

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 57/08  
5092468

BETWEEN                      BLAIR THOMAS HOMAN  
   Applicant  
  
AND                              DUNEDIN FIRE DISTRICT A  
   DIVISION OF THE NEW  
   ZEALAND FIRE SERVICE  
   Respondent

Member of Authority:      Paul Montgomery  
  
Representatives:            Anja Klinkert, Counsel for Applicant  
   Paul McBride, Counsel for Respondent  
  
Investigation Meeting:    27 and 28 November 2007 at Dunedin  
  
Submissions received:    21 April 2008 from both counsel  
  
Determination:             6 May 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant alleges he was unjustifiably disadvantaged by being suspended from his employment and then being unjustifiably dismissed from his position as a firefighter. He asks the Authority to reinstate him to his former role, to order reimbursement of lost remuneration and compensation for hurt and humiliation and costs.

[2]     The respondent denies the suspension while it investigated the incident and awaited the applicant's Court appearance was unjustified and further says that the particular claim is barred by statute. It denies the dismissal was unjustified in the circumstances and declines to meet the applicant's claims for remedies.

[3] The parties attempted to resolve their differences in mediation but were unsuccessful.

**What caused the problem?**

[4] The applicant was attending an employment-related course in Rotorua to enable him to progress to the rank of Qualified Fire Fighter when, on 3 March 2007, after drinking with his colleagues earlier in the evening, he visited another bar on his own. An altercation between the applicant and two female patrons led to Mr Homan being arrested on assault charges. Having checked his obligation to his employer, the applicant advised his instructor of his situation the following day.

[5] On attending the District Court in Rotorua, Mr Homan faced a charge of indecent assault relating to his alleged groping of one woman's breast and a charge of male assaults female. At the hearing, his name and occupation were suppressed in the interim and he was granted bail on conditions of abstention from alcohol, not entering licensed premises apart from supermarkets and reporting three times weekly to the South Dunedin Police station.

[6] Upon his reappearance for sentencing on 12 April 2007, the applicant pleaded guilty to two charges of male assaults female under s.194(b) Crimes Act 1961. Mr Homan was sentenced to 150 hours' community work and ordered to pay each victim reparation of \$350.

[7] In the period between the assault and the applicant appearing for sentencing, the respondent undertook an assessment of the situation. Upon Mr Homan's return to Dunedin he met with Mr Seque, the Dunedin District Chief Fire Officer, at 9am on 12 March 2007. Mr Mike Meaden, the local Union secretary and a fellow firefighter, was also present representing Mr Homan.

[8] Mr Seque gave the applicant and his representative a letter proposing that Mr Homan be suspended on pay until at least 27 March 2007 with an understanding that the suspension would be reviewed at that time. While the letter invited comment on the proposal, it also stated *if I do not hear from you and/or your representative(s) by 5pm Monday 12 March 2007 we shall assume that you accept the proposal.* Mr Seque said that both men present read the letter and then agreed to the proposal to suspend the applicant.

[9] The Court appearance was deferred for a further two weeks and the applicant asked Mr Seque if he could return to firefighting duties. This was declined as *nothing had altered* but Mr Seque advised Mr Homan that once Mr Seque had received confirmation of the applicant's lawyer's application to have the charges modified, he would review the suspension and advise Mr Homan or his representative of details.

[10] Mr Seque duly wrote to the applicant on 29 March 2007 proposing the suspension remain *at least 11 April 2007. We shall review the suspension and its terms at that date. We invite your comment on this proposal ... If I do not hear from you and/or your representative(s) by 5pm on Monday 2 April 2007, we shall assume that you do not have any comment on the proposal and it shall be implemented.*

[11] A further letter from Mr Seque to Mr Homan was sent on 3 April 2007. This confirmed the suspension was to continue and also covered the respondent's concern at the applicant's apparent *lack of insight into your situation*. The letter raises the possibility of imprisonment and the effect that would have on Mr Homan's employment. It also raises the employment-related difficulties involving possible breaches of the Fire Service Standards of Conduct if the allegations are made out. It also formally advises the applicant that the Service is commencing its own investigation into the incident and the possible consequences should it find the Standards of Conduct have been seriously breached. The letter also identifies the Fire Region Commander, Mr Stuart Rooney, as the decision-maker and Mr Seque as the investigating officer in conjunction with the Service's human resources unit. Finally, it confirms the applicant's right to take appropriate advice and be represented in any meetings regarding the issues.

[12] A series of meetings took place between the parties in the conducting of the investigation. The first was set for 11 May 2007. Prior to that taking place, Mr Meaden sent an email to Mr Seque and copied it to Mr Rooney which is significant. The email reads:

*After taking advice the Union will not be a representative of Blair Homan. I will be on standby on the day of the 11th. If asked to attend I will but his representative will be his lawyer. I will attend the meeting only to witness any statements that Mr Homan may make. I will not be speaking at all. All his representations will have to come from his lawyer. I would like that made clear prior to the meeting. ... Any other Union delegate will be there on the same understanding.*

[13] At the meeting proper, Ms Sarah Homan was present as a support person for the applicant and Mr Meaden attended on the terms set out above. Mr Vigor-Brown, who had represented Mr Homan in the District Court, attended by telephone conference call.

[14] The notes from the meeting indicate Mr Vigor-Brown was explaining the legal aspects of the criminal matter and the steps the applicant had taken to apologise to the women assaulted, to attempt a restorative justice conference and him involving himself in an alcohol rehabilitation programme. Mr Vigor-Brown placed these events in the context of a young man taking steps to be responsible and change his ways. Clearly, he was advocating for Mr Homan to have another chance on strict conditions including a final warning and a three to six month probationary period working under close supervision. The ongoing alcohol counselling was to operate in tandem for two to three months.

[15] The applicant then expressed his views pointing to steps he had taken since the incident and supporting Mr Vigor-Brown's views on the remedies to be applied to him.

[16] The meeting was curtailed when Mr Meaden was called out to a fire. It was reconvened on 21 May 2007 with similar personnel present and also Mr Ross Walker from the Union. Counsel for the applicant once again participated by teleconference. Mr Vigor-Brown inquired whether the respondent was aware of the applicant's drink driving offence prior to commencing with the Fire Service and whether there was a written warning on his personnel file from the previous Court appearance and hearing.

[17] This latter matter relates to an incident involving the applicant being charged with stealing a wallet after a drinking session at the time he was about to start his Basic Training course with the Fire Service. He was convicted and discharged on that matter.

[18] Mr Seque told the meeting he was unaware of the drink driving offence as the respondent was, at that time, represented by the Service's national recruitment system rather than the Dunedin Fire District. He told the meeting that a formal warning was not issued nor attached to the applicant's file at the time of the Court appearance over the wallet matter. Mr Seque referred to a letter dated 15 April 2005 and signed by the National Recruiting Manager. The relevant sections state:

*After hearing your account, we were satisfied that our original judgement that you are suitable to be an NZFS firefighter remains.*

*As discussed, this matter may have become known within the NZFS. Therefore the onus will be on you to prove yourself worthy of being a NZFS firefighter more than may be the case with other recruits. We wish you all the best in that endeavour.*

[19] Mr Homan then told the meeting he had completed all but 20 hours of his sentence, had abstained from alcohol since the incident, had changed his life with the assistance of his counsellor and intended to continue with counselling support.

[20] Neither Mr Rooney nor Mr Seque made any comment and the two Union representatives, Messrs Meaden and Walker, did not offer any comment either.

