Determination Number: WA 51/02
File Number: WEA 56/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Criss Lawry (Applicant)
AND	The Attorney-General in respect of the Department of Corrections (Respondent)
REPRESENTATIVES	Mr J Slater for the Applicant Ms R Chan for the Respondent
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	Wellington, 23 May 2002
INVESTIGATION COMPLETED	4 June 2002
DATE OF DETERMINATION	20 June 2002

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. Mr Lawry disputes that his dismissal by the Department of Corrections (Corrections/the Department), for admitting the use of cannabis and acknowledging that he knew that cannabis was in his home, was justified.

The Facts

2. The following facts are agreed. Mr Lawry commenced employment with the Department on 13 June 1988. He was appointed as a Principal Corrections Officer at the Hawkes Bay Regional Prison on 20 March 2000. On 17 May 2001 the Police searched the residence of Mr Lawry and his partner and a quantity of loose-leaf cannabis, a cannabis pipe, cannabis seeds and a cultivated plant were found. On 17 May Mr Lawry informed his site manager and other managers that his house had been searched and cannabis found. He admitted to using cannabis. Mr Lawry was later advised an investigation was being instituted into whether he had been involved in the

illegal possession and/or consumption of drugs. On 21 May he was suspended. The investigation led to a number of staff being interviewed (many of whom gave written statements) between 18 May and 6 July. Following receipt of the report, a meeting between Mr Lawry, his representative from the Corrections Association of New Zealand, Mr Brian Davies, and other support people was held with Mr John Jamieson, Regional Manager and Mr Ken Hutchison, HR Adviser, on 26 July. On 13 August Mr Lawry was sent a letter outlining proposed disciplinary action. A disciplinary interview then took place on 17 August. On 27 August, at a meeting with Mr Jamieson, Mr Lawry was dismissed.

3. Other relevant facts are that Mr Lawry had had an exemplary employment record with the Corrections Department. The area of the prison where he served as a Principal Corrections Officer was, amongst other things, a drug-free unit. The Department is actively working to reduce the number of inmates taking drugs to below 20%.

4. The Department's Code of Conduct lists illegal possession or consumption of drugs as an example of serious misconduct. Also categorised as an example of serious misconduct is admitting to or being convicted by a Court of law of an offence which would give reasonable doubt as to suitability for continued employment.

5. In an interview during the investigation process, Mr Lawry, having been shown the statements of other officers, said that he could pick them to pieces but did not wish to do so, except for one comment about alleged difficulties working in a drug-free unit. In his statement, he did not deny that on several occasions over the last three years he had consumed cannabis and neither did he deny knowing that cannabis was in his home when searched by the Police.

6. As a result of the investigation, Mr Jamieson came to the provisional conclusion that Mr Lawry's behaviour amounted to serious misconduct for consuming cannabis. It was also noted that he had acknowledged that he knew that cannabis was to be found at his house. He was given an opportunity at a further meeting to discuss the appropriate penalty. At that meeting, Mr Lawry was represented by Mr Davies. Mr Davies stated that what Mr Lawry had done did constitute serious misconduct and that one option was dismissal. However, he saw "*an opportunity on a one-off basis to send a*

message to people that even in situations involving serious misconduct, honesty [could] pay." He also noted (and this is as close to an argument of disparity of treatment as was ever raised during the process) that "*there have been other occasions on which people in circumstances similar to Criss and some even in more senior positions have committed acts that have fallen into the same category of serious misconduct as Criss's and they have been given second chances*".

7. It was noted that Mr Lawry had the support of staff at the prison and Mr Jamieson accepted that Mr Lawry would not offend again in the same manner. Despite this and Mr Lawry's undertaking to undergo drug testing if required, as well as undertake any other sort of rehabilitation prescribed by the Department, Mr Jamieson determined to dismiss Mr Lawry. In a letter dated 27 August he stated:

> *"I acknowledge all the favourable comments about your career and work. You have also been very honest in all aspects of your response to the Police search of your home. However, the use of cannabis and your acknowledgement that you knew cannabis was in your home is inconsistent with the role of a Corrections Officer. Your situation is even more incongruous with this type of behaviour in that you are the Principal Corrections Officer in a drug-free unit."*

8. Mr Lawry later pleaded guilty to knowingly permitting premises to be used for the purposes of possession of cannabis. He was discharged without conviction.

