

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 53  
5515687

BETWEEN                    GUY DESMOND MAGON  
   Applicant  
  
A N D                            NZ CASTLE RESORTS AND  
   HOTELS LIMITED  
   Respondent

Member of Authority:    T G Tetitaha  
  
Representatives:            M Meyrick, Counsel for Applicant  
   A Cook, Counsel for Respondent  
  
Investigation Meeting:    13 to 14 December 2016 at Auckland  
  
Submissions Received:    16 December 2016 from both parties  
  
Date of Determination:    28 February 2017

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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- A.    Guy Desmond Magon was unjustifiably dismissed by NZ Castle Resorts and Hotels Limited.**
- B.    NZ Castle Resorts and Hotels Limited shall pay Mr Magon lost remuneration of three weeks salary less PAYE and reduced by 25% for Mr Magon’s contributing behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**
- C.    NZ Castle Resorts and Hotels Limited shall pay compensation to Mr Magon of \$6,000 including a reduction of 25% for Mr Magon’s contributing behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- D.    Costs are reserved. If either party seeks an order for costs, a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve its reply.**

## **Employment relationship problem**

[1] Guy Desmond Magon, alleges he was unjustifiably dismissed by NZ Castle Resorts and Hotels Limited (NZCRH) for failing to pay for parking at the respondent's hotel.

### **Relevant facts**

[2] Mr Magon was employed as a handyman at the Spencer on Byron Hotel in Takapuna Auckland on 10 July 2006. He signed an employment agreement that included "company rules for employee" and a definition of serious misconduct being failure to obey a lawful and reasonable instruction or direction.

[3] Staff could park in the Hotel carpark for \$5 for per day. The Chief Engineer, Alan Meyler had free carparking as part of his employment terms. In 2007 he was appointed Assistant Chief Engineer. There was an agreement for Mr Magon to use Mr Meyler's carpark when he was away.

### ***Previous disciplinary action***

[4] Up and until November 2011 Mr Magon had performed his job without issue. On 24 November 2011 he received a letter alleging "deliberate action of failing to pay for parking" and therefore failure to obey an express instruction and dishonesty.

[5] He attended a meeting on 29 November 2011 with Mr Meyler and Greg Remmington General Manager. He received a final written warning the same day.

[6] A memorandum was circulated to staff about parking on 8 February 2013. Unauthorised parking onsite would result in the car being either clamped or towed.

[7] On 11 March 2013 a complaint was received about Mr Magon's abusive behaviour towards a co-worker over parking. On 13 March 2013 Mr Magon met with Mr Remmington. He was issued a verbal warning by letter the same day that included parking on site without paying.

[8] On 30 August 2013 Mr Meyler issued Mr Magon a verbal warning for "reoccurring infringement of parking onsite without paying". The warning was recorded in a filenote on his personnel file.

[9] On 11 December 2013 Mr Magon received a letter from Mr Meyler alleging amongst other things he failed to pay for parking on 6 December 2013 and parked in a private residents carpark without permission to avoid paying for carparking.

[10] Mr Magon met with Messrs Meyler and Remmington on 18 December 2013. The following day he received a final written warning for failing to obey an express instruction and dishonesty for the parking.

[11] On 19 March 2014 Mr Magon received a letter from Mr Meyler alleging amongst other things he failed to pay for parking on 19 February 2014 and parked in a private resident's carpark on 18 and 19 February 2014 to avoid paying.

[12] He met with Terry Holt, Hotel Manager and Mr Meyler on 27 March 2014. He was issued with a written warning for failing to obey a lawful and reasonable instruction and dishonesty.

### ***Dismissal***

[13] On 18 June 2014 Mr Magon received a letter alleging he took the deliberate action of failing to pay for parking on 18 June 2014 and admitted having carried out this "offence" to Mr Meyler on 25 June 2014.

[14] On 3 July 2014 he met with Messrs Holt and Meyler. Following that meeting he was dismissed.

[15] On 18 July 2014 he raised a personal grievance of unjustified dismissal.

### **Issue**

[16] The issue for determination is whether the applicant was unjustifiably dismissed.

