IN THE EMPLOYMENT COURT
WELLINGTON

WC 6/09
WRC 28/05

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	JAMES JESUDHASS Plaintiff
AND	JUST HOTEL LIMITED Defendant

Hearing: 12 and 13 March 2009
Affidavit filed by defendant on 23 March 2009
(Heard at Wellington)

Appearances: A P Cressey, Counsel for Plaintiff
Matthew Gilkison, Counsel for Defendant

Judgment: 9 April 2009

JUDGMENT OF JUDGE B S TRAVIS

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[1] Almost 4 years since his dismissal, and after a full Court decision allowing him to call evidence of being dismissed in the course of a mediation[1], and a successful appeal to the Court of Appeal by the defendant preventing that evidence from being led[2], the plaintiff's personal grievances have finally been heard on the merits. The plaintiff's grievances were removed for hearing to the Employment Court because of the issues arising out of the mediation. His grievances are that he was unjustifiably disadvantaged by being suspended and a claim he was subsequently unjustifiably dismissed.

[1] *Jesudhass v Just Hotel Ltd* [2006] ERNZ 173

The Facts

[2] In August 2004 the plaintiff applied for a position as general manager of the Just Hotel in Willis Street, Wellington. The shareholders and directors of the defendant were brothers John and Michael Chow. The plaintiff had extensive overseas experience in opening hotels and managing them and his application was successful.

[3] The terms and conditions of his employment were set out in a written individual employment agreement dated 29 September 2004. This provided for employment for a fixed term of 2 years, a salary of $50,000, the provision of a car, $500 per month as a bar tab to be used at the Eclipse restaurant and bar in the hotel and a $10,000 bonus if the occupancy rate reached 50 percent within 12 months.

[4] The agreement allowed for termination on 1 month's notice and the termination by the defendant without payment of notice on a number of grounds, the first being if the plaintiff was guilty of serious misconduct. The plaintiff could be suspended on pay for a reasonable period if the defendant had reason to believe that he might be guilty of serious misconduct, to allow an appropriate investigation to take place (clause 14).

[5] The agreement provided that if at any time the plaintiff had an employment relationship problem with the defendant he could contact the mediation service of the Department of Labour to get information about his rights, the services he could be offered and help in resolving any problems (clause 17).

[6] The agreement set out in detail the plaintiff's duties and responsibilities which, inter alia, required him to plan, organise and control the operation of the hotel, manage the hotel's business plan or direction, hire and train new staff, supervise the day to day running of the hotel, and to report directly to the managing director. The agreement provided that the defendant might alter those duties to meet changing demands of the business environment "*but no significant alterations will be made without consultation*" (clause 2.2).

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[2] *Just Hotel Ltd v Jesudhass* [2007] ERNZ 817(CA)

[7] When the plaintiff commenced employment on 1 October 2004 the hotel was still under construction. He was required to take all the necessary steps to have the hotel open and running within 1 month. This included employing all the staff, who were generally fresh graduates who could start immediately without having to give notice to previous employers, training those staff, ensuring that all systems were functioning correctly, and solving all difficulties before the grand opening of the hotel. The plaintiff was required to work long hours to ensure that the opening went smoothly. His personal situation was complicated because his wife gave birth to a son 2 months prematurely on 11 October 2004 and was kept in hospital for 2 months. He had to travel to and from work to the hospital. In spite of all these difficulties the hotel opened without any serious problems, as intended, on 1 November 2004.

[8] In January 2005 Mr John Chow, who was then the managing director of the hotel and the person to whom the plaintiff was required to report, instructed the plaintiff to train his sister, Vicki Chow, to be the assistant general manager. She had no previous experience in the running of hotels. After 6 weeks' training, Mr Chow appointed Ms Chow to be the managing director of the defendant and instructed the plaintiff to report directly to her. This was done without prior consultation with the plaintiff.

[9] Again without prior consultation, Ms Chow took over many of the duties listed in the plaintiff's employment agreement. Although the plaintiff frequently complained about this to Mr Chow, nothing was done about it. The plaintiff also became concerned that Ms Chow was undermining his role as general manager.

[10] On 28 April 2005 the plaintiff wrote to Mr Chow expressing his concerns at the way Ms Chow was managing the hotel. He stated the hotel department heads, including himself, were very unhappy with her style of management which was causing work stress. The plaintiff asked for this to be resolved quickly. I find that he met with Mr Chow and voiced his concerns but was told that, because Ms Chow was his sister and a family member, Mr Chow could not ask her to leave her position.

[11] In Court Mr Chow appeared to have no recall of these meetings but did not deny their existence. I find Mr Jesudhass to be a more reliable witness and his evidence was supported by contemporary documents. I therefore prefer his evidence to that of Mr Chow, wherever there is a conflict.

