[2014] FWC 543

The attached document replaces the document previously issued with the above code on 22 January 2014.

To correct a typographical error in paragraph 64.

Carreen Dew
Associate to Commissioner Cambridge

Dated 24 January 2014

# DECISION

*Fair Work Act 2009*
s.394 - Application for unfair dismissal remedy

**Matthew John**
**v**
**The Star Pty Limited**
(U2013/1671)

COMMISSIONER CAMBRIDGE SYDNEY, 22 JANUARY 2014

*Unfair dismissal - summary dismissal - negligent act which resulted in a minor gaining entry to a casino - failure to perform work in accordance with standards required by employer - unreasonable standards - erroneous factual elements for dismissal - invalid reason for summary dismissal - extraneous influences on decision to dismiss - disproportionate overreaction to unsatisfactory work conduct - significant procedural deficiencies - harsh, unjust and unreasonable dismissal - reinstatement Ordered.*

**[1]** This matter involves an application for unfair dismissal remedy made pursuant to section 394 of the *Fair Work Act 2009* (the Act). The application was lodged at Sydney on 21 May 2013. The application was made by *Matthew John* (the applicant) and the respondent employer is *The Star Pty Limited ABN: 25060510410* (the employer).

**[2]** The application indicated that the date the applicant's dismissal took effect was 2 May 2013. Consequently, the application was made within the 21 day time limit prescribed by subsection 394 (2) of the Act.

**[3]** The matter was not resolved at conciliation and it has proceeded to arbitration before the Fair Work Commission (the Commission) in a Hearing conducted in Sydney on 20, 21 and 22 November 2013.

**[4]** At the Hearing, *Mr O Fagir*, barrister, with *Ms G Starr* from the United Voice, appeared for the applicant. The applicant was the only witness called to provide evidence in support of the claim. The employer was represented by *Mr M Seck*, barrister, instructed by *Mr J Entwistle*, solicitor, who called a total of three witnesses who provided evidence on behalf of the employer.

**Factual Background**

**[5]** The applicant is a man of some 30 years of age and he had worked for the employer for about five years and three months. The applicant was employed as a Security Officer.

**[6]** The employer operates The Star casino located at Pyrmont, Sydney. The employer has in excess of 3,000 employees. The operation of the casino is governed by the *Casino Control Act 1992* [NSW] (*Casino Control Act*).

**[7]** In about 2011, the employer divided the work performed by Security Officers into different teams, relevantly including the Safety team and the Welcome team. The applicant was assigned to the Safety team, which was broadly focussed on incident response work. The work of persons assigned to the Welcome team generally involved greeting patrons as they entered the casino premises and vetting those potential patrons to ensure that they were not under 18 years of age or intoxicated or otherwise not permitted to enter the casino premises.

**[8]** On regular occasions the applicant, as with other members of the Safety team, would be allocated to work for a period of a shift performing work as a member of the Welcome team. On the evening of Saturday 27 April 2013, the applicant was assigned to work a part of his shift from 11pm until 1am, as a static Welcome team Security Officer, situated at the Harbour side entrance of the casino.

**[9]** On 27 April, the applicant commenced work at about 6:45 pm and performed his Safety team work until about 11pm when he went to the Harbour side entrance as assigned. The applicant and three Welcome team Security Officers performed the greeting and vetting functions, as potential patrons approached the Harbour side entry.

**[10]** This particular work essentially involved the four Security Officers standing across the entrance and each identifying persons who appeared to be under 25 years of age and beckoning that person to produce some identification (ID) to verify that they were at least 18. Additionally, the Welcome team Security Officers and the applicant were engaged with patron inquiries, identification of any intoxicated individuals, and surveillance of patrons who were acting in a potentially anti-social manner, particularly those individuals who may have been asked to leave the casino premises, usually because they were intoxicated.

**[11]** Individuals who have entered the casino via the Harbour side entrance are required to be vetted a second time, if they wish to enter another part of the casino called the Marquee Night Club (the Marquee). At about 11:36 pm, a 17 year old female attempted to gain entry into the Marquee. This minor was ejected from the casino. However, before she was discovered by Security staff at the Marquee vetting point, she had managed to gain entry to the main gaming floor of the casino via the Harbour side entrance. The female minor, Ms L, was discovered to be using the ID of a Learner Drivers Licence of an 18 year old friend, Ms C. Upon questioning by Security staff at the Marquee, Ms L admitted that she was 17 and using her friend's Learner Drivers Licence as a means to falsely present as being 18 years of age.

**[12]** Although located within the casino premises, the arrangements for vetting of patrons entering the Marquee were more structured than those applying at the Harbour side entrance on the night of 27 April. These more structured arrangements included the deployment of bollards and roping, to direct persons into queues and the utilisation of equipment which magnified the IDs that were presented to Security staff. These more structured arrangements for entry into the Marquee are utilised to check persons who are already on the casino premises. In any event, the management of the employer had identified that a minor had breached the vetting conducted at the first point of entry into the casino, when Ms L had entered through the Harbour side entrance.

**[13]** Various aspects of the *Casino Control Act* are administered by the Independent Liquor and Gaming Authority (the ILGA). Once a minor has been discovered on the casino premises an ILGA Officer is advised. On 27 April, Ms L was interviewed by an ILGA Officer and Ms L was given an infringement fine of $110. Further, any entry of a minor becomes the subject of report which can lead to the ILGA imposing a fine on the employer after it has issued the employer with a notice to show cause.

**[14]** The issue of entry of any minor into the licensed area of the casino is treated with an appropriate level of seriousness. Consequently, the employer undertook an investigation into the circumstances which permitted entry of a minor, in this case, Ms L, into the casino premises via the Harbour side entrance.

**[15]** The employer's investigation into the matter focussed upon review of CCTV footage of the Harbour side entrance shortly before Ms L was discovered attempting to enter the Marquee. The CCTV vision showed that Ms L gained entry via the Harbour side entrance when she produced ID to the applicant, who then permitted her entry. Later on the night of 27 April or morning of 28 April, the employer's Security Duty Managers advised the applicant that it appeared that he had permitted the entry of a minor into the casino. The applicant made a brief written statement shortly after 4am on 28 April and he was suspended from duty with pay, pending the employer's further investigation.

