IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 177

3138441

	BETWEEN	TINA WATSON Applicant
	AND	BAY HOLDINGS LIMITED T/a THE BAY BAR & BRASSERIE Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Ira White, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	27 April 2022 by Zoom
Submissions and/or further evidence	27 April 2022 from the Applicant None from the Respondent
Determination:	03 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Tina Watson, claims that she was unjustifiably dismissed on 11 February 2011 by the Respondent, Bay Holdings Limited t/a The Bay Bar & Brasserie (BHL).

[2] Ms Watson further claims that she was unjustifiably disadvantaged by a lack of process and a breach of good faith during the termination of her employment.

[3] The Respondent denies that Ms Watson was unjustifiably dismissed or unjustifiably disadvantaged during her employment and claims that it lost all trust and confidence in her as an employee.

The Authority's investigation

[4] Ms Tipping, joint Director and Shareholder of BHL, advised the Authority on 10 March 2022 that the bar and restaurant business of BHL had sold at a loss in September 2021.

However it had not been possible to wind up BHL because there was a loan outstanding to the IRD which prevented this happening until such time as the loan is repaid.

[5] Ms Tipping advised that she would not be attending the investigation meeting.

[6] The investigation proceeded by Zoom. Ms Watson presented her evidence. There were no other witnesses.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[8] The issues requiring investigation are whether or not:

- Ms Watson was unjustifiably dismissed by BHL?
- Ms Watson was unjustifiably disadvantaged by BHL?
- BHL breached the duty of good faith it owed to Ms Watson?

Background

[9] BHL trading as The Bar and Brasserie operated a suburban bar and restaurant which was sold in September 2021.

[10] Ms Watson commenced employment with BHL as Front of House staff at The Bar and Brasserie on 15 October 2020. She worked approximately 20 hours per week at an hourly rate of $21.00.

[11] Ms Watson was provided with an individual employment agreement which she confirmed she had read (the Employment Agreement). Clauses 10.1 and 11.1 of the Employment Agreement state:

> [Under this Agreement, the employee shall:]
>
> 10.1 At all times comply with all reasonable and lawful instructions issued by the employer and shall comply with all rules and procedures established for the conduct of the employee or employees in general.
>
> 11.1 Various or work house rules and policies may be developed for the effective and safe operation of the employer's business and for the welfare and interests of employees, and customers, and the employee must comply with these particular rules and policies.

[12] On 30 November 2020 Ms Tipping posted a message on the BHL staff page on Facebook about the consumption of alcohol whilst working not being permitted. The message stated:

> Hi all, Just a quick note that drinking on the job or before you start your job is illegal and in breach of employment contracts. I have attached the workplace drug and alcohol policy that is also hanging on the doorway in the cupboard.

[13] Ms Watson confirmed that she was aware of the Facebook notification and of the Drug and Alcohol policy. She said she had queried the Facebook notification with Ms Tipping and had been told that it did not apply to her but to the other employees.

[14] The BHL Drug and Alcohol Policy stated:

> **Employees must not under any circumstances work under the influence of alcohol or any other drugs.**
>
> It is our policy that no employee is to report to, commence or return to work while under the influence of drugs or alcohol.

[15] Ms Watson said that she frequently worked on a shift with Ms Tipping, and they regularly had an alcoholic drink before and during work. Ms Watson said that although she sometimes reported for work whilst under the influence of alcohol, Ms Tipping had not raised this as an issue with her and she did not receive any formal warnings about her drinking at work.

[16] During December 2020, as suggested by Ms Tipping, Ms Watson had commenced a course with the Taupo District Licensing Committee to study for a Licence Controller Qualification (LCQ) otherwise known as a Manager's Certificate. The course had entailed knowledge of the Sale and Supply of Alcohol Act 2012.

[17] Ms Watson said she had understood that the course enabled her to qualify as a Duty Manager controlling the sale of alcohol, and running a safe environment in which alcohol was sold.

[18] Ms Watson said she had been required to work as the Duty Manager for BHL prior to her obtaining her LCQ. She said she had not been aware of the repercussions of doing so, and that Ms Tipping had told her it was acceptable for her to do so because it was Ms Tipping's name "above the door." Consequently she had not felt she was doing anything wrong.

[19] Ms Watson said that she had qualified for the Manager's Certificate on 9 February and had received it by post on 15 February 2021 after her employment with BHL had been

terminated. Ms Watson said in re-examination that she had stopped drinking alcohol before or during her working shifts after she had received her qualification.

[20] On 11 February 2021 at approximately 11.50 a.m. Ms Watson said that Ms Tipping approached Ms Watson in the bar area where she was working and accused her of disclosing the business financial information and phoning customers about workplace gossip.

[21] She said Ms Tipping started to yell at her, levelling a range of accusations at her before telling her to collect her belongings and leave. This took place in front of other employees. She was not given an opportunity to respond to the allegations and was told she was dismissed and to leave immediately.

