

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 365
3020179**

BETWEEN RUI LEITAO
Applicant

AND OPOTIKI RETURNED
SERVICES ASSOCIATION INC
Respondent

Member of Authority: Eleanor Robinson

Representatives: Stan Austin, Advocate for Applicant
Leonard Hemi, Counsel for Respondent

Investigation Meeting: 1 November 2018 at Tauranga

Submissions received: 7 November 2018 from Applicant
1 & 9 November 2018 from Respondent

Further information: 21 November 2018

Determination: 22 November 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Rui Leitao, claims that he has been unjustifiably dismissed by the Respondent, Opotiki Returned Services Association Inc (Opotiki RSA).

[2] Opotiki RSA denies that Mr Leitao was unjustifiably dismissed and claims that he was justifiably dismissed on the basis of serious misconduct.

Issue

[3] The issue for determination is whether or not Mr Leitao was unjustifiably dismissed by Opotiki RSA.

Note

[4] During the course of the Investigation Meeting, the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered

questions from me and the parties' representatives. The parties have also submitted closing submissions on the facts and law.

[5] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on each of the issues necessary to dispose of the matter and specified orders made as a result.

Background Facts

[6] The Opotiki RSA has approximately 800 members and at the time when Mr Leitao's employment ended, there were two full-time employees and two part-time employees.

[7] Mr Leitao had been employed as Duty Manager for approximately twelve years at the time of the incident which took place on 10 October 2017. In that capacity he was responsible for the efficient running of the Bar and Gaming areas and meeting the customer service requirements of the Opotiki RSA members and guests.

[8] Mr Leitao was provided with an individual employment agreement signed by Mr Leitao and a former President of the Opotiki RSA and dated 1 December 2013 (the Employment Agreement). The Employment Agreement included the following provisions:

Clause 5 TRAINING

5.1 The employer will provide employee with training by Service IQ at the employers cost which is to be completed within six (6) months of starting. If employee is successful he shall receive a wages increase of .50 cents per hour.

9 TERMINATION

9.2 The Employer may terminate the Employee's employment immediately for serious misconduct where the Employee: NB: the following is not exhaustive:

...

9.3 SUSPENSION

The employee agrees that the Employer may suspend the Employee from performance of the duties and/or exclude the Employee from the workplace for the purposes of investigating any allegation of misconduct or serious misconduct against the Employee. Any such suspension and/or exclusion shall be on full pay and shall only take place after the Employer has given the Employee an opportunity to comment (which may be brief) on the proposed suspension.

Schedule B HOURS OF WORK

RENUMERATION (sic)

Your pay rate is \$16.00 per hour and a minimum of 30 hours is paid (fortnightly) and recognises any restraint set out in this agreement.

On completion as set out in the section subtitled TRAINING, an increase of .50 cents per hour will be in effect.

HOURS

Your hours of work will be a minimum of thirty hours (those required to fulfil the requirements of the position) but will not generally be more than) forty hours per week. Your hours will be posted on roster with a minimum of sixty hours per fortnight.

Pokie Machine Operation

[9] The Opotiki RSA had 15 pokie machines in the gaming area which is constantly monitored by two security cameras.

[10] Winning combinations can be achieved on individual pokie machines, however a jackpot which is set at an amount in excess of \$800.00 is reached when there is a sufficient credit accumulation on a set of networked pokie machines.

[11] The pokie machine can pay out a jackpot at any time depending on chance and the pokie machine credit accumulations. A jackpot win in excess of \$800.00 triggers an audible and visual announcement of the jackpot and the winning player will present a notification to either Mr Leitao or another employee who makes a manual pay out of the winning amount.

[12] Once a jackpot has been achieved the procedure is that the employee will reset the pokie machine to restart the jackpot credit accumulation.

[13] Mr Peter Jackson, President of the Opotiki RSA at the time Mr Leitao was dismissed, said that if an employee has not cancelled the credits on a pokie machine after the jackpot has been paid out, the same person or another player can press the 'Collect' button on the machine and claim the credits even if no money had been put into the pokie machine.