**[16]** On 2 May, the applicant was accompanied by a United Voice representative when he attended a disciplinary meeting with the employer's managers. The managers questioned the applicant about the events of 27 April relating to the entry of Ms L through the Harbour side entrance. After some questioning, the applicant was shown the CCTV vision of the time when Ms L entered the casino through the Harbour side entrance, after having produced ID to the applicant.

**[17]** Upon viewing the CCTV vision, the applicant admitted that he did not perform a thorough vetting of Ms L's ID. However the applicant suggested that there were particular circumstances which contributed to his less than adequate examination of Ms L's ID. The applicant said that he was stressed and distracted at the time. He complained that there were insufficient staff on the Harbour side entrance on that night, the team leader was absent at the time, and he had asked for assistance which had not been provided. The meeting adjourned to allow the employer's managers to consider the applicant's protestations and explanations.

**[18]** After a break of about 35 minutes, the disciplinary meeting resumed and the applicant was told that his employment was summarily terminated for failing to conduct a proper ID check, which included that he "*...failed to look at the female and vet the ID*."[1]

**[19]** Some 22 days later, the applicant was provided with a letter entitled: "*Immediate termination of your employment*", which inter alia, stated that the summary dismissal was "*...due to a serious breach of your employment duties and the Casino Control Act 1992, specifically permitting a minor to enter the main gaming floor*."

**[20]** A short time after his dismissal, the applicant obtained alternative employment, albeit, of a casual nature.

**The Case for the Applicant**

**[21]** *Mr Fagir* appeared for the applicant and made verbal submissions in addition to documentary material that had been filed. *Mr Fagir* submitted that the determination of the matter was fairly straightforward. In essence, *Mr Fagir* said that the case involved a summary dismissal for a one-off mistake and that in the absence of some extreme aggravating circumstance surrounding that mistake, such summary termination of employment must be held to be harsh, unjust and unreasonable. *Mr Fagir* said that the summary dismissal of the applicant involved five and a half years of good dedicated employment being swept away as a result of four or five seconds of inadvertence.

**[22]** *Mr Fagir* submitted that the applicant had admitted his mistake as soon as he was shown the CCTV vision. However according to *Mr Fagir*, there were a number of extenuating circumstances which explain the mistake and operate to fortify the conclusion that summary dismissal was particularly unfair.

**[23]** The extenuating circumstances referred to by *Mr Fagir*, included that the applicant was working at a busy entrance that was understaffed and his requests for additional Security personnel went unanswered. *Mr Fagir* mentioned that there was no team leader present at the entrance during the relevant time and this contributed to the inadequate staff levels which created concern for each of the Security Officers who were attempting to conduct vetting at a busy time.

**[24]** Further, *Mr Fagir* mentioned that the Harbour side entrance had been poorly organised with people coming and going from every direction. Added to these difficult circumstances, *Mr Fagir* said that at the critical moment that Ms L presented the illegitimate ID of Ms C, the applicant was distracted by a potential altercation. *Mr Fagir* also submitted that Ms L looked remarkably similar to the photograph in her friend's ID.

**[25]** *Mr Fagir* made further submissions which addressed particular issues raised by the employer. *Mr Fagir* said that the seriousness that is attached to any entry of a minor into the casino was undeniable and accepted by the applicant. In addition, the applicant had consistently acknowledged and admitted that the ID check of Ms L that he conducted on 27 April was imperfect and should have been more thorough.

**[26]** Further, *Mr Fagir* submitted that the applicant did not seek to rely upon any inadequacy in respect to the training or experience that he had, as some justification for the mistake that he made. However, *Mr Fagir* pointed to the absence of any stipulated standard operating procedure in respect to ID checks. In this regard, *Mr Fagir* placed emphasis upon evidence which was provided by two of the employer's managers and which gave different versions about what each claimed to be the detail of the proper procedure for conducting an ID check.

**[27]** In further submissions, *Mr Fagir* was critical of the structural arrangements that the employer had deployed at the Harbour side entrance. *Mr Fagir* stressed the contrast between the arrangements in place for entry into the Marquee, involving bollards, ropes, magnification equipment and directed queues, compared with the line of an inadequate number of Security Officers attempting to deal with people randomly moving both in and out of the casino. *Mr Fagir* mentioned evidence that a few weeks before April 27, bollards and directional roping

had been removed from the Harbour side entrance, and as part of the investigation into the entry by Ms L, a recommendation had been made to return to arrangements involving bollards, ropes and directional signage, for persons under 25 years of age.

**[28]** *Mr Fagir* made further submissions about the common law position that existed in respect to conduct that justified summary dismissal. *Mr Fagir* stressed that as a general proposition, it would be only the most exceptional acts of gross negligence that could provide justification for summary dismissal.

**[29]** *Mr Fagir* also made submissions about external factors which influenced the decision to dismiss the applicant, but which he said did not provide a legitimate basis for that decision. In this regard, *Mr Fagir* said that the employer acted with a desire to demonstrate to the ILGA, that the entry into the casino of any minor, in this case, Ms L, was as a result of the fault of an individual employee and not the employer. Consequently, the employer's position as advanced to the ILGA, would be enhanced with confirmation that the employee was at fault and that the employee had been dismissed.

**[30]** *Mr Fagir* also criticised aspects of the investigation and discipline procedure that the employer had adopted. *Mr Fagir* said that the applicant was asked to make a written statement shortly after the event on 27 April, without being given any details other than that a minor had gained entry through the Harbour side entrance. Similarly, at the disciplinary meeting held on 2 May, the applicant was interrogated before he had been given an opportunity to see the CCTV footage.

**[31]** *Mr Fagir* further submitted that an inference as established by the principle recognised in the case of *Jones v Dunkel* [2] should be drawn from the absence of any evidence from the person who had discovered Ms L, when she attempted to enter the Marquee. *Mr Fagir* said that the employer could have provided evidence from the Security Officer who discovered that Ms L was underage and the circumstances which led to that discovery. According to *Mr Fagir*, the inference which should be drawn from the absence of this evidence, was that it would not have assisted the employer's case.