[12] The plaintiff's situation was further complicated by either Ms Chow or Mr Chow hiring migrant workers or students without work permits, who could not speak any English, and who did not appear to have the requisite skill for the jobs they were doing. He was unable to prepare food costings and planning for the restaurant as he was not told what these employees were being paid. He complained to Mr Chow on several occasions about this and asked for copies of their employment agreements so that he could ascertain their wages. Mr Chow refused to provide them and told the plaintiff not to worry about them. This again undercut the plaintiff's job description and duties, as he was responsible for hiring and training new staff. He also became concerned when those staff came to him, complaining about not being paid the same penal rates for working on statutory holidays as the other staff that the plaintiff had employed, as he was unable to do anything to assist them because of the position taken by the directors.

[13] On 29 April 2005 the hotel's marketing manager, Phillip Stuart, informed the plaintiff that Sarah Dickens, Mr Chow's personal assistant, was sitting in the hotel reception area and apparently monitoring the front of office staff going about their daily business. The plaintiff had not been consulted or made aware of this prior to Ms Dickens' arrival. Mr Chow accepted in cross-examination that he had not made any contact with the plaintiff about this matter but had instructed Ms Dickens to do so. Ms Dickens was not called as a witness and I am satisfied that if she did make any contact with the hotel it was not brought to the plaintiff's attention.

[14] I find that the plaintiff was upset by the way that this was done and he called Ms Dickens into the main office and asked her what she was doing. She informed him that Mr Chow had directed her to monitor the front of office staff. He said to her that she should have come and spoken to him about it first.

[15] The plaintiff allowed her to continue performing the duties she had been instructed to perform, but he contacted Mr Chow and complained that he had not been consulted. The plaintiff pointed out to Mr Chow that such practices undermined his authority as general manager and were contrary to the provisions of his employment agreement, that he was tired of being undermined, and that he intended to seek legal advice about his authority as general manager. It appears to be common ground that Ms Dickens had no experience in monitoring front of office staff, or in the management of hotels, having been employed as Mr Chow's personal secretary.

[16] On 2 May 2005 Mr Chow gave the plaintiff two letters. The first stated that when Ms Dickens had visited the hotel on Friday 29 April she was representing the board of directors and that it was expected as part of the plaintiff's normal duties that he should offer all assistance to her performing front desk inspections. The letter stated (reproduced verbatim):

> *It has come to our attention that this is not the case and that you deliberately stop this inspection accruing and that you intimidated the BOD representative. This shall not be the case and you should have accepted her authority to perform this duty.*
>
> *It would be expected by the BOD that you would cooperate with their representative and ensure that the hotel operation were functioning correctly and efficiently.*
>
> *This will be going on your personal records and if you wish to discuss this incident please arrange an appointment with me.*

[17] The second letter requested the plaintiff's attendance at "*a formal performance counselling session*" on 3 May, which would be attended by Mr Chow, Ms Chow, and Ms Dickens for minute taking, and invited him to bring a representative.

[18] I accept the plaintiff's evidence that on receipt of the second letter he considered that he was in serious trouble and, in accordance with the provisions of his employment agreement, he contacted the Department of Labour helpline to enquire about his employment rights. The helpline put him through to a staff member of the mediation service who suggested that the parties attend mediation, but indicated that the first available date was 18 May 2005.

[19] On the morning of 3 May 2005, the plaintiff left a message with Ms Dickens for Mr Chow, that he could not meet that night because he had contacted the mediation service, and it was unavailable until 18 May 2005.

[20] Shortly afterwards, Mr Chow telephoned the plaintiff and asked why the mediation service was involved. The plaintiff replied that because the letter had referred to a formal counselling session and invited him to bring a representative, he wanted the mediation service there as his representative. At that time the plaintiff had only recently arrived in New Zealand and did not understand the nature of the services the mediation service provided and thought that mediators were available as representatives. Mr Chow told the plaintiff that if he involved the mediation service there was "*no turning back*". The plaintiff understood this to mean that he would no longer be welcome in the hotel and that his employment would be placed in jeopardy. Mr Chow suggested that the plaintiff bring his wife to a meeting which he proposed for 4 May 2005.

[21] That same day, 3 May, an organiser for the Service and Food Workers Union Inc, Alastair Duncan, telephoned the plaintiff and told him that some staff had contacted the union about joining up and he wanted to meet with them. They agreed that he could meet the staff at 2pm on 5 May.

[22] On the evening of 4 May, the plaintiff and his wife met with Mr Chow at a café. The plaintiff's wife acted as his support person. Mr Chow opened the discussion by asking the plaintiff to explain the problems he was experiencing in managing the hotel. The plaintiff explained that Ms Chow had not followed the approved organisation structure of the hotel, constantly bypassed the plaintiff and dealt directly with his subordinates, which caused confusion as well as unhappiness

amongst department heads. The plaintiff said Ms Chow had no hotel experience and he found it hard to take instructions from her, especially when her decisions were not profitable for the hotel or good for staff morale. He complained that Ms Chow was involved in every aspect of the hotel operation and this undermined his job description. He referred to the request that he had made of Mr Chow, in the presence of Ms Chow, for clear directions on her role, but to date he had not received these. He complained of other aspects of Ms Chow's management which he said were badly affecting staff morale. The plaintiff referred to Mr Chow's letter concerning the incident with Ms Dickens and claimed that he was not intimidating her or stopping her from doing her job and that Mr Chow's accusations were baseless, insulting and humiliating. He explained why he had contacted the Department of Labour and confirmed that a mediator would be available on 18 May.

[23] Mr Chow criticised the plaintiff's decision to ask for a mediator from the Department of Labour and said this had damaged their relationship because the plaintiff had not given Mr Chow a chance to solve the problems. Mr Chow said that since the plaintiff had consulted the Department of Labour, Mr Chow had felt obliged to seek legal advice. Mr Chow offered to give the plaintiff another chance and to remove Ms Chow from the hotel for a month. He asked the plaintiff to improve his performance or else to offer his resignation after that 1-month period.

[24] The plaintiff reminded Mr Chow that the hotel was making a profit, the restaurant had reached the break even point in March and the hotel occupancy was consistently above 60 percent which was far above the directors' expectations.

[25] The following day, Thursday 5 May, Ms Chow sent an internal memorandum to all staff, copying it to the plaintiff, which stated that due to the turnover of the restaurant dropping by 50 percent and because the hotel was "*struggling with the occupy* [sic] *rate*" to help boost the hotel occupation rate, the plaintiff would be concentrating on marketing and would work with the marketing manager and would move to the downstairs office. The memorandum advised that Ms Chow would be stationing herself at the plaintiff's office to direct the new restaurant manager and that these moves were to take effect immediately.

[26] Ms Chow did not discuss this memorandum with the plaintiff or consult with him on any of these issues prior to issuing it. The plaintiff considered the effect of the memorandum was to demote him from general manager to marketing manager and to remove from him key duties in his job description. He felt humiliated and embarrassed as Ms Chow had effectively assumed responsibility for all his operational duties.

[27] At 11.56 am on the Thursday John Chow sent an e-mail to the plaintiff under the heading "*Counselling Meeting*". It read as follows (reproduced verbatim):

> *Dear James Jesudhass,*
>
> *It's nice to meet you and your wife last night for informal meeting.*
>
> *Regarding for the performance counciling meeting as on my letter dated 2 May 2005, 18 May 2005 is too long to wait and also you cannot confirm the time too. I need you to come back to me for a meeting time within 24 hours. Again, you can bring along a support person if you requires.*
>
> *Please feel free to contact if you have any problems.*
>
> *regards*
>
> *John Chow.*
>
> Managing Director
> Just Hotel Limited
> …

[28] The plaintiff replied at 12.10pm that day:

> *Mr. Chow,*
>
> *I had to write to the Mediation service with the labor Department and give them the overview of the problem. They say after getting the report they will contact you directly.*

I plan to do that tomorrow as I am quite busy today.

Regards

James Jesudhass
General Manager
Just Hotel
…

[29] In his evidence Mr Chow said he took the plaintiff's response as a refusal to meet and disobedience of his direct order.

[30] At 2pm that day Mr Duncan met with the plaintiff and it was agreed he would address the department heads at the weekly operations meeting scheduled for 2.30pm that day. The plaintiff understood that he was legally obliged under the Employment Relations Act 2000 (the Act) to allow this. This is the plaintiff's evidence of what then took place. At 2.30pm, as the weekly operations meeting commenced, he introduced Mr Duncan to the department heads. While he was doing this, Ms Chow, who had never attended a weekly operations meeting in the past, had walked into the meeting and demanded to know what was going on. Mr Duncan said that he was from the union and that he was giving those present a short presentation about the benefits of union membership. Ms Chow asked to be present but Mr Duncan declined and asked her to leave. Mr Duncan then asked the plaintiff to also leave, which he did. After Mr Duncan left, the plaintiff returned and completed the operations meeting.

[31] Ms Chow apparently prepared a written report of her version of what had taken place and gave that to her brother John.

[32] I note at this point that on 10 March 2009, counsel for the defendant filed a memorandum advising that Ms Chow's evidence, in respect of which he had filed a brief, was important as to her general dealings with the plaintiff and the events at the staff meeting on 5 May 2005. The memorandum advised that Ms Chow was pregnant and expecting her child on 1 April 2009 and annexed a medical certificate confirming her due date. The memorandum also advised that Ms Chow resided in

Melbourne and therefore could not fly to New Zealand to give evidence on 12 March 2009 at the hearing. Leave was sought to have her evidence taken in Melbourne via video link as soon as possible after 12 March. The plaintiff did not object to that course, providing it did not delay the hearing. Arrangements were then put in place for Ms Chow's evidence to be heard in a video linked courtroom in the Court of Appeal building in Wellington at 11am on Friday 13 March 2009. The hearing on 12 March 2009 was concluded approximately 1 hour early as all other witnesses had been dealt with, in order to allow this evidence to be called.

