of sleep and self-confidence and self-esteem. Ms Te Ariki also referred to the financial consequences of losing her employment. On the other hand

there is some evidence that Ms Te Ariki had not been happy in her employment at the Hotel for some time and that she had thought about leaving.

[43] Taking into account all of the circumstances, including the evidence that Ms Te Ariki, most probably, was aware that her employment was less than secure, an award of compensation of \$7,000 would be appropriate.

### ***Contribution***

[44] Pursuant to s.124 of the Act, the Authority must consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[45] The evidence shows that Ms Te Ariki substantially contributed to the circumstances that eventually culminated in her dismissal. While it is established that Ms Te Ariki never took possession of, or read, the letters produced by Ms Te Amo relating to the various performance and behavioural issues that arose, I have no doubt that Ms Te Ariki was well aware of the dissatisfaction of her employer about these matters.

[46] Given the doubtful circumstances relating to the first written warning dated 26 December 2012, I can give no weight to that matter. However, whilst Ms Te Ariki never took receipt of the letter dated 24 January 2013, it is established to my satisfaction that the matters of concern recorded in that letter were discussed with Ms Te Ariki at a meeting with Ms Te Amo and Mr Te Amo on 23 January 2013 and as a result of those concerns, they were recorded in a written warning dated 24 January 2013.

[47] Nonetheless, the notes of the subsequent review meeting on 29 January 2013 record that Ms Te Ariki had an improved attitude towards various issues. However, the letter of 30 January 2013, again not uplifted by Ms Te Ariki, records the discussion that occurred at the meeting and that Ms Te Ariki continued to be subject to weekly performance reviews and that if her behaviour did not continue to “improve dramatically”, her employment at the Hotel “would cease”.

[48] The evidence is inconclusive regarding whether Ms Te Ariki was told this at the meeting on 29 January 2013 but I am satisfied that while she may not have

understood that her continued employment was under threat, she would have certainly realised that there was work to be done on her part for her tenure to become more secure.

[49] The last straw for Ms Te Amo was clearly Ms Te Ariki's response towards her following the incident at the other Whakatane bar; particularly when Ms Te Ariki informed Ms Te Amo that: "Everyone hated her". Not surprisingly, Ms Te Amo took this to mean that "everyone" included Ms Te Ariki and coupled with the previous issues pertaining to her performance, a decision was made to terminate her employment.

[50] In considering the appropriate reduction in remedies, I gave some thought to whether the "hate" message given to Ms Te Amo by Ms Te Ariki constituted such a serious allegation that the bond of trust and confidence that is deemed to be essential to an employment relationship was irretrievably broken. Given that this matter was not investigated further before the decision to dismiss was made, and the context is arguable, I reduce the weight I might have otherwise put on that factor which, if the evidence had been more conclusive, could have resulted in a nil award of remedies.

[51] On the weight of the evidence it is established that the overall behaviour of Ms Te Ariki was such that the remedies that would otherwise have been awarded should be reduced by 70% because of her blameworthy behaviour.

### **Summary**

[52] For the reasons set out above, I find that the dismissal of Ms Te Ariki was unjustified. Pursuant to ss.123 and 128 of the Act, Omaet Investments Limited is ordered to pay to Ms Te Ariki the gross sum of \$2,646.65 (\$8,822.18 less 70%).

[53] Pursuant to s.123(1)(c)(i) of the Act, Omaet Investments Limited is ordered to pay to Ms Te Ariki the sum of \$2,100 (\$7,000 less 70%).

**Costs**

[54] Costs are reserved. The parties are invited to resolve that matter if they can. In the event that a resolution is not possible, the applicant has 28 days from the date of this determination to file and serve submissions. The respondent has a further 14 days to reply.

**K J Anderson**  
**Member of the Employment Relations Authority**