[14] Accordingly the effect of the credits not being cancelled may result in a second jackpot being paid out without the credit accumulations having taken place.

Events 10 October 2017

[15] Mr Leitao said that on the evening of 10 October 2017 he had paid out a second jackpot on a pokie machine. Shortly afterwards he had paid out a third jackpot which occurred on a different pokie machine. He had been concerned about this and had telephoned Mr Jackson.

[16] Mr Jackson said that Mr Leitao had telephoned him at home and explained that he had paid out a jackpot on a pokie machine which had shortly afterwards paid out a second jackpot.

[17] He had attended the Opotiki RSA club building and met Mr Leitao who explained what had occurred. As a result he had checked the Cancelled Credits, Short Pays and Refills Report which was required to be maintained by the employees on duty.

[18] He had also checked the Cancelled Credits Meter reading and observed that it had not been changed between the jackpot pay-outs. When the first jackpot had occurred at 2.52 p.m. the Cancelled Meter Reading had been 16453 which was the same reading recorded at opening and at the time of the second jackpot pay-out at 4.15 p.m. This indicated that not sufficient credits had accumulated since the first jackpot pay out to support a second jackpot pay out.

[19] Mr Leitao had signed the Cancelled Credits, Short Pays and Refills Report to confirm that the credits had been cancelled at 2.52 p.m. when the first jackpot occurred, and signed again at 4.15 p.m. when the second jackpot occurred.

[20] Mr Jackson had spoken to Mr Leitao who told him that he believed he had cancelled the credit when he had paid out the first jackpot and suggested that the pokie machine was faulty.

[21] Mr Jackson stated that on reviewing the Cancelled Credits Report it had: *“immediately led me to believe that the issue was with the failure of the Applicant to cancel the credits ...”*

[22] Mr Jackson said he had also spoken to another employee who had been present and who told him she had intervened to prevent Mr Leitao paying out the second jackpot amount.

[23] Mr Jackson turned off the pokie machine to ensure it would not be used again and the following morning he had arranged for a Gaming Machine Technician to check the pokie machine to ensure it was working correctly.

[24] After conducting various tests, the Gaming Machine Technician had verified that the pokie machine had been working correctly, supplying a report to Mr Jackson.

[25] Mr Jackson wrote to Mr Leitao inviting him to attend a meeting by letter dated 11 October 2017 which stated:

We request your attendance at meeting on Friday 14 October, at 11 am.
The purpose of this meeting is to investigate the occurrence of last evening's events 10 October 2017 in regards to the error which occurred with Pokie Machine.
The investigation may result in further formal disciplinary action and you are invited to bring a support person with you to this meeting.

Suspension

[26] Mr Jackson said he had delivered the letter personally to Mr Leitao at his home. At that time he had informed Mr Leitao that he was suspended and was not to attend work prior to the meeting to be held on 13 October 2017. He confirmed that he had not provided Mr Leitao with an opportunity to comment on the proposal to suspend before it was implemented.

Meeting 13 October 2017

[27] Mr Leitao attended the meeting on 13 October 2017 accompanied by Mr Austin. Mr Jackson attended accompanied by the Opotiki Vice President, and an office administrator.

[28] Mr Jackson had said that the meeting would be recorded and Mr Austin and Mr Leitao agreed to this providing that they received a copy of the recording.

[29] Mr Jackson explained the findings from the Gaming Machine Technician and said he had given Mr Leitao an opportunity to offer an explanation. He said Mr Leitao's only explanation was that the pokie machine had been at fault.

[30] Mr Leitao said that he had told Mr Jackson that he believed he had cancelled the credits and Mr Jackson had responded that he was certain that was not the case.

[31] Mr Jackson had shown him a copy of a procedure guide, but he had commented that he believed the procedure applied to old pokie machines which were no longer in use.

[32] Mr Leitao said that although Mr Austin had requested a copy of the procedure and the Gaming Machine Technician's report these had not been supplied.