[33] At approximately 9am on the morning of 13 March 2009, counsel for the defendant advised the registry of the Court that Ms Chow was no longer comfortable with attending to give evidence at the video link and provided a second medical certificate stating that she was unfit for work. Counsel for the defendant then sought an adjournment to allow that evidence to be called sometime after the birth and confinement. Counsel for the plaintiff objected to that course, due to the further delays it would occasion.

[34] I was of the view that there was no certainty that Ms Chow would ever present herself to give the evidence contained in the brief and instead directed that this evidence be presented to the Court in the form of an affidavit. I invoked the Court's jurisdiction under s189(2) of the Act which allows the Court to accept, admit and call for such evidence and information as in equity and good conscience it sees fit, whether strictly legal evidence or not. Because the plaintiff would not have the opportunity of cross-examining Ms Chow, I advised counsel that once the affidavit was filed it would be given such weight as the Court considered just in the circumstances. Counsel accepted this course. The affidavit was filed on 23 March 2009.

[35] Ms Chow's affidavit claims that from her point of view the plaintiff was unsatisfactory as a hotel manager and that she had observed this from the beginning when she was his assistant. She refers to an e-mail of 21 April 2005 dealing with the range of operational matters that were discussed with the plaintiff. She produced an e-mail with the plaintiff's response, complaining that she was taking over his duties. She states as far as she was concerned she was the managing director of the hotel and

fully entitled to issue the plaintiff with instructions on how to run it. She complained that the plaintiff's lack of communication was frustrating to her.

[36] Ms Chow claims that she had arrived at the hotel at about 2pm on 5 May 2005 and had gone to the plaintiff's office but as he became aware she was intending to enter he rushed to the door and stopped her from doing so, brushing her off and saying that he was in a meeting and would speak to her later. She found out later that he was speaking to Mr Duncan and that the defendant had not been informed beforehand that a union representative was to be calling at the hotel. She claimed that when she knocked on the door at the time of the weekly operations meeting, she was stopped by the plaintiff who was very dismissive and rude to her and said that the meeting was for department heads only and that she could not attend despite being the managing director. She claimed that the plaintiff did not disclose to her that a union representative was addressing the staff at the meeting. She telephoned Mr Chow about what was occurring and he told her to insist on being at the meeting. She returned to the meeting at which point the union representative identified himself and, at his request, she left the meeting. She claimed to have felt extremely embarrassed in her position as managing director at being abruptly denied admission to what she understood was an operations meeting.

[37] The report of 5 May that Ms Chow gave to Mr Chow is not on all fours with the material contained in her brief of evidence. In that report, for example, she states the plaintiff asked her to excuse him, and it makes no mention of any rudeness on the plaintiff's part. Because of the lack of cross-examination I am unable to assess her credibility on precisely what took place and can therefore give her affidavit little weight.

[38] I also note that Mr Chow produced to the Court a report he obtained on 5 May from Perry Cox, the maintenance man, which stated Ms Chow came into the meeting and was asked to leave because she was not involved. A few minutes later she came back and said she was the managing director and had the right to be at any meeting happening at the hotel. Again she was told it was inappropriate for her to be there and she left after being told again to leave the meeting. That report does not state who asked Ms Chow to leave. Mr Cox's report is consistent with the plaintiff's

account that it was Mr Duncan who asked her to leave what was by then a union meeting. For these reasons I prefer the plaintiff's account of what took place that afternoon.

[39] I find that the board of directors of the defendant and Ms Chow were unaware that Mr Duncan was coming to the meeting. However, as this meeting had been arranged between the union and the general manager of the hotel I can see no reason why it was necessary for the board to be informed about a union representative performing his duties. Mr Chow in cross-examination indicated that he had no knowledge at all of the union's rights under the Act to come onto an employer's premises and seemed surprised that there was any such right of access. Mr Chow's lack of knowledge of the rights of unions may well have coloured the view he formed about the plaintiff's actions in relation to the union's visit.

[40] What is not in issue is that Mr Chow went into the plaintiff's office at about 3.30pm that same day and told him that he was suspended and that he was to leave immediately. He gave him a letter which stated (reproduced verbatim):

> *Dear James*
>
> *I was surprised that you did not respond directly to my email requesting you to attend a meeting within 24 hours. You have simply advised me that you have written to the mediation service. As I have already said to you, the proposed mediation date of 18 May 2005 (possibly) is too long to wait until the present problems are addressed.*
>
> *Matters are compounded by the fact that you objected to the presence Vicki Chow, my representative and the Managing Director of Just Hotel Limited, at your staff meeting this afternoon, not only that, but you announced that the meeting would be attended by a Union representative without the courtesy of advising us in advance of this.*
>
> *In the present circumstances I am obliged to suspend you from your employment on pay, and place another Manager in charge of the Hotel. The suspension will last until 18 May 2005 which is when I understand a*

mediation can take place. You are not to enter the Hotel premises while on suspension.