[22] On 12 February 2021 Ms Watson received a letter from BHL dated 12 February 2021 which stated:

> This letter confirms my advice to you that you are dismissed without notice. This means that your employment ends immediately.
>
> In our meeting on 11.02.2021 you and [the Head Chef] attended and we discussed being intoxicated and going to my financial advisors house discussing work gossip, phoning customers and accusing other customers of instigating workplace gossip, on the 7th February being intoxicated before starting your shift and continuing drinking alcohol during a shift. Drinking alcohol during a shift and not paying without owners consent. Divulging personal financial details to colleagues without owners consent.
>
> As discussed during the meeting, your conduct during that incident:
>
> - Was wilful or deliberate behaviour by you that is consistent with your employment continuing by admitting to drinking heavily before the start of your shift.
>
> - Was conduct which was considered to be dishonest (eg theft or fraud) and in the circumstances your continued employment during a notice period would be unreasonable.
>
> You told me that you had a hell of an afternoon, therefore you were drinking before your shift and you were merely taking an interest in the sales figures for The Bay.
>
> I notified you that my preliminary view was that I considered your actions to be serious misconduct justifying your summary dismissal (dismissal without notice) and you left the premises.
>
> I have taken your feedback into account ….

[23] When questioned about the content of the letter, Ms Watson denied she had been drinking before the commencement of her shift on 11 February 2021 but said that she may have had a few drinks the previous night.

[24] Ms Watson said that she was aware that Ms Tipping was selling BHL because the business had been on the market but had not sold at that time. Her partner at the time had been

interested in a possible purchase of BHL, but denied she had discussed any financial details with him.

[25] Ms Watson said she believed the accusation of dishonest conduct mentioned in the letter referred to a bar tab she had with BHL totalling $152.57 which she confirmed was still unpaid. Ms Watson said she had not paid it because she felt aggrieved at the manner in which she had been treated by BHL.

[26] Ms Watson confirmed she had visited Ms Tipping's financial advisors home on the evening of 10 February 2021 at his invitation. She had also called other customers of BHL because she discovered that Ms Tipping had been telling people that she was going to dismiss her (Ms Watson), and she wanted to ascertain what information they had about that issue.

[27] Ms Watson said she had no prior warning that the meeting was to be taking place, and no opportunity to respond to the allegations of which she was aware only on 11 February 2021.

Did Bay Holdings Limited unjustifiably dismiss Ms Watson?

[28] Ms Watson claims that she was unjustifiably dismissed by BHL. The test of justification in s 103A Employment Relations Act 2000 (the Act) states:

> **103A Test of justification**
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> 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.

[29] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair.

Substantive justification

[30] Ms Watson's evidence was that she had been drinking alcohol the evening before her shift, but denied that she had been drinking before she started work in 11 February 2021. In relation to the other reasons given for the dismissal, Ms Watson confirmed that she had contacted customers of BHL to ask them about the rumours of her potential dismissal from BHL, and had visited the BHL financial advisor. However there is no evidence supporting her acting inappropriately by doing so.

[31] I find that without firm evidence, there is no substantive justification for the dismissal decision.

Procedural Justification

[32] In accordance with s 103A (3) of the Act, BHL was required to carry out a fair investigation and follow a fair procedure into any performance or misconduct concerns it had with Ms Watson.

[33] In *Ministry of Maori Development v Travers-Jones* the then Chief Judge Goddard stated in regards to a fair procedure:

> What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.[1]

[34] There is no evidence that BHL provided Ms Watson with clear notice of the purpose of the meeting on 11 February 2021. In fact Ms Watson denies that there was a meeting, rather that Ms Tipping was angry and summarily dismissed her.

[35] Whilst the letter dated 12 February 2021 from Ms Tipping refers to a meeting, it does not reference any previous correspondence outlining the concerns BHL wished to discuss with Ms Watson.

[36] Although feedback provided by Ms Watson is referred to in the letter dated 12 February 2021, Ms Watson's evidence is that she had no time to provide any feedback, although I accept that the letter does itemise the detail of that feedback. However such feedback cannot have been provided following adequate time for its preparation.

[37] A fair and reasonable employer acts in accordance with the duty of good faith as set out in s 4 of the Act.

[38] In all the circumstances I find that dismissing Ms Watson was not a decision a fair and reasonable employer could have taken.

[39] I determine that Ms Watson was unjustifiably dismissed by BHL.

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[1] *Ministry of Maori Development v Travers-Jones* [2003] 1 ERNZ 174 at [30]

Did Bay Holdings Limited unjustifiably disadvantage Ms Watson?

[40] I have found that BHL unjustifiably dismissed Ms Watson and did not act in good faith by carrying out a fair and reasonable procedure. I have also determined that Ms Watson was unjustifiably disadvantaged by the failure of BHL to carry out a fair procedure.

[41] Accordingly I find that Ms Watson was unjustifiably disadvantaged by BHL not following a fair procedure during her dismissal.

[42] There was a breach of the good faith duty BHL owed to Ms Watson arising from the same circumstances.