9. Despite mediation and ongoing discussions between the parties, for which they must be congratulated, they have been unable to resolve this employment relationship problem. It therefore falls to the Authority to determine it.

Legal Issues

10. No issue was taken with the procedure adopted by Corrections. Rather it was the severity of the penalty and alleged disparity of treatment that has given rise to this personal grievance.

11. Mr Slater, on behalf of Mr Lawry, submitted that the penalty was too harsh. However, that submission can only be examined in the light of the judgement of the Court of

Appeal in *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448. For instance, at 459 the Court noted:

> *"The dismissal might have seemed harsh, but the correct issue was whether it was open to the employer, acting fairly and reasonably, to have seen that as the appropriate response to Mr Oram's conduct."*

12. Furthermore, at 458 it was stated:

> *"If, in a particular case of summary dismissal, the employer shows that the conduct was such that a fair and reasonable employer could see it as deeply impairing of the basic confidence and trust essential to the employment relationship, it would hardly be necessary to consider, as a separate step, whether in all the circumstances the employee ought to have been dismissed."*

13. In this case, the employer did conduct a two stage disciplinary process anyway.

14. Following a full and fair enquiry, Mr Jamieson took into account a raft of factors, as set out in the correspondence and his evidence (some of which is recounted in paragraphs 7 and 22) before coming to his final decision. There is no evidence that he took into account irrelevant considerations or failed to take into account relevant considerations in coming to his determination on penalty and serious misconduct was admitted. There is no doubt in these circumstances that dismissal was one option open to Mr Jamieson and this was conceded by Mr Davies at Mr Lawry's second interview.

15. I accept that the consequences for Mr Lawry have been extremely serious (he is still unemployed over 9 months later), that he has been scrupulously honest and apologetic over his actions throughout this whole process, that his misconduct occurred off the job and appears partly the responsibility of another, that he has the confidence of other staff in the prison and that he is extremely unlikely to offend again. He is entitled to sympathy and credit over all these matters. However, they were all factors (except the first, which could not have been known at the time) taken into account by Corrections. Therefore what the union and Mr Lawry want the Authority to do is in essence to substitute its judgment for that of the Department, which is outside its role. Where serious misconduct has been admitted the discretion whether to dismiss is very much that of the employer. It is not relevant whether Mr Lawry, his union or even the Authority might take a different view to that of Corrections on penalty, where the penalty is one, such as here, that a fair and reasonable employer could impose.

16. That then leaves the issue of disparity of treatment. This was never raised, except in the most general of terms by Mr Davies. Even then, the way that it was raised by Mr Davies would not be such as to put an employer on alert of any particular concerns that Mr Lawry had in this respect, or even that any response was required, especially as disparity was not the main focus of his submissions on behalf of Mr Lawry. The particular alleged instances of disparity were not elucidated until the investigation meeting. They related to final warnings being given to staff convicted of driving with an excess blood alcohol level.

17. Issues of disparity do not always have to be raised at the time - see for example *NZ Pulp & Paper Company Limited v Horne* [1996] 1 ERNZ 278. However, *Horne* distinguishes between cases involving a distinct two-stage inquiry in the nature of separate determinations on liability and sanction and those that do not involve this process. It was noted that where an employer offers an employee a separate opportunity to make submissions on the sanction, a prudent employee might seek to advance an argument that similar misconduct by other employees in the past had not attracted the ultimate sanction of summary dismissal. That would be in the nature of an anticipatory argument against disparity. This was contrasted with cases where an employee will not know whether there has been any disparity until the sanction is imposed. By that time it is usually too late to make submissions on sanction.

18. I hold that the separation of the determination on misconduct (which noted that dismissal was proposed) and the determination on penalty allowed Mr Lawry a reasonable and fair opportunity to make submissions on disparity of treatment. Thus if there were issues that Mr Lawry wanted raised in the area of disparity of treatment he did have a fair opportunity to raise them. However, as stated above, his union did not do so, other than in such general terms that it did not require a response from the Department. He therefore can not now complain that the process he went through was unfair, even in respect of the issue of disparity of treatment.