Should it not be possible to have the mediation organised by 18 May 2005 I will review matters again are that stage.

I regret that matters have got to this point. However, as the proprietors of the Hotel we are obliged and entitled to have the operation run smoothly. Your attitude both to the meeting I have requested and as displayed at the stagg meeting make this impossible.

Regards

John Chow

…

[41] The plaintiff was suspended without any prior meeting or discussion and without being given an opportunity to respond to the two allegations advanced in support of the suspension.

[42] The plaintiff wanted to leave with a file containing correspondence, e-mails and notes of meetings that he had collected concerning his complaints about Ms Chow and which he wanted to use for the mediation. Mr Chow claimed the file belonged to him and confiscated it. In spite of requests through solicitors subsequently the file has never been returned and was not disclosed through the process of discovery.

[43] Mr Chow directed Ms Dickens to drive the plaintiff home after confiscating the file. While the plaintiff was suspended Mr Chow cut off his cellphone, changed the lock on his office door and removed his car keys. Ms Chow issued a memorandum to all staff that afternoon from the board of directors, stating that the plaintiff had been suspended from his position and would not be permitted to obtain any company information or be able to enter the hotel premises while on suspension until 18 May 2005. She directed all matters to herself.

[44] Subsequent discussions through the solicitors led to the car being returned until 18 May when the mediation took place. As a result of the position the defendant took, and argued effectively for in the Court of Appeal, what occurred during the mediation was unable to be referred to. However, that same day, Mr Chow sent a letter, addressed to the plaintiff, to the defendant's solicitors who then passed it on to the plaintiff's solicitors. The letter stated the plaintiff's employment would not be reinstated and was terminated as at 18 May 2005. The six grounds for termination which were said to have caused the defendant to lose all trust and confidence in him were:

1. failing to obtain a manager's license promptly;

2. unsatisfactory performance in failing to follow up or respond to various lawful requests including monitoring incoming calls, investigating buses stopping outside the hotel, presenting a marketing plan, investigating the introduction of Sky TV, organising an express checkout system, investigating the introduction of pre-paid TV, liaising with other staff over a new menu, and preparing a diagram for outside heating;

3. a refusal to attend a meeting to discuss performance issues as requested in Mr Chow's letter of 5 May 2005;

4. refusing to admit the managing director to the weekly operational meeting on 5 May;

5. sending an e-mail on 4 May countermanding a lawful direction by the managing director by e-mail to Mr Stuart to arrange a meeting with the new restaurant manager;

6. using derogatory language in the same e-mail to Mr Stuart about the managing director and attempting to undermine her standing in the company.

[45] The plaintiff was summarily dismissed without notice.

[46] Mr Chow's evidence as to what precisely were the grounds for the dismissal was somewhat unsatisfactory. In his written brief of evidence he stated the 4 May e-mail to Mr Stuart was a matter of which they had subsequently become aware, and which had served to confirm his decision to terminate the plaintiff's employment. He also asserted, contrary to the terms of the letter he wrote nearly 4 years ago and sent through his solicitors, that there were only two grounds for dismissal, those numbered 3 and 4, namely: the refusal to attend a meeting to discuss performance issues and his refusal to admit Ms Chow to the weekly operational meeting on 5 May.

[47] Mr Chow fairly accepted in evidence that he was relying on those two grounds only, because they were mentioned as the grounds for the suspension and to that extent, and to that extent only, the plaintiff had prior knowledge of them. The other grounds were never previously raised with the plaintiff as matters which could have led to his dismissal and Mr Chow had already conceded that the operational issues were never intended to be discussed in a disciplinary setting.

Defendant's submissions

[48] Mr Gilkison's final submissions followed his opening and contended these two grounds were the only grounds for the dismissal. Mr Gilkison submitted that the defendant had grounds for summary dismissal immediately following the plaintiff's refusal on 5 May 2005 to obey a lawful direction to attend a meeting. He submitted that the defendant's position was that its grounds to dismiss the plaintiff were not in any way diminished by the decision to suspend him. He submitted that Mr Chow's evidence was to the effect that the defendant had grounds to terminate the plaintiff's employment at the time of the suspension and this view was later confirmed by the discovery of the e-mailed exchange between the plaintiff and Mr Stuart, which put the matter beyond doubt.

[49] Mr Gilkison's submissions did not deal directly with the defendant's justification of the suspension but I have presumed that the defendant relied on the two grounds for dismissal as justifying the suspension for they are both set out in the suspension letter.