**[32]** In addition, it was submitted by *Mr Fagir* that there was evidence of differential treatment of employees who had made ID vetting mistakes. *Mr Fagir* said that there was evidence of other instances where other Security Officers had made mistakes with ID vetting which resulted in minors gaining entry into the casino, but these persons had not been dismissed.

**[33]** *Mr Fagir* summarised his submissions by concluding that the summary dismissal of the applicant was entirely disproportionate to the gravity of the misconduct, if it was misconduct at all. *Mr Fagir* urged that the Commission decide that the applicant be reinstated to his former position, with no loss of continuity and compensation.

**The Case for the Employer**

**[34]** The employer was represented by *Mr Seck*, who submitted that the dismissal of the applicant was not unfair. *Mr Seck* made extensive verbal submissions which elaborated upon documentary material that had been filed on behalf of the employer.

**[35]** *Mr Seck* commenced his submissions by stating that the essential facts in the proceedings were largely uncontested. *Mr Seck* said that the basis for the dismissal of the applicant was the negligence that he demonstrated in conducting the ID check on 27 April. According to *Mr Seck*, the applicant's action amounted to gross negligence.

**[36]** *Mr Seck* made detailed submissions which referred to various common law authorities, which he said established that in circumstances where the action of an employee amounts to gross negligence involving a grave, serious or significant departure from the standard of care which would be reasonably expected of someone in the applicant's position, then justification for summary dismissal existed.

**[37]** *Mr Seck* submitted that the applicant had failed to conduct the ID check in accordance with the standard of care which a reasonably competent Security Officer would be required to observe. According to *Mr Seck*, the applicant had both the training and experience required to perform what is a fairly straightforward process. In particular, the applicant had failed to check the facial features of the person presenting an ID and ensure to the best of his ability, that the photo matched the person presenting it.

**[38]** *Mr Seck* made detailed submissions which analysed the CCTV footage which had captured the ID check performed by the applicant on 27 April, when Ms L entered the casino via the Harbour side entrance. According to these submissions, the applicant failed to pay additional attention when presented ID in the form of a Learners Drivers Licence, and the only time that the applicant could have looked at Ms L was when she approached the entrance because he did not look at Ms L when he had been given the ID. These actions were, according to *Mr Seck*, a significant and serious departure from the standard of care which the employer could have expected of a Security Officer, having particular regard for the legislative and regulatory ramifications for the employer.

**[39]** In addition to the CCTV footage involving the applicant permitting Ms L to enter the casino, *Mr Seck* sought to rely upon six other incidents which he said could be identified from further examination of the CCTV footage, covering a period both before and after the incident involving the applicant and Ms L. *Mr Seck* examined these other incidents in some detail and made reference to these other incidents as confirmation of a pattern of dilatory conduct, inconsistent with acceptable standards for the applicant's position.

**[40]** *Mr Seck* made detailed submissions which referred to various Judgments that he said established that there was a common law basis for an act of serious negligence by an employee to represent justifiable basis for summary termination of employment. *Mr Seck* made particular mention of a Decision of a Full Bench of the Commission in the case of *Parmalat Food Pty Ltd v Mr Kasian Wililo* [3] (Parmalat).

**[41]** Although the Decision in Parmalat was concerned with the statutory occupational health and safety obligations imposed upon an employer, *Mr Seck* submitted that in this instance the employer had significant statutory obligations which arose under the *Casino Control Act*. *Mr Seck* made a detailed examination of various provisions of the *Casino Control Act* and the particular measures that the regulatory authority had recently imposed on the employer regarding stringent restrictions on the entry of minors into the casino.

**[42]** *Mr Seck* made further submissions which rejected the criticism made about the structural arrangements that may or may not have been in place at the Harbour side entrance

on 27 April. *Mr Seck* said that the matter was fundamentally directed at the actions of the applicant, whereby he failed to perform the basic task of conducting a proper ID check, rather than whether there were certain arrangements in place at the time.

**[43]** The submissions made by *Mr Seck* also rejected the various other factors which the applicant said contributed to his inadequate ID check of Ms L. *Mr Seck* said that these alleged factors such as the alleged distraction created by a potential confrontation, and the absence of a team leader, were matters of distraction which tried to avoid the central issue, that being, that the applicant just did not do his job properly.

**[44]** *Mr Seck* submitted that there was no basis to find that the applicant had been unfairly dismissed. He said that the fundamental issue was that the applicant did not actually check the face of a person as part of the ID process involving Ms L. This was, according to *Mr Seck*, a grave departure from the standard which is expected of a competent Security Officer and it would be unsafe to reinstate the applicant to a position where there was a risk of reoccurrence.

**Consideration**

**[45]** Section 385 of the Act stipulates that the Commission must be satisfied that 4 cumulative elements are met in order to establish an unfair dismissal. These elements are:

> *(a) the person has been dismissed; and*
>
> *(b) the dismissal was harsh, unjust or unreasonable; and*
>
> *(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
>
> *(d) the dismissal was not a case of genuine redundancy.*

**[46]** In this case, there was no dispute that the matter was confined to a determination of that element contained in subsection 385 (b) of the Act, specifically whether the dismissal of the applicant was harsh, unjust or unreasonable. Section 387 of the Act contains criteria that the Commission must take into account in any determination of whether a dismissal is harsh, unjust or unreasonable. These criteria are:

> *(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and*
>
> *(b) whether the person was notified of that reason; and*
>
> *(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
>
> *(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
>
> *(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and*

*(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*

*(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*

*(h) any other matters that the FWC considers relevant.*

**387 (a) - Valid Reason for the Dismissal Related to Capacity or Conduct**

**Summary Dismissal**

**[47]** This was a case of summary dismissal. The common law and various applicable statutory regimes, including the Act and its predecessor legislation, have for many decades, distinguished summary dismissal from dismissal with notice. The reason for the applicant's dismissal was directly related to his conduct. Any consideration as to whether there was a valid reason for dismissal should logically have regard for the summary nature of the dismissal. In simple terms, what may be a valid reason for a dismissal with notice, may not be a valid reason to dismiss someone summarily.