Remedies

[43] Ms Watson was unjustifiably dismissed by BHL and she is entitled to remedies. Whilst I have determined that Ms Watson was unjustifiably dismissed and unjustifiably disadvantaged by BHL, since it is the same set of circumstances which gave rise to the unjustifiable dismissal and unjustifiable disadvantage, the remedies awarded encompass both causes of action.

Lost wages

[44] Ms Watson commenced alternative employment two weeks after the termination of her employment.

[45] BHL is ordered to pay Ms Watson the sum of $840.00 gross in respect of lost wages (calculated as $21.00 per hour x 20 hours x 2 weeks).

[46] Ms Watson did not receive a notice period to which I find she is entitled in the circumstances. In accordance with clause 12.1 of the Employment Agreement, I find Ms Watson was entitled to two weeks' notice.

[47] BHL is ordered to pay Ms Watson the sum of $840.00 gross in respect of the notice period (calculated as two weeks' notice pay of $21.00 per hour x 20 hours x 2 weeks).

Compensation

[48] Ms Watson said she suffered hurt and humiliation following her dismissal by BHL, which took place within earshot of other employees.

[49] Considering the range of awards in cases of this kind, the relatively short duration of the employment and the circumstances of this case, I consider an award of compensation of $5,000.00 to be appropriate.

[50] I order BHL to pay Ms Watson the sum of $5,000.00 as compensation pursuant to s 123(1)(c) of the Act.

Contribution

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

[52] Ms Watson admitted that she had consumed alcohol both before and during her shifts, including when working as a Duty Manager.

[53] I am satisfied that Ms Watson was aware of the existence of the Drug and Alcohol policy, and that she was also aware, from the Facebook notification sent shortly after the commencement of her employment at BHL, that consuming alcohol before the start or during her shift was illegal. This understanding would have been reinforced during the LCQ training which commenced in December 2020.

[54] Ms Watson confirmed that she had been drinking during her shifts prior to 11 February 2021 and on the evening of 11 February 2021, and that she had contacted customers of BHL following her shift that evening in connection with rumours she had heard.

[55] Irrespective of the claim that Ms Tipping not only knew of the drinking of alcohol whilst working at BHL, but allegedly joined in drinking with Ms Watson during her shifts, I consider Ms Watson must take personal responsibility for her consumption of alcohol whilst working, given her knowledge at the relevant time. It is also the case that the consumption of alcohol more than likely influenced her behaviour in contacting BHL customers on 11 February 2021, and in her presentation at work the following morning.

[56] I find contributory fault on the part of Ms Watson and reduce the sum awarded in respect of the compensation for hurt and humiliation by 20%. As a consequence BHL is ordered to pay Ms Watson the sum of $4000.00.

Penalties

[57] I have determined that by failing to follow a fair and reasonable procedure, BHL did not act in good faith towards Ms Watson.

[58] When assessing the level of penalty I have regard to the principles governing the imposition of a penalty[2].

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[2] *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson and Ford* [2018] NZEmpC 132.

[59] Ms Watson has been compensated for her losses. The purpose of penalties is to deter, not to compensate. The penalty imposed is to reinforce to BHL and other employers the importance of adhering to the duty to act in good faith towards employees, and in particular to follow a fair and reasonable process when conducting a disciplinary matters with employees.

[60] I note that it appears that given BHL has ceased its operational part of the business and owes a debt to the IRD, its ability to pay a penalty may be limited and I take this into consideration when determining the appropriate level of a penalty.

[61] I order BHL to pay a penalty amount of $500.00 to the Authority for transfer to a Crown Bank Account.

Costs

[62] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[3] that costs are modest. Principles also include that costs are reasonable and that they normally follow the event.

[63] I see no reason for not applying these principles in this case. Ms Watson was the successful party in the matter.

[64] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at $4,500.00 for the first day of hearing. This matter was determined 'on the papers'. Costs normally follow the event and the Applicant is entitled to a contribution towards its costs.

[65] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[66] Accordingly BHL is ordered to pay Ms Watson the sum of $2,250.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

Filing Fee

[67] BHL is ordered to pay Ms Watson the filing fee amount of $71.56.

Recommendation

[68] I note that Ms Watson currently owes BHL the amount of $152.57 in respect of an unpaid bar tab.

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[3] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[69] I would recommend that she now pays that amount.

Summary of Orders

[70] The Authority makes the following findings and summary of orders:

a) Ms Watson has been unjustifiably dismissed and unjustifiably disadvantaged by BHL and BHL is to pay her:

i. $840.00 gross in respect of lost wages;
ii. $840.00 gross in respect of a 2 week notice period
iii. $4,000.00 as compensation for hurt and humiliation
iv. $71.56 filing fee

b) Payments are to be made within 28 days of the date of this determination.

c) BHL has failed to act in good faith during the disciplinary process and is to pay a penalty amount of $500.00.

d) BHL is to pay to Ms Watson a costs award of $2,250.00.

Eleanor Robinson
Member of the Employment Relations Authority