[33] Mr Jackson said he believed he had supplied the Gaming Machine Technician's report to Mr Austin and said that the procedure he had shown Mr Leitao had been the current procedure, a copy of which had been attached to the book containing the Cancelled Credits, Short Pays and Refills Report which Mr Leitao had completed on 10 October 2017.

[34] During the Investigation Meeting Mr Leitao described the procedure he followed when a jackpot had been achieved and paid out. This was identical to the Cancel Credit Procedure which Mr Jackson said he had shown Mr Leitao at the meeting on 13 October 2017 and which had been attached to the folder containing the Cancelled Credits, Short Pays and Refills Report Mr Leitao had completed on 10 October 2017.

[35] Mr Leitao said Mr Jackson had commented that he (Mr Leitao) had made a mistake and he needed to be sure it would not occur again. Mr Austin had asked what training he had

received and Ms Bristowe had suggested that more training was needed with which observation Moana had agreed. Mr Leitao said Mr Jackson had nodded which he believed had indicated acceptance of the suggestion of more training.

[36] Mr Jackson denied that he had agreed with the training suggestion during the meeting held on 13 October 2017. He said that the suggestion had been made by Mr Leitao who had not apologised during the meeting for having made a mistake with the potential to cause the Opotiki RSA a loss of funds, or shown remorse at the mistake.

[37] Mr Leitao said he had not denied that he had made a mistake.

[38] Following the meeting Mr Leitao said he had spoken to the Opotiki RSA member who had received the second jackpot pay out. Mr Jackson said he had also spoken to the member who had subsequently returned the money paid out as jackpot winnings to the Opotiki RSA.

[39] Mr Leitao said he had attended for work on his next rostered day on Tuesday 17 October 2017 believing that the matter had been resolved with the indication that further training would take place. He had therefore been shocked when Mr Jackson had presented him with a letter terminating his employment with immediate effect. The letter dated 16 October 2017 stated:

It is with regret that this letter needs to be written; however with all the evidence as it stands it comes to this: Our employment contract must finish as terms and conditions that you have agreed to have not been met. You and I had a meeting on 13 October where we discussed the happenings around improper "cancelled credits" actioned on 10 October and how this came about. You declared that you had not had had proper training to achieve this and therefore you were not responsible in any way. After working this job for many years, this simple task requires no more training. In accordance with your employment contract you underwent said training and now, after all those years of doing this job, you say it didn't happen. At no time during the meeting on the 13th were there any signs of culpability, responsibility or regret for what happened, yet \$871.80 of RSA funds had been inappropriately paid out when all the evidence (in your own handwriting) for this sum not to be paid out was before you, before you paid it out.

Therefore under the sect 9.2.(j) of your employment contract under serious misconduct your contract terminates immediately and because my relationship of trust and confidence with you has dissolved.

"Without prejudice" there are other issues that you and I have already recently spoken about which need not be written about at this time. The above substantial loss of RSA funds must take precedence over all those other issues.

[40] Mr Jackson said he had consulted with the full Opotiki RSA Committee, and it had been the Committee's decision to terminate Mr Leitao's employment. Consideration had been

given to alternative disciplinary action other than dismissal; however it had been the Committee's view that Mr Leitao's behaviour had been ongoing and irresponsible.

Was Mr Leitao unjustifiably dismissed by Opotiki RSA?

[41] Mr Leitao claims that he was unjustifiably dismissed by Opotiki RSA. The test of justification in s 103A of the Employment Relations Act 2000 (the Act) states:

103A Test of justification

1. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
2. The test is 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 or action occurred.

[42] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. Opotiki RSA must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Procedural Justification

[43] In accordance with s 103A (3) of the Act, Opotiki RSA was required to carry out a fair investigation and follow a fair procedure. The Authority must also consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ... the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[44] The letter dated 11 October 2017 advising Mr Leitao that he was required to attend a disciplinary meeting made no reference to the fact that a potential outcome might be the termination of his employment, and Mr Jackson had not verbally informed Mr Leitao that might be the outcome.