**[48]** Any employer should be very cautious about invoking a summary dismissal, as opposed to dismissal with the required notice. In this regard, it is relevant to repeat an extract from the Judgement of Mr Justice Hungerford in the case of *Pastrycooks Employees, Biscuit Makers Employee & Flour and Sugar Goods Workers Union (NSW) v. Gartrell White (No 3), (Gartrell White)* [4]:

"*The right of an employer to summarily dismiss an employee without notice is qualified by the employee inter alia having committed an act of misconduct; thus, to be able to rely upon the right, and to pay the employee up to the time of dismissal only rather than terminate by notice or payment in lieu of notice, the employer must not only allege misconduct but must also prove it*." [5]

**[49]** The following further extract from the same Judgement is relevant:

"*...the test comes down to the question whether the employee's conduct has been so inconsistent with his duties under the employment contract that it strikes down any reasonable suggestion that the employer-employee relationship can be continued in the future*." [6]

**[50]** Much of the recent case law on the question of what conduct of an employee may justify summary dismissal, has developed from a line of authority which, for present purposes, can be conveniently traced back to the case of *Laws v. London Chronicle (Indicator Newspapers) Limited*.[7] Although this was an English case from 1959, it established the concept that any conduct which is relied upon to provide basis for summary dismissal must *"... have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions."* [8]

**[51]** The letter of dismissal dated 24 May 2013, stated, inter alia, that the applicant's employment "*was terminated effective immediately on 2 May 2013 due to a serious breach of your employment duties and the Casino Control Act 1992, specifically permitting a minor to enter the main gaming floor."* Although upon reading of the wording of the letter of dismissal, it could be interpreted to infer that the applicant knowingly permitted the entry of a minor, there was no suggestion that the applicant's actions were in any way intentional, but rather a gross dereliction of duty.

**[52]** In this instance, it was unusual to find that the reason for summary dismissal was an act of negligence, rather than some deliberate, wilful misconduct. In general, a summary dismissal will usually be implemented in circumstances where an employer believes that an employee deliberately committed an act of serious misconduct. In effect, summary dismissal will usually be confined to circumstances that have as a prerequisite, the clear presence of a guilty mind, or *mens rea,* in respect to the action of the employee.

**[53]** However, it would appear that in certain circumstances, an act of gross negligence which causes substantial loss or damage to the employer, may represent a valid basis for summary dismissal.[9] The employer advanced such a proposition in this case. In particular, the employer sought to rely upon the requirements of the regulatory regime governing its casino operation as a particular factor which amplified the loss and damage caused by the applicant's negligent failure to properly check the ID presented to him by Ms L. The employer was fined $5,000.00 in respect to the admission of Ms L into the casino.

**[54]** The seriousness that is attached to the requirement to prohibit the entry of minors into the casino cannot be overstated. Consequently, if a Security Officer or other member of the employer's staff, consciously permitted entry of a minor into the casino, absent some extenuating circumstances, such action would likely be wilful misconduct which would justify summary dismissal.

**[55]** As stated earlier, there was no suggestion that the applicant consciously permitted Ms L to enter the casino, in the knowledge that she was only 17 years of age. The CCTV vision does not show the applicant abandoning his role or waving people through the entry without concern or care. Indeed, the applicant and the other Security Officers appear to be quite anxious at times when large numbers of people approach the entrance and the Security Officers are all clearly concerned to ensure that ID checks are performed and that in particular, persons do not "slip past" and avoid vetting completely.

**[56]** The CCTV vision shows that on several occasions, the applicant was not conducting the vetting of IDs including the one presented by Ms L, with a sufficient degree of detailed examination. The employer complained that the applicant took only about four seconds to check the ID presented by Ms L. As soon as he reviewed the CCTV vision, the applicant openly admitted that the ID check that he performed on Ms L was deficient. There are other examples from the CCTV vision when the applicant's ID checking appeared to be somewhat cursory.

**[57]** However, there are also examples of similar cursory vetting conducted by the other Security Officers who can be observed in the CCTV vision from the Harbour side entrance on 27 April. By way of some specifics; the male Security Officer on the applicant's left (far right of screen), permitted entry of two persons with a combined ID checking time of about eight seconds which commenced at about 23:27:02 and finished at about 23:27:10; and at about

23:28:24 to 23:28:27 he took about three seconds to check an ID; the female Security Officer on the applicant's right was distracted for an extended period including when she left the entry point and moved to the top of the escalators and then she can be seen later engaged in prolonged discussion with patrons some distance behind the entry point; further, at about 23:28:45 she took approximately three seconds to check an ID; and again at about 23:36:30 she took about three seconds to perform an ID check; the male Security Officer on the applicant's right appeared to complete an ID check in about four seconds from around 23:23:18 to 23:23:22; and he initially beckoned a female patron to stop at about 23:34:01 but then let that person pass without any check.

**[58]** The applicant gave evidence that the vetting process can involve an initial aspect of concern, either age or perhaps intoxication, and then upon closer inspection, the issue which gave rise to the initial concern may disappear. Consequently, an ID check which was initially required might become unnecessary, but may be performed anyway in a more abbreviated fashion.

**[59]** Following a detailed examination of all of the evidence, including in particular, the CCTV vision of the Harbour side entrance before and after the entry by Ms L, I believe that the negligent and inadequate performance of duty by the applicant did not represent such gross, grave, serious or significant departure from the standard of care which should have been exercised and which caused substantial loss or damage to the employer, as to render that action valid reason for summary dismissal. An objective and balanced assessment of the applicant's conduct as viewed from the CCTV vision and considered in the context of the performance of the other Security Officers who can also be examined, does not give an impression that the applicant's actions had any component of the gross negligence necessary to justify summary dismissal.

**[60]** Further, although the common law position may provide for summary dismissal to be justified in circumstances involving gross negligence, it seems to me, that the statutory position may not.