### **Law**

[17] The fact Mr Magons employment was terminated is accepted. NZCRH must justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.<sup>1</sup>

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

[18] The Authority must assess on an objective basis whether the decision to dismiss and the conduct of the employer fell within the range of what a notional, fair and reasonable employer could have done in all the circumstances at the time. Context is the key.<sup>2</sup>

[19] In determining whether the dismissal was justified there are certain matters to be taken into account. These include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond, and genuinely considered the employee's explanation prior to dismissal or taking action against the employee.<sup>3</sup> A failure to meet any of these is likely to result in a dismissal or action being unjustified.<sup>4</sup> However a dismissal may be justified if the procedural defects were minor and did not result in an employee being treated unfairly.<sup>5</sup>

### **Was Mr Magon unjustifiably dismissed?**

[20] The decision maker was Terence Holt. The incident giving rise to the dismissal was a failure to pay for parking onsite. The grounds for dismissal were continuing breaches of the employment agreement including failure to obey a lawful and reasonable instruction and dishonesty. Mr Holt found a "repeated pattern of behaviour" and "admittance to the same".

### ***Was the previous disciplinary action justified?***

[21] A single event of failing to pay for onsite parking could not be serious misconduct. This dismissal is alleged to be justified because of the cumulative effect of a series of similar acts of misconduct for which Mr Magon was disciplined. This presupposes the previous disciplinary action was also justified.

[22] Mr Holt had access to all information the employer held about the five previous disciplinary action from 2011 to 2014. This included the correspondence between the parties and the minutes from the disciplinary meetings. He did not interview Messrs. Meyler or Remmington about the previous disciplinary action.

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<sup>2</sup> *Patel v. OCS Ltd* [2014] NZEmpC 49 at [30]

<sup>3</sup> Section 103A(3) of the Act.

<sup>4</sup> *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

<sup>5</sup> Section 103A(5) of the Act.

[23] The fact Mr Magon never raised any personal grievances until dismissed does not indicate the previous disciplinary action was justified.

[24] Employees are required to carry out lawful and reasonable instructions given by their employers in the course of carrying out their duties.<sup>6</sup> The employment agreement states “the employer follows a three-step disciplinary action procedure that is designed to be corrective rather than punitive.” This presupposes Mr Magon would have been specifically instructed his behaviour and given an opportunity to correct it before disciplinary action is taken. He was not. In the circumstances the warning dated 29 November 2011 was unjustified.

[25] None of the previous disciplinary action stated dismissal was a possible consequence of repeated parking onsite without paying. The last warning on 31 March 2014 that stated “any further breach” may result in dismissal. The other warnings either gave no consequence<sup>7</sup> or referred to a disciplinary hearing<sup>8</sup> or written warning<sup>9</sup>. Only two warnings had any timeframe (six to twelve months)<sup>10</sup> where repeated behaviour may result in any further action. This was inconsistent and unfair to Mr Magon.

[26] The findings of dishonesty were unreasonable. Mr Magon denied dishonesty at all times and gave explanations. In December 2013 he states he made an honest mistake about Mr Meyler being away based upon what another worker had told him, tried to pay but was rebuffed by another worker and had permission to use a resident’s carpark. In March 2013 he believed he had permission to use a resident’s carpark. None of these explanations are fully investigated before the action is taken.

[27] There was evidence contradicting the respondent’s findings of misconduct. In March 2014 Mr Meyler states he spoke to the resident and was told it was a one off permission to use the car parking space<sup>11</sup> but could give no detail of what the resident told Mr Magon and when he permitted Mr Magon to use the carpark. This did not

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<sup>6</sup> *Kunal Goel v Director-General For Primary Industries* [2015] NZEmpC 214 [2 December 2015] at [56].

<sup>7</sup> Brief G Remmington sworn 13 December 2016 Attachment R5 written warning 29 November 2011 and R11 written warning 19 December 2013.

<sup>8</sup> Brief G Remmington sworn 13 December 2016 Attachment R7 verbal warning 13 March 2013.

<sup>9</sup> Brief A Meyler sworn 13 December 2016 Attachment M4 verbal warning.

<sup>10</sup> See n11 written warning 29 November 2011 and Brief T Holt sworn 14 December 2016 Attachment H3 written warning 31 March 2013.

<sup>11</sup> Brief T Holt sworn 14 December 2016 Attachment H2 Minutes p6.

indicate Mr Magon's belief he had permission to use the resident's carpark was wrong. It may also indicate he had permission to park there in December 2013 or 18 and 19 February 2014 for which he was disciplined. The decision maker never sought to clarify this with the resident.

[28] Overall it was unfair to rely upon the previous disciplinary action to justify dismissal.