[45] Employers and employees are under a duty of good faith to behave towards each other in good faith pursuant to s 4 of the Act. In accordance with s 4(1A) an employer who is proposing to make a decision that will, or is likely to have, an adverse effect on the continuance of an employee's employment is required to provide the affected employee with:

- (i) Access to information relevant to the continuation of the employees' employment, about the decision, and
- (ii) An opportunity to comment on the information to their employer before a decision is made.

[46] Mr Leitao had not been provided with information relevant to the decision to dismiss, notably the recording of the meeting held on 13 October 2017, the Gaming Machine Technician's report, or the copy of the Procedure Guide for clearing a credit.

[47] Mr Jackson's evidence included the fact that he had spoken to another employee on the evening of 10 October 2017 which appeared from his evidence to have influenced his view of what had occurred, however her evidence was not made available or referred to by Mr Jackson during the disciplinary meeting, nor did she appear to give evidence at the Investigation Meeting.

[48] Pursuant to s 103A(3)(d) of the Act, Opotiki RSA was also under a duty of good faith to genuinely consider Mr Leitao's explanation, however Mr Jackson's evidence that on 10 October 2017 he had immediately formed a view that Mr Leitao had been at fault which I find indicates predetermination.

[49] The decision to suspend was conducted in such a manner as to breach the requirement set down in clause 9.3 of the Employment Agreement that Mr Leitao be given an opportunity to comment prior to suspending him.

[50] Whilst minor flaws which did not result in an employee being treated unfairly would not render a dismissal unjustifiable, in this case I find the flaws in the procedure adopted by the Opotiki RSA were more than minor.

Substantive Justification

[51] Mr Leitao was the Duty Manager at the Opotiki RSA, it was a position he had held for approximately 12 years. He was dismissed on the basis of serious misconduct, which had in turn dissolved the trust and confidence Mr Jackson had in him.

[52] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*¹. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:²

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[53] In the later case of *W & H Newspapers Limited v Oram* the Court stated:

The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of “could” rather than “would”, used in the formulation expressed in [*Northern Distribution Union v BP Oil New Zealand Limited*].³

[54] In *Chief Executive of the Department of Inland Revenue v Buchanan (no 2)* the Court of Appeal found that:

In our view, the correct approach is to stand back and consider the factual findings made by the Authority and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal.⁴

[55] The rationale for the dismissal is contained in the letter dated 16 October 2017. One of the comments made is:

“Without prejudice” there are other issues that you and I have already spoken about that need not be written about at this time.

[56] I find that this sentence indicates that there were other issues which had influenced the decision to dismiss Mr Leitao rather than it being based solely on the incident on 10 October 2017. If that were not the case the mention of them would be otiose.

[57] I find this conclusion to be supported by Mr Jackson’s written evidence in which he makes the statement that: “*but when set against the background of the Applicant [‘s] continued failure to in relation to other procedural requirements the RSA were left with no choice but to dismiss the Applicant*”.

[58] I observe that there are no written warnings or other evidence of ‘other issues’ before the Authority that resulted in disciplinary outcomes.

¹ [1992] 3 ERNZ 483

² Ibid at p.487

³ 2000] 2 ERNZ 448 at [31]

⁴ [2005] ERNZ 767

[59] The dismissal letter also states: “*The above substantial loss of RSA funds must take precedence over all those other issues*”. Mr Jackson when questioned at the Investigation Meeting explained the sentence as being in the context of the RSA being in a precarious financial situation and the loss of \$871.80 being part of the general situation and adding to the lack of profitability.

[60] I observe that at the time the dismissal letter was written the \$871.80 had been paid and therefore the: “*substantial loss of RSA funds*” could only be in relation to the Opotiki RSA’s existing financial situation at the time of the dismissal. A situation on which Mr Leitao’s actions had not had an impact at the time of the dismissal.