Justification

[50] The test of justification for both the disadvantage grievance and the claim of unjustified dismissal is to be found in s103A of the Act, which provides:

> ***103A Test of justification***
> *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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[51] The first and major obstacle for the defendant in justifying the suspension and the dismissal is that there is no evidence that the grounds for taking these actions were ever put to the plaintiff to give him the opportunity to explain before the actions were taken. At least since 1982 the importance of procedural fairness, even where there are substantive grounds for a suspension or a dismissal, has been stressed. In *Auckland City Council v Hennessey* (1982) ERNZ Sel Cas 4 at p9; [1982] ACJ 699 at p703 the Court of Appeal stated:

> *… A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness.*
>
> *It follows that a dismissal may be held unjustifiable where the circumstances are such that justice or fairness requires that the employee should have an opportunity, which he has not been afforded, of stating his case. Whether such circumstances exist will depend upon the facts of the particular case including such matters as the nature of the employment and the occurrence that gives rise to dismissal.*

[52] Turning to the first of the two grounds the defendant relied on to justify for both the suspension and the dismissal, I find the 5 May e-mail from Mr Chow is pleasant in its introduction. Mr Chow states that it was nice to have met the plaintiff and his wife the previous night for an informal meeting. He was concerned that 18 May 2005 was too far away for a counselling meeting and he said "*I need you to come back to me for a meeting time within 24 hours.*" It is unclear whether that is a direction to attend a meeting within 24 hours or to come back within 24 hours with a

time for a meeting. The e-mail gives no indication of the possible consequences if the author considered the reply unsatisfactory.

[53] The plaintiff's reply did not constitute a refusal to attend any meeting. It said that the plaintiff could not deal with the matter that day, but he would deal with it the following day, which would still have been within the 24-hour period.

[54] Mr Chow's response was to suspend the plaintiff without any prior consultation or discussion a little over three and a half hours after he sent his e-mail, and obviously well within the 24-hour period.

[55] As to the exclusion of Ms Chow from the meeting on 5 May, it was clear from Mr Chow's answers in cross-examination that he had no knowledge of the rights of union access under the Act. A discussion with the plaintiff would have clarified that aspect and also have given him the opportunity to consider the plaintiff's explanation that it was the union organiser who had excluded Ms Chow from the meeting. That could have been verified at the time by obtaining statements from other persons present. The statement given by Mr Cox did not say who had told Ms Chow to leave the meeting.

[56] The circumstances required both the allegations to be put to the plaintiff before the suspension and his explanation may well have avoided the need for such action.

[57] As to the dismissal, there is no evidence that any of the six grounds relied on in the 18 May letter were ever put to the plaintiff for his explanation in a disciplinary setting. I have already dealt with the two matters. Most of the matters in grounds 1 and 2 were performance or operational issues which the defendant conceded were intended to be discussed in a meeting that was not disciplinary in character. They do not amount to serious misconduct.

[58] The only matters in the 18 May letter which could have amounted to serious misconduct are items 5 and 6 arising out of an e-mail dated 4 May which the plaintiff sent to Mr Stuart. I deal with this e-mail in some detail when looking at the issue of

contributory conduct. The bare allegation contained in the letter of 18 May cannot justify the action taken. This was a matter the plaintiff needed to be given the opportunity to explain before a fair and reasonable employer could come to the conclusion that the plaintiff's actions constituted serious misconduct that had undermined the essential trust and confidence of the employment relationship. The defendant both in the evidence of Mr Chow and in the submissions made on behalf of the defendant expressly disavowed this as a ground justifying the dismissal.

[59] I find the defendant has failed to discharge the burden of showing that the actions it took in both suspending and dismissing the plaintiff were, objectively viewed, what a fair and reasonable employer would have done in all the circumstances at the time they occurred. The defendant's actions were both procedurally unfair and substantively unjustified.

[60] It follows that the plaintiff's claims are established and he was unjustifiably suspended and then unjustifiably dismissed.

Remedies

Lost remuneration

[61] The plaintiff seeks lost wages of $68,268.63 being payment of his salary to 1 October 2006, the balance of the 2-year fixed term.

[62] The individual employment agreement is described as being fixed term and is expressed to be for 2 years from the date of commencement. The evidence was that the plaintiff has been unable to obtain gainful employment in that period so there is no credit to be offset against the amount of the claim.

[63] I accept Mr Cressey's submissions that on the evidence the plaintiff had a justified expectation of at least the 2-year term. Had he not been dismissed, he could have successfully worked out at least the fixed term.

[64] I therefore award the plaintiff under s128(3) of the Act, the sum of $68,268.63 before tax for remuneration he has lost as a result of his unjustifiable dismissal.

Loss of benefits

[65] The plaintiff seeks $1,800 in holiday pay which is referred to in his final pay slip. His evidence was that it was not paid upon termination, nor has it been paid since. Mr Chow's response in cross-examination was that he wanted the opportunity to check. He has had this opportunity for nearly 4 years. I am satisfied that this cause of action has been made out and that the plaintiff is entitled to an award of $1,800 for arrears of holiday pay.

[66] The plaintiff seeks reimbursement of expenses totalling $478.55 relating to petrol purchases for the company car. There was some issue as to whether or not the plaintiff was allowed private use of the motor vehicle and whether or not the petrol claim was for such usage. As Mr Cressey submitted, the plaintiff was entitled to a company car in Schedule B to the employment agreement and I am satisfied that this was a benefit he was entitled to and his claim has been made out. I award the plaintiff under s123(1)(c)(ii) of the Act reimbursement of $478.55.

[67] The plaintiff has also sought loss of use of the company car for the balance of the 2-year fixed term in the sum of $20,480.76. This is assessed on the basis of value of approximately $15,000 per year.

[68] The provision of a company car was a contractual entitlement and the plaintiff's unjustifiable dismissal deprived him of the use of that car for the balance of the period of the contract. I find that the claim under s123(1)(c)(ii) of the Act for $20,480.76 has been made out and I award that sum.

[69] The employment agreement also provided for $500 per month spending at the Eclipse restaurant and bar and the amount sought is $8,209.68, being payment at this rate for the balance of the 2-year fixed term. Again I find that this claim has been

made out as a benefit to which the plaintiff would have been entitled and I award the amount claimed.

[70] The plaintiff also seeks compensation for the loss of the occupancy bonus. The agreement provided that (reproduced verbatim):

> *If occupancy rate reach 50% within 12 months, you will receive $10,000 bonus.*

[71] A schedule of the hotel's occupancy rate for the month of November 2004 to March 2005 was produced. Remarkably for a newly opened hotel these figures disclose that the hotel was making a nett profit from the month of February 2005. More relevant to this particular claim, however, is that the monthly occupancy rate in those first 5 months was 63 percent, 38 percent, 37 percent, 84 percent and 78 percent respectively. There was no evidence to suggest that this trend was likely to cease. It was open to the defendant to have shown that the occupancy rate declined in spite of the early promise demonstrated by those first 5 months.

[72] The plaintiff sought $10,000 for each year of the 2-year term as a lost contractual benefit under s123(1)(c)(ii) of the Act. I consider the correct interpretation of the clause in the agreement is that it was a one-off bonus if the occupancy rate was reached within the first 12 months. I therefore award the plaintiff $10,000 for the lost benefit under this head.

Distress compensation

[73] Compensation for humiliation, loss of dignity and injury to feelings was also sought for both the effect of the suspension and the dismissal.

[74] I accept Mr Cressey's submissions that the lack of consultation on the appointment of Ms Chow as managing director and the removal of his duties were humiliating and distressing to the plaintiff. However, no separate disadvantage claim for these matters was made and I do not consider any award is therefore appropriate under this head.

[75] The plaintiff gave evidence of the distress and humiliation he suffered as a result of both the suspension and the dismissal. Reliving those events while giving evidence demonstrated to me the genuineness of his, albeit limited, evidence about the effect of these matters.

[76] Mr Cressey relied on *Western Mailing Ltd v Subritsky* [2003] 2 ERNZ 465 where there was extensive evidence of emotional damage and the need for medical assistance and the need for anti-depressants. The Employment Court upheld the award of the Employment Relations Authority for both the suspension and the dismissal of $27,000.

[77] I observe that care must be taken not to base an award of compensation on a perceived need to penalise an employer for what might be regarded as outrageous conduct. The award must be limited to compensation for the effects of the suspension and dismissal.

[78] The plaintiff gave evidence that he commenced employment with the Just Hotel with hopes and dreams for his family and for himself. He said that he felt threatened and humiliated and hopeless by the actions of the defendant. His wife was still unwell from the birth of a premature baby and the dismissal, he said, caused difficulties. They had to move to cheaper rental property and the plaintiff said that he felt powerless and useless and unable to secure a job. He said that he had not been able to pull himself out of depression or find a suitable alternative job.

[79] This evidence satisfies me that while there was a considerable amount of distress and humiliation caused by both the suspension and the dismissal, it was not to the extent of evidence given in the *Western Mailing* case.

[80] I consider the appropriate award for both grievances is the sum of $15,000.

Contributory conduct

[81] Section 124 of the Act requires the Court, where it has determined that an employee has a personal grievance, in deciding both the nature and extent of the

remedies to be provided, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, it must reduce the remedies that would otherwise have been awarded accordingly. The authorities under this section make it clear that for the remedies to be reduced the contributory conduct must be blameworthy: see *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334, 338; *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31, 53.

[82] Mr Gilkison's submissions appeared to rely for contributory conduct on the plaintiff's failure to attend a meeting within 24 hours, on the exclusion of Ms Chow from the meeting on 5 May and on the 4 May e-mail from the plaintiff to Mr Stuart. He submitted that the latter alone would justify a reduction of the remedies by 50 percent.

[83] Mr Gilkison did not appear to rely on the plaintiff's failure to obtain a manager's licence promptly and the various matters listed as unsatisfactory performance in the dismissal letter as justifying a reduction in the remedies awarded. At the hearing they were not advanced as reasons for the dismissal. As Mr Cressey submitted, if performance shortcomings are not properly brought to the employee's attention and there is no opportunity of correcting the performance, they are not contributory factors that are sufficiently blameworthy to justify a reduction in remedies, see *Paykel Ltd v Ahlfeld*. It is, however, necessary to consider the other three matters.

[84] I have already found that the plaintiff did not refuse to attend the performance meeting and responded adequately to the 5 May e-mail from Mr Chow. There was no blameworthy or contributory conduct on his part in relation to this matter.

[85] As to the exclusion of Ms Chow from the meeting because of the presence of the union organiser, the evidence satisfies me that it was not the plaintiff who excluded her but Mr Duncan. The concern of the defendant seems to be driven largely because the directors were not informed that Mr Duncan was coming to address the staff. The union acted properly in pre-arranging the meeting with the plaintiff who was the general manager. I do not consider that this could be taken as

an act of undermining the authority of Ms Chow, who had been given the title of managing director. I note that this title was not reflected in information supplied to the Companies Office. The two brothers were the directors and Ms Chow had no official role, either as a director or managing director of the defendant.

[86] Although there is evidence that Ms Chow was upset by what took place on that day, this may be partially a misunderstanding of their respective roles and that of the union, all of which could have been resolved had these matters been discussed with the plaintiff. I do not find that this incident amounts to blameworthy conduct on the plaintiff's part which would justify a reduction in the remedies.

[87] Turning to the third matter, I find there is more substance here in the defendant's concerns. The context was an e-mail from Ms Chow to Mr Stuart, copied to the plaintiff, stating that as the new restaurant manager was starting the following week she wanted to arrange a meeting regarding the restaurant. The plaintiff responded by e-mailing Mr Stuart as follows (reproduced verbatim):

> *Phil, I want the new restaurant manager to start right. Just reply to Vicky that James has arranged a meeting for me to meet the new restaurant manager. Thanks but no thanks.*
>
> *I am having a meeting with John Chow in a coffee shop this evening and I am going to tell him that none of my managers including me have no desire to work with Vicky as she do not know what she is doing and she is no good for Just Hotel. Since you are reporting to me please tell her it is OK. James has organised that.*

[88] Mr Gilkison put it to the plaintiff in cross-examination that this was an inappropriate communication from a manager to a subordinate about the board's representative. The plaintiff's response was that he and Mr Stuart had already discussed this matter and the concerns of the department heads had been raised with him at staff meetings. He also said that he had raised these concerns with Mr Chow several times and it was nothing new. The letter of 28 April and the minutes of 4 May confirm that the plaintiff had made virtually identical complaints to Mr Chow about Ms Chow in far more detail than that contained in the e-mail to Mr Stuart.

[89] However, the fact remains that this was a communication from the general manager to the marketing manager, his subordinate, about the board's representative. I am satisfied that these were genuinely held views and that there was a legitimate basis for them, in that Ms Chow had been undermining the plaintiff's position as general manager. But I also accept Mr Gilkison's submission that it was misconduct for the plaintiff to have discussed this with a subordinate.

[90] To this extent I find that there was blameworthy conduct, which did contribute to the situation which gave rise to the unjustified personal grievance dismissal claim but not to the unjustified disadvantage grievance relating to the suspension. This was because the communication was not known to Mr Chow at the time of the suspension on 5 May. It is clear, however, that it constituted two grounds in the dismissal letter and was expressed in the evidence as being "*the last straw*". Although not relied on in Court to justify the dismissal it was a matter that confirmed the decision to dismiss.

[91] I consider that this conduct does require a reduction, but not to the extent being argued for by Mr Gilkison. It seems these matters were already known to Mr Stuart, having already been discussed with him and at staff meetings and this considerably mitigates the level of contribution. I consider that the matter can be appropriately dealt with by reducing the award for distress and humiliation from $15,000 to $10,000. The other remedies awarded are, in substance, damages for breach of express terms of the employment agreement and I do not consider that the contributory conduct would justify a reduction in those remedies.

[92] To summarise the awards in favour of the plaintiff:

	$
Lost remuneration (gross)	68,268.63
Holiday Pay	1,800.00
Reimbursement of expenses	478.55
Loss of use of car	20,480.76
Loss of restaurant expenses	8,209.68

Loss of occupancy bonus	10,000.00
Distress compensation (less contributory conduct)	10,000.00
	$119,237.62

Costs

[93] The plaintiff is entitled to costs. If these cannot be agreed they may be addressed by an exchange of memoranda, the first of which is to be filed and served within 30 days from the date of this judgment. Any reply is to be filed within 21 days of receipt of the other side's memorandum.

B S Travis
Judge

Judgment signed at 10am on 9 April 2009