

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Shucksmith & Allan Rigby (Applicant)

AND Ports of Auckland Limited (Respondent)

REPRESENTATIVES Simon Mitchell, Counsel for Applicant
Philip Skelton, Counsel for Respondent

MEMBER OF AUTHORITY Alastair Dumbleton

INVESTIGATION MEETING 25 May 2005

DATE OF DETERMINATION 26 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants Mr John Shucksmith and Mr Allan Rigby have complained that their summary dismissal by the respondent Ports of Auckland Limited (referred to as "POA") was unjustified. They were dismissed for drinking alcohol in a room which had been hidden inside a building where they worked. They confessed to having done so and did not seek to excuse or mitigate their conduct.

[2] The applicants do not dispute that their actions amounted to serious misconduct. Under the collective agreement they were bound by, consuming alcohol on company premises is expressly given as an example of "conduct that may constitute serious misconduct and may warrant instant dismissal." Mr Shucksmith and Mr Rigby, who were employed as electricians and had served POA for nearly 40 years each, were working night shifts when they used the hidden room for drinking.

[3] Notwithstanding their admissions of serious misconduct, on behalf of the applicants it has been strongly contended that their dismissals lacked justification. The scope of challenge is narrow. It is confined to what the applicants say was an unreasonable amount of time it took after they had made their confessions until POA advised them it was taking this ultimate form of disciplinary action. The period of delay is argued to be one of about four months, between 2 November 2004 and 22 February 2005.

[4] Although during the whole of that time POA was fully aware of the nature of their misconduct, it did not suspend the applicants from work or in any way limit them in carrying out their jobs as electricians.

[5] The commission of serious misconduct by itself is not usually sufficient to justify summary

dismissal, for as well as having grounds on which to dismiss an employer must also act fairly and reasonably in the course of reaching a decision whether to dismiss or take any other form of disciplinary action. What is fair and reasonable will depend on the circumstances.

[6] In this case it is argued that the delay was so great as to make dismissal an unreasonable action. It is however acknowledged for the applicants that POA may have been justified in dismissing them, had it done so closer to the beginning of November 2004 when they had confessed to the misconduct.

[7] It is also argued for the applicants that by allowing them to continue working for the period between 2 November 2004 and 22 February 2005, their employer POA showed that despite the admitted misconduct and its seriousness, trust and confidence in them had been retained.

[8] POA has contended that the dismissals were justified because any delay that occurred was no more than necessary and reasonable in circumstances where it was investigating the misconduct of several other employees, including supervisors, and not just that of the two applicants. POA also points to the fact that while it was making enquiries into the misconduct of all the employees under suspicion, an application was urgently made to the Authority on behalf of the applicants by their union which sought to stop POA from investigating in the way it intended.

[9] POA argues that once the parties were before the Authority with an issue about the conduct of the disciplinary investigation, respect for the due process of law required them to suspend the investigation until the case was dealt with by the Authority. POA also argues that the Christmas – New Year holiday period unavoidably lengthened the time within which it was reasonably able to conclude its investigation.

[10] To determine this employment relationship problem the Authority has had to consider a number of issues. They include whether the passage of nearly four months between the dates on which the applicants confessed their misconduct and were dismissed, is reasonably explained by POA. There is an issue as to whether the fact that the applicants were required to continue working for POA during that time amounted to a waiver by the employer of any right it had to dismiss them. If there was any unreasonable delay, there is also an issue whether the applicants suffered any real disadvantage in their employment as a result of it.

Investigation of misconduct by POA

[11] In August 2004 the employer discovered in a substation building a room with a cleverly concealed entrance. It contained two beds, bedding and some appliances which included a heater, bedside light and radio alarm-clock. To find out what use was being made of the room POA secretly installed a camera to observe any activity in it. Filming took place between 2 September and 4 October 2004, to coincide with a full cycle of the shift roster.

[12] The applicants were filmed on different occasions sleeping and drinking in the room during night shifts they were rostered on. Five other POA employees were also filmed in there, but they were not shown drinking. Some of those using the room were filmed sleeping in it for up to five hours at a time on occasions. The use of the room by all seven employees was for a total of about 200 hours, with Mr Shucksmith and Mr Rigby occupying it for nearly half that total.

[13] The applicants were advised on 20 October 2004 that there would be a disciplinary investigation into their use of the room and a copy of the film taken of them was given to Mr Mitchell, their representative.

[14] There were some delays at this point in progressing the investigation because Mr Rigby was not available to Mr Mitchell for him to obtain instructions, and Mr Mitchell had other commitments to attend to on several days.

[15] On 28 October a letter from Mr Mitchell advised POA of his view that POA could not properly request information from the applicants and other employees about the construction, fit-out and maintenance of the hidden room unless it had first made allegations of misconduct about those particular matters. He warned that if POA did not accept his view then an application would be made urgently to the Authority, asking it to resolve a dispute about this issue. POA replied to Mr Mitchell the following day rejecting his view and asserting that as the employer it was entitled to request its employees to respond to questions about their use of the hidden room and also their knowledge of who was responsible for the construction, fit-out and maintenance of it.

[16] Meetings were held by POA management with the applicants and other employees to investigate allegations of misconduct made against them. By 2 November both Mr Shucksmith and Mr Rigby had each provided POA with a written statement fully admitting that they had been sleeping and drinking in the hidden room during the course of their rostered shifts.

[17] The applicants did not implicate their supervisors but several other workers who had also used the hidden room told POA that their supervisors had approved of them sleeping in it. POA therefore continued investigating to establish the complicity of several supervisors. Further meetings for this purpose were to be held on 10 December but were delayed until 16 December, after Mr Mitchell became ill.

[18] The difference of opinion over the scope of questioning by POA of its employees surfaced again during the meeting of 16 December, causing it break up part way through. Next day the applicants and five others lodged an application in the Authority asking it to determine with urgency the extent of questioning permitted POA in relation to the hidden room. A date for an urgent investigation meeting was fixed for Thursday 23 December 2004.

[19] On 22 December the applicants withdrew their urgent application following a meeting between the CEO of POA, Mr Geoff Vazey, and the President of the Maritime Union of NZ, the applicants' union, Mr Denis Carlisle. Although neither gave evidence to the Authority they provided statements which are reasonably consistent in two important respects. First, that there was agreement to resume discussions about the fate of the applicants and other employees after the Xmas-New Year break in January 2005. Second, that Mr Vazey had said to Mr Carlisle (to quote the latter) "he thought it would be inevitable that the employees who were drinking on the job would be dismissed." This is a reference to the applicants Mr Shucksmith and Mr Rigby.

[20] Mr Carlisle's unsworn written statement was that he had expected to be contacted by Mr Vazey in the week of 17 January 2005 but was not. He said they spoke the following week and arranged to meet on 4 February 2005.

[21] At that meeting Mr Vazey and Mr Carlisle discussed the disciplinary action then under consideration. It appears there was some discussion around a suggestion by Mr Vazey that POA might be more lenient in its disciplinary treatment of the employees who had used the room but not to drink in, if the union was prepared to help improve wider relationships between employer and union and to also help with reforming certain work practices.

[22] It is not necessary to decide whether any trade-off was entered into on 4 February 2005 between Mr Vazey and Mr Carlisle. What is relevant is that the conclusion of any disciplinary action to be taken against the applicants had been linked to the consideration still being given to the

fate of their non-drinking co-workers which in turn was linked, at least by POA, to the resolution of wider industrial issues.

[23] It is also relevant, and it is something the Authority has become aware of from other cases, that there is an established culture in this workplace of the employer and the union endeavouring to pragmatically resolve disputes through direct discussion between CEO and Union President, Mr Vazey and Mr Carlisle.

[24] It seems that Mr Vazey in speaking to Mr Carlisle on 4 February 2005 did not retreat from his prediction made on 22 December 2004 that the applicants were likely to be dismissed. The applicants themselves have alleged in a second statement of problem which was lodged on 14 February, that POA representatives had told Mr Carlisle on 9 February that the applicants “would be dismissed”.

[25] As a result of this advice given to their representative, the applicants should not have retained any optimism about keeping their jobs even although reaching a final decision remained pending and the applicants were permitted to work in the meantime.

[26] The application lodged in the Authority on 14 February was the second the applicants had brought to challenge POA’s investigation of the hidden room. In it they made various allegations against POA in relation to its disciplinary investigation, including the length of time that process had taken. The Authority directed the parties to mediation on 17 February and fixed 24 February for an urgent investigation meeting, if one was to be required. The application was however withdrawn on 3 March without the necessity for a meeting and a determination. Again it seems that at a meeting attended by Mr Vazey and Mr Carlisle some accommodation was reached which resolved the problem that had been the subject of the application.