19. Even if I were wrong on this point, I determine that this is not a case where there was a *prima facie* case of disparity or enough evidence to cause inquiry to be made by the Authority into the issue of disparity (*Airlines Stewards and Hostesses of NZ IUOW v Air NZ Limited* [1985] ACJ 952 applied). The disparity that was being alleged related

to other employees of the Department of Corrections who were given a final warning for being convicted of driving with excess blood alcohol levels. At least two instances of such a penalty being imposed were given to the Authority.

20. In *Sutherland v Air NZ Limited* [1993] 2 ERNZ 386, it was held at 397, with respect to disparity of treatment, that:

> *"There must, I accept, be a sufficient degree of similarity and materiality for comparison to be made. But I think it is preferable for the Court or Tribunal to assess whether the proven facts of any case amount to such. Factors such as identity of employer, position held by the employees, the general nature of the misconduct and alike are all relevant and will assist in the assessment of whether a valid comparison can be made."*

21. In this case, both the actions under scrutiny constituted misconduct and are serious offences. In terms of the criminal law, the penalties for the offence Mr Lawry admitted but was discharged without conviction on held a higher jail term (six months compared with three months), but did not involve any loss of liberty in terms of not being able to drive a car. On the other hand, the offences are quite different. One involved the possession and use of illegal drugs; the other involved misuse of a legal drug. The differences are so significant as to not require the Department of Corrections to explain the alleged disparity, I hold. These were different offences of a quite different nature.

22. Even if it could be determined that there was a case of disparity to answer, I hold that Mr Jamieson has adequately explained the disparity. I accept Mr Jamieson's evidence that he assessed each case on its merits. I am therefore satisfied that while reasonable parity of treatment of an employee as compared with others in material circumstances is required, in this case circumstances between those employees convicted of drunk driving were not materially similar to Mr Lawry's circumstances. While Mr Jamieson accepted that drunk drivers provided a very poor role model for inmates, he considered that an employee's involvement in drugs was more incompatible with workplace responsibilities than driving with excess blood alcohol levels, because an officer dealt every day with drug offending in the prison compared with driving offences, which never occurred. He also noted Mr Lawry's responsibility for reducing or eliminating possession and consumption of illegal drugs and the misuse of drugs. In this regard

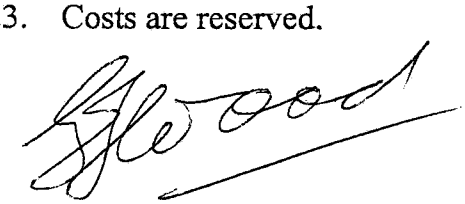
Mr Lawry was required daily to prevent and detect drug offences by inmates and report them for misconduct, including those related to drugs, particularly in a drug-free unit such as the one in which Mr Lawry worked. Furthermore, Mr Jamieson noted that while alcohol itself was not illegal, cannabis was. He also noted that the two types of offences were different and that the offences Mr Lawry admitted provided for more serious penalties in law. Although the criminal penalties for drug offences would perhaps be better described as similar to those for driving with excess blood alcohol levels, rather than more serious, it is possible to argue that they were more serious because of the imprisonment periods. All in all, I accept Mr Jamieson's explanations as an adequate explanation for any disparity of treatment between Mr Lawry and Department of Corrections' employees convicted of drunk driving.

Conclusion

23. Mr Lawry admitted committing serious misconduct. Although he had an excellent service record, there were mitigating circumstances in relation to his misconduct (which occurred off the job) and he was unlikely to offend again, the decision to dismiss him was one that was open to a fair and reasonable employer. Mr Lawry had an opportunity to raise issues of disparity of treatment in advance of his dismissal. The issues he later raised were not sufficiently similar and material to his own to constitute disparity of treatment. Even if they were, the different sets of circumstances were adequately distinguished by Corrections. I therefore dismiss Mr Lawry's claims.

Costs

23. Costs are reserved.



G J Wood
Member of Employment Relations Authority