### *Dismissal*

[29] Mr Magon explained his car broke down and he was required to park onsite until he could remove it but was very busy at work and had no opportunity to do so. He had difficulties dealing with Mr Meyler and was reluctant to speak to him. Mr Meyler alleged the car did not break down, he saw Mr Magon during the day when he could have told him or had it removed but failed to do so.

[30] At the disciplinary meeting Mr Meyler was allowed to put his version of events and question Mr Magon's credibility. Given Mr Magon's views about Mr Meyler, this was unfair. He was not allowed the same opportunity to question Mr Meyler. It was not an opportunity for Mr Magon to be heard. Rather, it was an opportunity for Mr Meyler to put his views.

[31] The decision maker visited the carpark to view where Mr Magon had allegedly parked. Mr Magon was not told about this at the time. Mr Holt relied upon his observation of where Mr Magon parked to accept Mr Meyler's view the car had not broken down. This was unfair because at hearing Mr Magon disputed where Mr Holt believed he had parked.

[32] An employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate.<sup>12</sup> Employers are entitled to prefer the complainant's version of events provided it approaches the fact finding with an open mind and dealt on a reasonable basis with the conflicting accounts presented.<sup>13</sup>

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<sup>12</sup> *Air New Zealand v Hudson* [2006] ERNZ 415 at [144].

<sup>13</sup> *Ritchies Holdings Ltd v Merennage* [2015] NZEmpC 198 at [67]

[33] In my view, the approach to this fact finding was not with an open mind. Rather, the process leading to dismissal was unfair to Mr Magon. This was not a minor defect.

[34] Taking into account the above matters, Guy Magon was unjustifiably dismissed by NZ Castle Resorts and Hotels Limited.

### ***Remedies***

#### *Lost remuneration*

[35] Mr Magon seeks lost remuneration for the period since dismissal until hearing. He has an obligation to mitigate loss by seeking alternative and paid employment.<sup>14</sup> If remuneration has been lost because of a failure to mitigate, there is no statutory requirement to order reimbursement.<sup>15</sup> In practice this requires evidence of a detailed account of efforts made to obtain employment, including dates, places, names, copies of correspondence and the like.<sup>16</sup>

[36] There is little evidence of mitigation. Mr Holt confirmed being told by Mr Magon he had fulltime employment within 3 weeks. Mr Magon stated it was conditional upon him attaining qualifications which he could not achieve. No evidence from his employer about the need for qualifications is before me. There is little evidence of any efforts to secure employment. At best, Mr Magon has lost three weeks lost remuneration subject to any reduction for contributing conduct.

#### *Compensation*

[37] Mr Magon gave evidence of financial hardship and emotional distress. He had lost confidence, was under considerable strain and found it psychologically difficult to look for work. There was evidence of existing financial hardship that his job loss would have exacerbated. No medical or other assistance was required. The effects for Mr Magon appear moderate justifying an award of between \$5,000 and \$10,000. An award of \$8,000 is appropriate subject to any reduction for contributing behaviour.

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<sup>14</sup> *Carter Holt Harvey v. Yukich* (CA, 04/05/05)

<sup>15</sup> *Finau v. Carter Holt Building Supplies* [1993] 2 ERNC 971 (NZEmpC at 977)

<sup>16</sup> *Allan v. Transpacific Industries Group Ltd (trading as Media Smart Ltd)* [2009] 6 NZERA 530 at [78]

### *Contributing behaviour*

[38] I must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance.<sup>17</sup> Reduction is appropriate where the actions of the employee were both causative of the outcome and blameworthy.<sup>18</sup>

[39] Mr Magon's behaviour contributed towards this situation. He admitted he could have paid for the parking in 18 June 2014. This was blameworthy behaviour given his history of onsite parking without payment. Instances of repeated misconduct have warranted a 25% reduction<sup>19</sup> which is appropriate here.

[40] The following orders shall issue:

- a) NZ Castle Resorts and Hotels Limited shall pay Mr Magon lost remuneration of three weeks salary less PAYE and reduced by 25% for Mr Magon's contributing behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.
- b) NZ Castle Resorts and Hotels Limited shall pay compensation to Mr Magon of \$6,000 including a reduction of 25% for Mr Magon's contributing behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

[41] Costs are reserved. If either party seeks an order for costs, a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve its reply.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>17</sup> Section 124 of the Act.

<sup>18</sup> *Goodfellow v. Building Connexion Ltd trading as ITM Building Centre* [2010] NZEmpC 82 at [49].

<sup>19</sup> *Nagel v Nelson Underground Services Ltd* [2016] NZERA Wellington 36 at [53].