**[61]** The Act introduced the Small Business Fair Dismissal Code (the Code) which contains provisions which describe the circumstances when it would be fair for a small business employer to dismiss an employee summarily. The relevant part of the Code is reproduced as follows:

> "***Summary Dismissal***
>
> *It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.*

***Other Dismissal***

*In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.*

*The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.*

*The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations*."

**[62]** It would seem that the Code is designed to provide small businesses with something of a less stringent and simplified set of evidentiary and procedural requirements, which may avoid a finding that a dismissal was unfair. It would be illogical to contemplate that a "large business" would not be required to comply with, or more likely, exceed, the requirements of the Code.

**[63]** Of course the Code should not be interpreted as providing an exhaustive explanation of the circumstances which would justify a summary dismissal. However, the Code's use of the words, "*Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures*" when combined with both the absence of any mention of grossly negligent or similar conduct, and the mention of reporting the employee's conduct to the police, is suggestive of a requirement that there be a wilful character to any action which would justify summary dismissal, as opposed to other dismissal. Essentially, I believe that the Code is directing that summary dismissal would usually only be justified where the actions of the employee contain an element of *mens rea,* either in respect of serious misconduct or serious breach of occupational health and safety procedures.

**[64]** Consequently, the Code would generally require that a small business should implement summary dismissal only where the employer is satisfied that the actions of the employee are intentional, rather than negligent or incompetent. Logically, the *mens rea* prerequisite for summary dismissal as I describe it, would apply to large businesses, perhaps with a greater degree of stringency and satisfaction.

**[65]** Although upon my interpretation, the Code may be modifying the common law position regarding summary dismissal for negligent rather than intentional action, there has, from my observation, been something of an evolutionary development in this particular area of employment law. Courts and Tribunals appear to be gradually casting off the proposition that negligence would justify summary dismissal, as it represents an outdated concept which was established upon the principles which applied during the era of the master and servant relationship.

**Factual Errors**

**[66]** The evidence has also disclosed that the reasons for the applicant's dismissal included a number of factual errors. The letter of dismissal was almost four pages in length and provided to the applicant some 22 days after his summary termination. The reason for this delay apparently involved the "*relevant HR officer*" recently returning from leave. However, given the time delay, the length of the letter, and the strict standards of performance that the employer was insisting upon from the applicant, the employer might have been expected to apply similar standards of accuracy and timeliness in respect of the letter of dismissal.

**[67]** Unfortunately, the letter of dismissal contained numerous inaccuracies in detail and also important factual errors. The overall impression that is gained from a reading of the letter of dismissal, in the context of the summary termination of employment for alleged gross negligence, is that the employer demanded standards of performance of the applicant which it was incapable of achieving itself.

**[68]** The letter of dismissal incorrectly stated that the incident on 27 April occurred at approximately 10.30pm and that the applicant was performing his usual role. Further, the letter mistakenly stated that Ms L presented a NSW Drivers Licence and that the applicant's only duty on the night in question at the entry point, was to greet patrons and check for minors, intoxicated persons, or those otherwise excluded from entry. I acknowledge that these are issues of inaccuracy rather than significance. However, the letter of dismissal also included two important factual errors which were relied upon as basis for the applicant's dismissal.

**Did Not Look at Ms L's Face**

**[69]** On the first page of the letter of dismissal, the assertion was made, that the applicant "*...failed to even look at the patron's face...*" This issue was restated on the second page in the terms: "*...you did not even look at the face of the patron presenting you with her identification*." On the fourth page, the letter stated: "*You have acted in total breach of your employment responsibilities by failing to even look at a patron who provided her identification to you ...*" The evidence from the employer's Asset Protection Manager, Mr Lomax, who said he had examined the CCTV vision, was that "*...at no point did he appear to even have a proper look at her face*."[10] There is a major factual omission which is missing from these repeated statements regarding the applicant allegedly not looking at the face of Ms L.

**[70]** The CCTV vision shows that the applicant did not look at the face of Ms L at the time that he had possession of the Learners Licence that she presented to him. From the time that the applicant was first shown the CCTV vision, he admitted that this was a significant error on his part. However, a careful examination of the CCTV vision shows that at about 23:31:00 the applicant looks directly at the face of Ms L as she approaches the entry. The applicant's eye contact with Ms L was confirmed during the replaying of the CCTV vision during the Hearing.[11]

**[71]** A balanced and objective contemplation of the applicant's ID check of Ms L should have at least, included some recognition that the applicant did look at the face of Ms L as she approached the entry, even though he failed to look again at her face when he had the Learners Licence in his hand. The absence of any such recognition is a significant factual

omission which as a result, erroneously portrayed and artificially exaggerated the mistake made (and admitted) by the applicant.

**No Resemblance between Photo ID and Ms L**

**[72]** The second significant factual error contained in the letter of dismissal and which formed part of the reasons for dismissal, concerned the allegation that the ID presented by Ms L "*...displayed a photo of a female who failed to match the appearance...*" of Ms L. The issue of the extent to which the photographic ID presented by Ms L matched her own appearance has become a matter involving some disconcerting evidence.

**[73]** Mr Burns, the employer's Asset Protection Risk and Compliance Manager, made the decision to dismiss the applicant in conjunction with HR Manager, Ms Watson. Mr Burns gave evidence that he believed that the photographic ID presented by Ms L "*showed no resemblance to that of* [*Ms L*]"[12]. During the Hearing, Mr Burns confirmed that he believed that there was no resemblance between the photographic ID, a picture of Ms C, and the appearance of Ms L as captured in the CCTV vision. This comparison is neatly encapsulated by viewing the pictures respectively located at attachments 3 and 4 of Annexure GB5 to the witness statement of Mr Burns (Exhibit 6).

**[74]** I readily acknowledge that individual perceptions of human facial appearances can be a highly subjective exercise. However, if an objective assessment and examination of the respective photographic images is made, I believe that to assert that there is no resemblance between the appearances of the two women would, at best, be disingenuous.

**[75]** A significant component of the basis for the applicant's dismissal was that his ID check procedure of Ms L was so grossly negligent as to warrant summary dismissal. Implicit in the level of negligence as alleged, was that if the ID check was conducted properly, the absence of any resemblance in appearance between the photograph in the ID Licence and the appearance of Ms L, would have been identified and entry of a minor would have been prevented.

