

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 43
5520901

BETWEEN	MEREANA TAYLOR Applicant
AND	TENNENT HOTELS LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Sandy Dodunski, Counsel for Applicant Andrew Laurenson, Counsel for Respondent
Investigation Meeting:	21 January 2016 at New Plymouth
Submissions Received:	16 October 2015 and on the day from the Applicant 22 October 2015 and on the day from the Respondent
Determination:	11 April 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mereana Taylor was employed by Tennent Hotels Limited at the Devon Hotel in New Plymouth from February 2006 until her dismissal on 6 June 2014. Ms Taylor was employed as a room attendant/night porter. She was dismissed for sleeping on the job following a formal disciplinary meeting. Ms Taylor claims her dismissal was unjustifiable and seeks financial remedies.

[2] Tennent Hotels Ltd (Tennent) denies Ms Taylor's dismissal was unjustifiable and says her actions compromised the security, health and safety of its guests. For that reason, it considered her actions amounted to serious misconduct. Tennent says if the Authority finds Ms Taylor's dismissal to have been unjustifiable for any reason, then her actions contributed significantly, if not wholly, to the situation which gave rise to her dismissal.

Events giving rise to the dismissal

[3] Ms Taylor's role at the Devon Hotel included working as the night porter on two nights of the week, starting at 11pm and finishing at 7am the following day. On the night of Friday, 30 May 2014, Ms Taylor started duty at 11pm. By her evidence, there were approximately 44 guests in the hotel that night. She was the only person on duty after the hotel receptionist left at or around midnight.

[4] Ms Taylor says she completed her regular jobs such as locking up all the doors, doing the laundry, the toilets and the vacuuming. She recalls that her back was very stiff and sore and she was generally not feeling very well. Her back had been playing up for about a week. She says she sat down for a brief period to take the weight off her feet and to relieve her back. She does not recall going to sleep. She does recall that two kitchen staff arrived at some point, with one of them helping her to get up because her back was so stiff and sore. Ms Taylor says she then continued with her duties until 7am.

[5] Peter Tennent is one of two Managing Directors of Tennent Hotels, the other being his wife, Rosemary Tennent. Mr Tennent's home is located on the site of the Devon Hotel. He says that at approximately 5.40am on Saturday, 31 May 2014, the kitchen staff knocked at his door to advise they had not been able to get into the hotel and were unable to get any response from the night porter. Mr Tennent let the staff in to the hotel and returned to his home.

[6] Shortly after 9am that day Mr Tennent emailed the following message to the General Manager of the Devon Hotel, Robert Davies¹:

This morning the morning chef and morning restaurant controller knocked on my door about 5.40am, as they were unable to get Maryanne or gain access to the hotel. I let them in.

They found her asleep on the couch outside Governors. I have no idea if the phone was turned on or off.

Unacceptable.

Please follow through.

PS: Obviously their time cards shouldn't penalise them based on Maryanne's incompetence.

¹ With salutation and sign off omitted

[7] On Sunday, 1 June 2014, Ms Taylor was on duty again, this time during the day. She had started work in the laundry at approximately 9am. Mr Tennent asked if he could talk to her and took her through to the housekeeper's office. Ms Taylor says Mr Tennent stood over her and told her that she had been caught sleeping and he wanted an apology. He said he had had to be woken up by the incoming kitchen staff the previous day because Ms Taylor had not opened the locked outside door. It was part of her duties to do so in order that the kitchen staff could enter the building in the mornings to commence their shifts.

[8] Ms Taylor says she was surprised by the accusation that she had been sleeping on duty and by Mr Tennent's intimidating manner. She says she tried to explain to Mr Tennent that she was tired and not feeling well. She was not confident that she had heard everything Mr Tennent was saying but she does recall him saying he was going to speak to the housekeeper about the matter and he told her that he was giving her an "*official warning*". Ms Taylor says the meeting ended at this point and Mr Tennent went back to his office. Ms Taylor continued with her duties.

[9] Following the meeting Mr Tennent sent a further email to Mr Davies as follows:

I have just spoken with Mary-anne.

She tells me she has not wanted to do night portering for three years, and Yvonne has been told that. She says she is not well.

She says she just nodded off. But, then acknowledged she must have been asleep for at least 40 minutes. She claimed to have cleaned toilets, even though they had to be done again.

I told her to refrain from laughing when I spoke to her as a serious issue.

I told her this was an official warning

[10] Mr Tennent says that at no stage in his discussion with Ms Taylor did he suggest to her that the matter had been fully dealt with. He says he made it clear to her he wanted the matter dealt with appropriately and that it would be when her manager returned to the hotel.