[61] Moreover the serious misconduct cited in the letter of dismissal dated 16 October 2017 is based upon clause 9.2 (j) of the Employment Agreement which states: “*Misappropriation of the Employer’s funds*”. The dictionary definition of misappropriation is: “*Dishonestly or unfairly take (something, especially money belonging to another) for one’s own use*”⁵

[62] As confirmed by Mr Jackson at the Investigation Meeting, there was no allegation that Mr Leitao had dishonestly taken any money for his own use and therefore the reason cited for the finding of serious misconduct could not be based upon clause 9.3 of the employment Agreement.

[63] I find that although Mr Jackson’s evidence was that the decision to dismiss was based solely upon the failure to follow procedures that occurred on 10 October 2017 in fact it was influenced by the factors referred to in the dismissal letter dated 11 October 2017, namely (i) the previous performance concerns which had never been the subject of a formal disciplinary procedure, and which no evidence in the form of written warnings had been provided to the Authority; and (ii) the precarious financial situation of the RSA.

[64] Mr Leitao was a long serving employee with approximately twelve years’ service. There was no evidence that he had other than a good performance record.

[65] In all the circumstances at the relevant time I find that dismissing Mr Leitao was not a decision a fair and reasonable employer could have taken.

Remedies

[66] Mr Leitao has been unjustifiably dismissed and he is entitled to remedies.

Lost Wages

⁵ The Oxford Dictionary Online, www.oxforddictionaries.com

[67] Mr Leitao said that he had sought other employment a few weeks after his employment with the Opotiki RSA had ended. This had not been without difficulty for Mr Leitao, who is over 70 years of age, in the limited job market of Opotiki and Whakatane, and coupled with manner in which his employment ended.

[68] It is to his credit that he obtained part-time seasonal employment in a kiwifruit packing house in March 2018.

[69] I order the Opotiki RSA to pay Mr Leitao four months lost wages pursuant to s 28(3) of the Act.

[70] I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

Compensation

[71] Mr Leitao had suffered considerable distress at the loss of his employment at the Opotiki RSA, his health suffered and he lost confidence. He also suffered significant distress as a result not only of the dismissal itself, but due to the implications of the news of his dismissal in the small community in which the events took place.

[72] Considering the range of awards in cases of this kind I consider an award of compensation of \$12,000.00 to be appropriate.

[73] Opotiki RSA is ordered to pay Mr Leitao the sum of \$12,000.00 as compensation pursuant to s 123(1)(c)(1) of the Act.

Contribution

[74] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[75] Although there was discussion of training requirements not being met throughout this investigation, I find that Mr Leitao demonstrated at the Investigation Meeting that he was aware of the procedure to be undertaken when clearing the credits from a pokie machine in order to avoid the situation in which a second, erroneous, payment might occur.

[76] On the night of 10 October 2017 Mr Leitao had not only failed to follow that procedure, but had signed the Cancelled Credits Report to indicate that he had followed the steps in the procedure. This signing process should have acted as a reminder to him of the procedural step he was signing to indicate it had been taken.

[77] Whilst I accept that the action was negligent rather than deliberate it was this situation which directly contributed to the situation in which Mr Leitao subsequently found himself.

[78] On that basis I consider it appropriate to reduce the remedies ordered by 20%.

Instalments

[79] The Authority may order payment of the remedies ordered by instalments, but only if the financial situation of the employer requires this pursuant to s 123(2) of the Act.

[80] Opotiki RSA has filed a letter from the Accountants for the Opotiki RSA which confirms that: “in their *the current state of financial position the Opotiki RSA would be unable to meet any financial claim imposed upon them.*”

[81] I find that this statement is supported by the financial accounts which have been provided to the Authority.

[82] In these circumstances I consider it appropriate to order payment by instalments.

[83] In accordance with s 123(2) of the Act I order that Opotiki RSA pay to Mr Leitao the remedies ordered by instalments as follows:

- 20% by no later than 22 December 2018
- 20% by no later than 22 January 2019
- 20% by no later than 22 February 2019
- 20% by no later than 22 March 2019
- 20% by no later than 22 April 2019

[84] Any default in payment may render the full unpaid amount due and payable.

Costs

[85] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[86] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority