

Conducting a fair and reasonable disciplinary process

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The Employment Court has recently laid down further guidance on the requisite standard required of employers conducting disciplinary investigations in *Hayashi v SkyCity Management Ltd* [2018] NZEmpC 14.

SkyCity dismissed a long-serving employee, Mr Hayashi, following a misunderstanding about a VIP customer's betting limits (which are required to comply with the Department of Internal Affairs' gambling rules). As the Court heard, if a customer is betting beyond their limit, they are "entitled to a refund for any losses incurred on the 'over the maximum' betting". Similarly, any wins are deducted from the customer's reimbursement.

The VIP customer was informed that her betting limits had been reduced and that, for a period, she was betting over the limits. She was subsequently told that the lowering of the limits was a mistake, and was offered a goodwill payment of \$300,000, even though she was likely not entitled to compensation under the playing rules. SkyCity investigated the misunderstanding and Mr Hayashi was blamed for this loss to SkyCity.

In concluding that Mr Hayashi's dismissal was unjustified, the Court identified a number of deficiencies in SkyCity's investigation:

- There was information available to corroborate Mr Hayashi's version of events, but this was disregarded by the decision-makers. The Court was of the view that "a fair and reasonable employer should have preferred [Mr Hayashi's] version or at the very least, if it was a matter of doubt, given him the benefit of that doubt" (at [14])
- Mr Hayashi and his legal counsel had not been given all relevant documentary evidence, including surveillance material and updated accounts from employees
- The Table Games Manager influenced the disciplinary process, despite the fact she was a witness against Mr Hayashi on a matter of substantial dispute and was motivated to "run for cover"
- The grounds for Mr Hayashi's dismissal were not the same as those contained in the initial letter he received
- SkyCity did not interview further employees at Mr Hayashi's request, and so he "lost the benefit" of having further evidence available to him
- The "tone" of the investigation was influenced by SkyCity's Chief Executive Officer: "[f]rom the correspondence, the tone was well and truly set; someone's head had to roll".

Hayashi serves as a useful reminder of what not to do when conducting a disciplinary investigation. Decision-makers are reminded to:

- Carefully consider whether the employee's version of events is corroborated
- Provide the employee with all relevant evidence prior to making a decision
- Interview all key witnesses, but limit the involvement of "conflicted" witnesses, where possible
- Be clear and consistent with disciplinary allegations
- Avoid potentially distorting influences.

Ultimately, the action or dismissal must pass the test of justification in s 103A of the Employment Relations Act 2000. Decision-makers should continue to ask themselves, "is this what a fair and reasonable employer could do in all of the circumstances?"

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