[11] On Wednesday, 4 June 2014 Ms Taylor received a letter from Mr Davies inviting her to a disciplinary meeting on Thursday 5 June 2014. The letter advised her of the allegations:

- (a) That she had been sleeping on the job on the morning of Saturday, 31 May 2014 between 3.44am and 5.34am; and
- (b) That her duties were not performed, toilets were not cleaned and that the security of the guests and hotel had been compromised.

[12] The letter informed Ms Taylor that she was welcome to have a representative present at the meeting, and she was encouraged to do so. It also informed her the matters were serious and termination of her employment was being considered.

[13] The disciplinary meeting took place on 6 June 2014 due to Ms Taylor's unavailability the previous day. An audio recording of the meeting was made by the employer and made available to the Authority and Ms Taylor's representative. Mr Tennent and Mr Davies were both present. At the outset of the meeting, Mr Davies noted that Ms Taylor did not have a support person with her and asked her if she wished to adjourn. Ms Taylor confirmed it was her choice not to have a support person present. It was reiterated to her that she could have somebody with her.

[14] Mr Davies referred Ms Taylor to the fact that she had been sleeping on the job on 31 May between 3.44am and 5.34am. He said her nap had been captured on the hotel's CCTV² when an employee had come down and woken her up in the morning. Ms Taylor at this point said "yeah". Mr Davies informed her that this was viewed as very serious with the consequences that she had not performed her duties and had compromised the security of the hotel.

[15] He informed Ms Taylor that he and Mr Tennent were considering what options were available and whether her employment would be terminated or not. He said he understood this was not the first time she had slept on the job. Ms Taylor agreed but said on the previous occasion, a year earlier, she had been ill.

[16] When asked if she had any comment to make about sleeping on the job on 31 May, Ms Taylor said she had no comment. She agreed she had been sleeping. She disagreed about the number of duties that she had left unperformed. Ms Taylor's explanation was that she had just collapsed and she did not know she was going to go to sleep. She agreed with a suggestion made by Mr Tennent that she had fainted.

² Closed Circuit Television

[17] Mr Tennent and Mr Davies took a five minute adjournment in the course of the meeting after which they returned and informed Ms Taylor of the decision to terminate her employment. Ms Taylor expressed the view that she expected to be dismissed and that she had enjoyed her years at the hotel.

Issues

[18] The issues for determination are:

- (a) Was Ms Taylor's dismissal justifiable; and if so
- (b) What remedies are appropriate; and
- (c) Did Ms Taylor contribute to the situation which led to her personal grievance?

Legal considerations

[19] Whether or not a dismissal is justifiable is to be determined on an objective basis by applying the test in s.103A of the Employment Relations Act 2000 (the Act). 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 action occurred.

[20] The Act requires the Authority to apply this test to Ms Taylor's dismissal. In addition to any other factors it considers appropriate, the Authority is required to consider:

- (a) Whether the employer investigated the allegations against Ms Taylor sufficiently, taking into account the resources available to it; and
- (b) Whether it raised its concerns with Ms Taylor before dismissing her; and
- (c) Whether it gave Ms Taylor a reasonable opportunity to respond to its concerns before dismissing her; and
- (d) Whether it genuinely considered Ms Taylor's explanations in relation to the allegations against her before dismissing her.

[21] The Act precludes the Authority from finding a dismissal to be unjustifiable solely because of defects in the employer's process if the defects were minor, and if they did not result in the employee being treated unfairly.

Evidence of the parties

[22] Evidence was given, both in written form and orally by Ms Taylor, on her own behalf. Mr Davies, Mr Tennant and Jonathan Wetherall gave evidence on behalf of Tennent Hotels Limited. Mr Weatherall is the director of JW Security Services Ltd and he is a security technician. His evidence related to the CCTV camera within the Devon Hotel which he installed and is responsible for servicing.

[23] There were few areas of dispute over the facts relating to this matter, most of which I have outlined above. In accordance with s. 174E of the Act I will not set out a record of all the evidence heard or received.

Oral indication

[24] After hearing the evidence of the parties and considering submissions of counsel, I gave the parties an oral indication of my preliminary findings. These were:

- (a) I find it more likely than not that Ms Taylor was asleep for 1¾ hours on the morning of 31 May 2014. I am not persuaded she collapsed or fainted.
- (b) I accept in the context of Ms Taylor's role of night porter that this is a serious concern to the respondent as it impacts on the security and safety of the hotel and its guests.
- (c) I find Mr Tennant's meeting with Ms Taylor of 1 June 2014, in which he gave Ms Taylor "*an official warning*", was unfair to her for the following reasons:
 - (i) she had no advance notice of such a meeting; it was first thing in the morning; and she had no time to gather her thoughts;
 - (ii) she was told her employer's view that her behaviour was unacceptable before she had had an opportunity to explain her perspective of what had occurred.

- (d) I find Mr Tennent's intervention and his email on the morning of 31 May 2014 to Mr Davies likely to have compromised Mr Davies' investigation. Mr Tennent had predetermined that she had been asleep before he had spoken with her. In his email asking Mr Davies to "*follow through*", he had referred to her conduct as being "*unacceptable*" and described it as "*incompetence*".
- (e) With regard to Mr Davies' investigation I find:
 - (i) There was no corroboration supporting his evidence of having interviewed any other employees as part of the investigation;
 - (ii) I have reservations over the extent of the investigation carried out and whether Ms Taylor's claims of her sore back/collapsing/fainting were explored at all as they appeared to have been quickly discounted. A fair and reasonable employer could be expected to have requested that Ms Taylor obtain medical evidence, and to have considered that evidence, before deciding to dismiss her.
- (f) I have reservations about the meeting of 6 June 2014 and the fairness with which it was conducted:
 - (i) While meaning no disrespect to Ms Taylor, I suggest a fair and reasonable employer would have told her it was in her best interests to have a representative at the meeting.
 - (ii) I find, without doubting Mr Davies' integrity, the strong stance his employer had taken was likely to have influenced his investigation;
 - (iii) I find it unfair that Mr Tennent and Mr Davies concluded, during their five minute adjournment in the course of the meeting of 6 June, that Ms Taylor had deliberately gone to the couch for the purpose of rest and sleep and relied on that for the decision to terminate her employment without giving her the opportunity to comment on that conclusion.

- (g) If, on consideration of these preliminary findings, I determine dismissal to be unjustified, I am likely to find that Ms Taylor's contribution is significant.

[25] After reviewing the evidence I confirm the preliminary findings I gave to the parties at the conclusion of the investigation meeting. On reflection I withdraw the suggestion I made at (f)(i) above regarding representation. However, as that was a suggestion rather than a finding, it does not alter my overall view of the matter. In accordance with my preliminary findings, I find Ms Taylor was unjustifiably dismissed.

Remedies and contribution

[26] Ms Taylor seeks the reimbursement of six months' lost wages arising from her unjustified dismissal. She says she has been unable to obtain alternative employment because she has no reference from Tennent. She estimates the value of the wages on the basis of 22 hours of work per week paid at \$14.50 per hour to be \$8,294.00 gross. Additionally, Ms Taylor seeks compensation for hurt and humiliation in the sum of \$5,000. She also seeks costs.

[27] The Act provides at s. 128 that where an employee has a personal grievance, and has lost remuneration as a result of it, the Authority must order the employer to pay the lesser of a sum equal to the lost remuneration or three months' wages. The Authority has the discretion to award a greater sum if it sees fit. In this instance I am not persuaded that an award in excess of three months is warranted. While I am satisfied from Ms Taylor's evidence that she made some attempts to obtain alternative employment, the lack of evidence to support those efforts leads me to conclude that no more than three months' wages is justified.

[28] The amount she seeks for hurt and humiliation is moderate and appropriate in the circumstances and, subject to contribution findings, I order Tennant to pay Ms Taylor the sum of \$5,000.

[29] In deciding the nature and extent of remedies to be provided for Ms Taylor's personal grievance, I am required to consider the extent to which her actions

contributed towards the situation that gave rise to her grievance and, if warranted, to reduce accordingly the remedies I would have otherwise awarded.³

[30] As noted earlier, counsel for Tennent submits that Ms Taylor's actions significantly, if not wholly, contributed towards the situation that gave rise to her dismissal. Counsel for Ms Taylor, unsurprisingly, submits there was no contribution by Ms Taylor.

[31] In line with the indication of preliminary findings given to the parties at the investigation meeting I find there was contribution by Ms Taylor and it was significant. Taking into account Ms Taylor's acknowledgement that she did sleep during her working hours on the morning of 31 May 2014 and that it was not the first time she had done that, I assess her contribution at 40%. The remedies awarded are accordingly reduced by that percentage.

Determination

[32] Tennent Hotels Limited is ordered to pay Mereana Taylor:

- (a) Under s. 128(2) of the Act the sum of \$2,488.20 gross;⁴ and
- (b) Under s. 123(1)(c)(i) of the Act the sum of \$3,000 without reduction.⁵

Costs

[33] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

³ Section 124 of the Act

⁴ Being three months' remuneration of \$4,147 less 40%

⁵ Being \$5,000 compensation less 40%