[27] On 22 February 2005 the applicants were notified of their dismissals. The five other workers who had used the hidden room received warnings. There is no issue raised by the applicants, who had admitted to drinking in the room, as to any disparity of treatment with regard to punishment. Their challenge is confined to the delay in taking disciplinary action.

Determination

[28] I find that such delay as may have occurred in commencing and concluding the disciplinary process was not unreasonable in the context of a complex investigation into serious misconduct, which involved not only the applicants but several other employees. The time required for completion of the entire investigation was correspondingly much greater than if only the applicants had been involved. I find that the delay, if any, was not so great as to render unjustified the dismissals which at an earlier point would have been justified.

[29] POA was required to conduct a thorough investigation into the possibility that there had been misconduct on the part of the shift supervisors as well as the applicants and other electricians who had used the hidden room. It was entitled to gather relevant information from all available sources so that it could assess the extent of any misconduct within its workforce before deciding what appropriate action to take. As part of this exercise it was reasonable to defer its decision in relation to the applicants until it could cross-check the information they had given with any obtained from their supervisors.

[30] I find it was reasonable for POA to check with the supervisors themselves whether they had been aware that the applicants were using the hidden room for any reason. POA was not bound to immediately and uncritically accept without making further enquiry, statements from the applicants

tending to free their supervisors of any blame. For this reason I disagree that the only appropriate time for dismissing the applicants was soon after they had confessed on 2 November 2004. They had been employed to work collectively as part of a team and their employer could expect their continued co-operation to allow it to investigate the team conduct for as long as that reasonably might take.

[31] The applicants I find during the time it took to conclude the investigation could not and should not have been under any illusion about the probability that they would be dismissed. They had admitted serious misconduct and had offered no excuse or mitigation, and it had been made plain to their representative Mr Carlisle by Mr Vazey from December 2004, that they were unlikely to be allowed to keep their jobs.

[32] I find that it was reasonable for POA to suspend its investigation each time after two separate sets of proceedings were commenced to challenge its actions. Dismissing the applicants before their claims brought in December 2004 and February 2005 had been dealt with by the Authority is likely to have led to further claims. POA was wise to suspend its investigations until the claims had been resolved.

[33] The traditional shut-down over Xmas-New Year held up the investigation for several weeks. This nationwide phenomenon is not something POA can reasonably be blamed for. It seems quite possible that the investigation could have been completed more quickly but there can be no absolute time limit imposed after which any delay is to be regarded as critical to the justification for dismissal.

[34] I find further that the actions of POA in allowing the applicants to continue working in their jobs while the disciplinary investigation was carried out, was not a waiver in any way of the right of the employer to dismiss for serious misconduct. As well as the fact that they had admitted their serious misconduct, since December 2004 the applicants had actual or imputed knowledge from Mr Carlisle, their representative, that they were likely to be dismissed. To imply a waiver from the circumstances would be to disregard the applicant's knowledge of POA's probable response to them in respect of their misconduct.

[35] I find that there was no material prejudice caused to the applicants by the length of time the disciplinary investigation took or by the fact that they were able to work during that time. Mr Shucksmith said that he gained no false expectations from these circumstances and that he thought he had been better off by being able to work rather than being suspended.

[36] It is probable also that the applicants were less disadvantaged by their dismissals occurring in February than in the period immediately before Christmas and New Year when they could expect to have a harder time finding new jobs.

[37] I determine that in terms of the recently amended statutory test for justification as provided in s.103A of the Employment Relations Act 2000, viewed objectively the actions of POA in reaching and implementing its decision to dismiss the applicants were what a fair and reasonable employer would have done in all the circumstances and at the time the dismissal occurred. There is nothing I can find of real significance arising from the fact that the dismissal occurred on 22 February 2005 rather than a day, a week, or a month earlier. The time frame was a product of a combination of circumstances that POA cannot fairly be blamed for.

[38] I find that POA has no legal responsibility for the applicants' employment relationship problem and no orders are therefore made against the employer.

Costs

[39] Costs are reserved. If the parties are unable to reach agreement to dispose of the question memoranda can be submitted to the Authority and a determination will be made.

A Dumbleton
Member of Employment Relations Authority