**[76]** Ms L was subsequently "caught" when she attempted to gain entry to the Marquee, only a few minutes after she had entered the casino past the applicant at the Harbour side entrance. The employer decided to summarily dismiss the applicant because if he had done his ID check properly, the absence of any resemblance between Ms L and the photo ID she was using, would have been obvious. Consequently, by logical inference, the Security Officer at the Marquee who "caught" Ms L presumably must have performed the ID check properly and noticed the absence of any resemblance, as asserted by Mr Burns, between the photo ID and Ms L. Strangely however, the employer did not adduce any evidence from the Security Officer who "caught" Ms L at the entrance to the Marquee.

**[77]** The employer did provide evidence which, although untested, suggested that Ms L was not "caught" at the Marquee because she showed no resemblance to the photo ID that she presented. The witness statement of Mr Burns included reference to a "Team Member File Note" which recorded the substance of the discussion that occurred during the applicant's disciplinary meeting held on 2 May 2013. This file note was prepared by Ms Watson but according to paragraph 34 of Mr Burns' witness statement, it represented an accurate record of the substance of the discussion during the meeting. Importantly, the file note records the following exchange between the applicant (MJ) and Mr Burns (GB):

> "*MJ: I was told that when I was asked to write a statement that she accidently provided the wrong ID which is how she was caught?*
> *GB: Either way she was found out - that could have been stopped by you at the first point*."[13]

**[78]** *Mr Fagir* urged that the Commission should draw an adverse inference from the absence of any evidence from the Security Officer who "caught" Ms L attempting to enter the Marquee. After careful consideration of the totality of the evidence, I am prepared to adopt such an inference. It would appear that at the time of the disciplinary meeting, the employer may have known that Ms L was not discovered by Security staff at the Marquee because of the purported difference between her appearance and the ID that she presented to the applicant.

**[79]** That aspect of the employer's reasons for decision which relied upon the purported absence of any resemblance between Ms L and the photo ID that she presented on 27 April has no basis in fact. Upon careful analysis, the similarities in the appearance of Ms L and the photo ID of Ms C, would have, in all likelihood, not been identified by the applicant or any other Security Officer working in accordance with the procedures and structural arrangements in place at the Harbour side entrance on the night of 27 April.

**Structural Arrangements**

**[80]** The applicant admitted that his ID check of Ms L was deficient. The applicant also told the employer that on the night in question, there were various factors relating to the arrangements in place at the Harbour side entrance which contributed to his deficient ID vetting. The employer rejected the applicant's protests about the arrangements and circumstances present on the night. The employer determined that there were not any extenuating factors which contributed to the applicant's deficient conduct. The letter of dismissal relevantly stated:

> "*It was explained to you that the incident in question revolved around your identification check. It was agreed that your entry point is a busy door, however there were more than enough Security Officers stationed there and you had the opportunity to call a Supervisor if you were stressed or concerned*."

**[81]** There was no doubt that the focus of the employer's concern about the applicant's conduct was his ID check, which was clearly conducted without a sufficient degree of detailed examination. However, the employer's rejection that other factors such as the structural arrangements involving the configuration of the entrance, did not contribute to the applicant's deficient conduct, was a conclusion that was plainly wrong and contrary to the employer's own recommendations arising from its investigation into the incident.

**[82]** The employer's investigation into the incident which resulted in the applicant permitting Ms L into the casino, made various recommendations including:

> "*c) ...it is recommended a bollard system be set up at the Harbour entry to separate those patrons under 25 years of age and channel them towards one side of the entry point whereby their identification can be more closely checked and prevent the entry of minors*."[14]

**[83]** This recommendation was unsurprising. Any reasonably minded person who examined the CCTV vision would feel sympathy for the predicament of the four Security Officers who formed a "human line" across the unorganised entry and exit point. There appeared to be no obvious signage alerting inward bound people that they were about to enter a licensed premise and that anyone under the age of 25 would be required to produce ID. Outward bound individuals mixed with others who were entering, some of whom were being beckoned for ID vetting, while others walked through unchecked. Into this mix of people moving in all directions, various patrons understandably approached and engaged the Security Officers with all manner of inquiry or seeking some other assistance.

**[84]** The employer's unilateral rejection of the applicant's protests that the structural arrangements contributed to his deficient ID vetting, was an entirely unreasonable aspect of the reasons for dismissal and a position which was not supported by its own recommendations arising from the investigation into the incident.

**[85]** In accordance with the recommendation, the structural arrangements at the Harbour side entrance where changed following the investigation and the dismissal of the applicant. The failure of the employer to properly recognise that the structural arrangements at the entrance were factors relevant to the decision to dismiss, but which nevertheless required subsequent rectification, displayed a very subjective and one sided assessment of the reasons for dismissal. Essentially, the employer approached the matter of the admission of a minor (Ms L) into the casino on the basis that it occurred solely because of the fault of the applicant and it unconscionably refused to acknowledge any responsibility for itself.

**Standard Operating Procedure - Four or Five Seconds**

**[86]** Although there was no dispute that the applicant's ID check of Ms L was conducted without a sufficient degree of detailed examination, the evidence provided by the witnesses for the employer revealed that the employer had not established any clearly articulated standard procedure that was required of Security Officers when conducting an ID check.

**[87]** Mr Burns said that an ID check should take between four to six seconds[15] with a minimum of four seconds.[16] While Mr Lomax thought that an ID check should take ten to fifteen seconds with a minimum of five seconds.[17]

**[88]** The employer had not promulgated any clear instruction to Security Officers to the effect that an ID check must take a minimum of four or five seconds. The evidence given by Mr Burns indicated that since the dismissal of the applicant, the employer had implemented a system which involved reviewing the actual time taken by Security Officers to check IDs. In the event that a review revealed that a particular Security Officer was conducting ID checks without sufficient care or time, Mr Burns said that the individual would be coached.[18] Mr Burns also said that he had timed the applicant's "fatal" ID check at two seconds.[19]

**[89]** The evidence about the absence of any clear procedure regarding the minimum time for conducting an ID check, and the more recent implementation of a system of reviewing and coaching any identified inadequate care and time with checking, demonstrated that the standards that the employer applied to the applicant in respect of his ID check of Ms L, were unspecified, unrealistic and unreasonable.

**387 (b) - Notification of Reason for Dismissal**

**[90]** On 2 May, the employer provided verbal advice to the applicant that he was summarily dismissed. It was not until a few days after he had filed a claim for unfair dismissal remedy that written notification of the reasons for the applicant's dismissal were provided.

**[91]** A delay of this nature should not occur. Particularly in a large organisation, even if a particular manager is absent from work, there is an obligation on that manager or management generally, to ensure that some other manager or appropriate officer attend to the fundamental requirement to provide written notification of the reasons for dismissal.

**[92]** In this instance, at the time of making claim for unfair dismissal remedy, the employer had not provided written notification of the reasons for the applicant's dismissal. The unacceptable delay with the written notification of dismissal reflects poorly upon the employer generally and when combined with the inaccurate and erroneous contents of the letter of dismissal which was eventually provided, it has manifested as an indication of serious managerial ineptitude.

**387 (c) - Opportunity to Respond to any Reason Related to Capacity or Conduct**

**[93]** The employer required the applicant to attend a meeting on 2 May during which he was given an opportunity to respond to various allegations. Unfortunately, the allegations were only particularised as the meeting progressed and the applicant was shown the CCTV vision for the first time. In such circumstances, the applicant was required to respond at the same time that he became aware of the particulars of the allegations made against him.

**[94]** Consequently, there was not a proper opportunity for the applicant to carefully consider and respond in respect to the details of the allegations made against him. This procedural deficiency has not ultimately presented as being of significant detriment to the applicant, primarily because the inadequacy of his ID check of Ms L was clear from the first observation of the CCTV vision.

**[95]** However, although it is only a matter of speculation, if the applicant had been given an opportunity to examine the CCTV vision, together with documented allegations of the precise nature of his negligent conduct, for which the employer was contemplating dismissal, before he was required to respond, some of the important issues such as the applicant looking at Ms L as she approached, may have been identified and clarified before any decision to dismiss was taken.

**387 (d) - Unreasonable Refusal to Allow a Support Person to Assist**

**[96]** There was no unreasonable refusal to allow a support person to assist the applicant.

**387 (e) - Warning about Unsatisfactory Performance**

**[97]** This factor has no relevance in this instance. Although, the matter probably should have been treated as inadequate performance of a very serious nature and requiring rectification, accompanied with the provision of a final warning.

**387 (f) - Size of Enterprise likely to Impact on Procedures**

**[98]** The size of the employer's operation should have provided for a much higher standard of procedure to have been followed. The unacceptable delay with the provision of written notification of the reasons for dismissal has become an unfortunate reflection of broader concerns.

**387 (g) - Absence of Management Specialists or Expertise likely to Impact on Procedures**

**[99]** Although it appeared that the employer did have dedicated employee relations management specialists, there was evidence that such specialists may not have assisted in ensuring that both substantive and procedural fairness was provided to the applicant.

**387 (h) - Other Relevant Matters**

**[100]** There were two other matters which have required consideration and mention.

**The Memorandum**

**[101]** Firstly, a few weeks before the incident of 27 April, the employer sought to have Security Officers complete and sign a "*Memorandum of Minors Training Acknowledgement*" (the Memorandum) which included, inter alia, the following:

> "*I _____ , on this date _____ as being a Security Officer employed by The Star Pty Ltd acknowledge that I have been formally advised by APRACM Burns, that I will be subject to serious disciplinary action including dismissal from employment at The Star should I negligently allow any Minor (U18) into the Casino and in contravention of S 93-94 of the casino [sic] Control Act (1992).*" [20]

**[102]** The applicant refused to sign the Memorandum and his refusal to sign became an issue which was the subject of discussions with various Supervisors, who attempted to persuade him to sign the document. The applicant steadfastly refused to sign the Memorandum and the issue was elevated to a discussion between the applicant and Mr Burns, during which the applicant continued to refuse to sign. Mr Burns told the applicant that he would elevate the matter further and raise the issue with his manager, Mr Lomax.

**[103]** The applicant was understandably concerned about the wording of the Memorandum, as it, somewhat prophetically, sought to buttress any decision of the employer to dismiss an employee who negligently allowed entry of a minor into the casino. The applicant was concerned that by signing the Memorandum he was giving some form of consent to being sacked if he made a mistake and he thought that this was harsh.

**[104]** The letter of dismissal mentioned the Memorandum and included the following:

> "*You refused to sign this memorandum. In any event it was provided to you and explained that it applied to you regardless of whether you signed it or not.*" [21]

**[105]** As fate would dictate, the applicant wound up in the very circumstances that the Memorandum sought to address. Notwithstanding the dubious probity and efficacy of the Memorandum, the employer was clearly dissatisfied with the applicant's refusal to sign the document. Consequently, the Memorandum and the applicant's refusal to sign it became an extraneous influence on the employer's consideration of the conduct of the applicant on the night of 27 April. The issues which surrounded the Memorandum operated to create an underlying, improper impetus for the employer to decide to terminate the employment of the applicant.

**The Response to the ILGA**

**[106]** Secondly, the incident of 27 April when Ms L gained entry into the casino, was one of four occasions when minors were discovered to have entered the casino and which occurred fairly closely in time. The ILGA issued the employer with notices to show cause in regard to the entry of minors on, respectively, 17 March, 26 April, 27 April (21:00) and 27 April (23:31). These notices to the employer were dealt with together and the subject of a response from the employer in correspondence dated 12 August 2013.[22]

**[107]** A review of the contents of the employer's response to the ILGA of 12 August, when considered in the context of the totality of the evidence in this case, reveals a disturbing predilection for the employer to assign blame solely upon the particular Security Officer who had been connected with the entry of a minor. In each of the four cases of entry of a minor, the employer made "cut and paste" submissions to the ILGA which inter alia, stated that the entry of the minor was due to human error and in each case, mention is made that "*The Star terminated the employment of the security officer*."

**[108]** After careful consideration of the evidence, particularly including the similarities that can be identified with the submissions made to the ILGA in respect to the event identified as SC010/13 of 26 April and SC012/13 of 27 April (23:31) which was the applicant's case, I have formed the view that the employer's decision to dismiss the applicant was inappropriately influenced by the employer's attempted appeasement of the ILGA which led it to erroneously apportion all blame to human error and to seek to appear to be "tough" on the individual Security Officers by terminating their employment.

**Conclusion**

**[109]** The applicant was summarily dismissed for an act of alleged gross negligence. Upon proper analysis, the applicant's admittedly deficient work performance does not constitute the gross negligence which might justify summary dismissal. The applicant's conduct did not involve the grave, serious or significant departure from the standard of care which should have been exercised and which caused substantial loss or damage to the employer, such as would be necessary to provide valid reason for his summary dismissal.

**[110]** Regrettably, the employer adopted entirely unreasonable standards and expectations of the particular performance by the applicant. The employer failed to acknowledge any share of responsibility, despite the manifest recognition that the system and arrangement of work required rectification and had thus contributed to the deficient conduct of the applicant.

**[111]** The procedure that the employer adopted, involving the disciplinary meeting that was held to provide opportunity for the applicant to respond to allegations, included significant

deficiencies. Importantly, natural justice is denied if a person is required to respond to allegations at the time that the detail of those allegations is first conveyed to them. The regrettable deficiencies in procedure were compounded by the very unfortunate failure to provide written notification of the reasons for dismissal within an acceptable time after dismissal.

**[112]** The approach that the employer adopted when considering the dismissal of the applicant, was unduly influenced by extraneous factors which made erroneous findings an almost inevitable outcome. As a consequence, the decision to dismiss the applicant was a completely disproportionate overreaction to the negligent action of the applicant. The decision to dismiss was taken without any fair and balanced apportioning of fault. The applicant admitted fault on his part for what was a serious error, which justified appropriate warning and coaching rather than dismissal.

**[113]** Consequently, the applicant's dismissal was harsh, unjust and unreasonable.

**Remedy**

**[114]** The applicant has sought reinstatement as remedy for his unfair dismissal. The applicant's barrister requested an opportunity to be heard further if the Commission was contemplating any alternative remedy involving payment of compensation. That process will not be required.

**[115]** The question of remedy in respect of an unfair dismissal is the subject of Division 4 of Part 3-2 (ss.390 - 393) of the Act. Section 390 of the Act is relevant to consideration in this instance and is in the following terms:

> "***390 When the FWC may order remedy for unfair dismissal***
>
> *(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:*
>
> *(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and*
>
> *(b) the person has been unfairly dismissed (see Division 3).*
>
> *(2) The FWC may make the order only if the person has made an application under section 394.*
>
> *(3) The FWC must not order the payment of compensation to the person unless:*
>
> *(a) the FWC is satisfied that reinstatement of the person is inappropriate; and*
>
> *(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case*."

**[116]** I have carefully considered whether it would be appropriate to make Orders for the reinstatement of the applicant. I do not share the concerns that the employer expressed about

the potential for reoccurrence of inadequate ID checking, which may be created by any reinstatement of the applicant.

**[117]** The introduction of the changed structural arrangements for the Harbour side entrance, which might be enhanced with clear signage directing all persons under the age of 25 into a bollard and roped vetting area, similar to that of the security checking arrangements at airports, together with the regular CCTV review of vetting, and the coaching of any Security Officers who are identified as needing to take more care and time with checking, should ensure that there is significantly less potential for any repeat of cursory ID checking.

**[118]** In addition, it would be appropriate to issue the applicant with a formal written warning about his inadequate ID checking, and conduct 1, 3 and 6 month reviews of the applicant's ID checking, using the recently introduced CCTV review and coaching procedure.

**[119]** In the circumstances, I have decided that reinstatement of the applicant would not be inappropriate.

**[120]** Consequently, for the reasons stated above, I find that the dismissal of the applicant was unfair and I am prepared to make Orders for the reinstatement of the applicant.

**[121]** Orders providing for the reinstatement of the applicant will be issued separately. In the event that the Parties are unable to agree on the amount to be paid to the applicant in accordance with Order 3, regarding an Order to restore lost pay, the application will be listed for further proceedings to enable the Commission to determine that amount. Any request for such further proceedings should be made within 21 days from the date of this Decision.

COMMISSIONER

*Appearances*:

*Mr O Fagir*, barrister, together with *Ms G Starr* from United Voice, for the applicant;

*Mr M Seck*, barrister, together with *Mr J Entwistle* from Allens, for the employer.

*Hearing details:*

2013.
Sydney:
November, 20, 21 & 22.

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[1] Exhibit 6 Annexure GB7.

[2] Jones v Dunkel (1959) 101 CLR 298.

[3] Parmalat Food Pty Ltd v Mr Kasian Wililo [2011] FWAFB 1166.

[4] Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No. 3), Industrial Commission of NSW, [Hungerford J], 35IR @ page 70.

[5] Ibid @ page 84.

[6] Ibid @ page 74.

[7] 1 WLR [1959] @ 698.

[8] Ibid @ 701.

[9] Rankin v Marine Power International Pty Ltd (2001) 107IR 117.

[10] Transcript of proceedings (21 Nov 2013) @ PN2641.

[11] Transcript of proceedings (20 Nov 2013) @ PN995 to PN1011.

[12] Exhibit 6 Annexure GB5.

[13] Exhibit 6 Annexure GB7.

[14] Exhibit 6 Annexure GB5.

[15] Transcript of proceedings (21 Nov 2013) @ PN1869.

[16] Transcript of proceedings (21 Nov 2013) @ PN1874.

[17] Transcript of proceedings (21 Nov 2013) @ PN2558, PN2559 and PN2627.

[18] Transcript of proceedings (21 Nov 2013) @ PN2199 to PN2201.

[19] Transcript of proceedings (21 Nov 2013) @ PN1876 to PN1877.

[20] Exhibit 2.

[21] Exhibit 6 Annexure GB8.

[22] Exhibit 13 Annexure JL1.