[21] Later that day, Mr Rooney despatched a letter to the applicant via Mr Vigor-Brown advising that following the meeting earlier in the day and hearing from the applicant and his solicitor, he had considered the submissions made and confirmed the decision to dismiss. The applicant was dismissed, however, Mr Rooney said:

*We consider that your behaviour justifies summary dismissal – that is, dismissal without notice. But out of compassion, we are prepared to pay you one month in lieu of notice.*

### **The issues**

[22] To determine this matter, the Authority needs to make findings on the following issues:

- Was the suspension of the applicant an unjustified action causing disadvantage to the applicant; and
- Was the dismissal of the applicant unjustified; and
- In the event that either or both the above issues are made out, to what extent did Mr Homan contribute to the circumstances giving rise to them; and
- What, if any, remedies is the applicant entitled to should he succeed?

### **The test**

[23] The test to be applied in relation to these issues is set out in s.103A of the Employment Relations Act 2000 and its amendments. This requires the Authority to determine whether a dismissal or an action was justifiable 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 investigation meeting**

[24] At the investigation meeting, the Authority heard evidence from Mr Homan personally and from his sister who had been his support person at two meetings in May. The Fire Service evidence was provided by Mr Rooney and Mr Seque.

[25] The applicant's essential position was he had not breached the standards of conduct and thus the suspension and subsequent dismissal were unjustified. In part, his reasoning was based on the premise that the assaults took place away from his workplace and thus were of no concern to his employer. Another plank in his case was his effort to do what he could to atone for his mistakes and his undertaking counselling to address his personal problems.

[26] Under questioning, the applicant accepted he had no memory of the Rotorua incident, that he understood the standards of conduct, including actions which may *negatively impact on the employment relationship* and that affect the performance of his official duties or reputation of the NZFS were relevant. Mr Homan simply denied the assaults had any such effect.

[27] A central conflict between the parties was whether the sole ground on which the respondent relied in dismissing the applicant was the issue of bringing the NZFS into disrepute. Both applicant witnesses, referring to the 11 and 21 May meetings, say that Mr Vigor-Brown asked if this was the sole concern and they say that Mr Rooney told them that was correct. Both Mr Rooney and Mr Seque denied this was said as they say the focus was wider and included trust and confidence issues which go to the heart of the matter.

[28] Regrettably, the Authority's extensive attempts to speak to Mr Vigor-Brown foundered and I have had recourse to the correspondence and meeting notes to resolve this conflict. The delay in having counsel provide submissions was due to the Support

Officer's attempts, and those of Ms Klinkert and her colleague, to have Mr Vigor-Brown to reply to correspondence and email so a teleconference could be convened. The silence endured and the need to progress the matter prevailed.

[29] The Authority records its thanks for Ms Klinkert's assistance in that matter and to both counsel for their assistance at the meeting and for providing well-considered legal submissions.

### **Analysis and discussion**

[30] The legal principles regarding misconduct away from the workplace are now well established. The Court of Appeal in *Smith v. Christchurch Press Company Ltd* [2000] 1 ERNZ 624 made it very clear:

*It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts upon the employer's obligations to other employees or for any other reason that undermines the trust and confidence necessary between employer and employee. (Emphasis added)*

[31] It is simply not accurate for the applicant to strenuously assert that the respondent, in the conduct of its investigation, was fixed solely on the issue of his bringing NZFS into disrepute. This was a factor in its deliberations but to this must be added the loss of trust the respondent experienced in the light of the undertakings previously given by Mr Homan, and the respondent's concerns regarding the applicant's fellow firefighters' ability to trust him.

[32] The evidence in the respondent's initial letter to the applicant on 12 March 2007 regarding the proposed suspension is indicative of the respondent's concerns at the time:

*Naturally the New Zealand Fire Service (NZFS) firmly believes in the principle of innocent until proven guilty. Equally, we are aware of the likely strain you may be under due to facing these allegations. This could place yourself and others at risk. We are also mindful of the possible attention you could come under from other employees and members of the public if they become aware that you are facing these charges and remain on duty.*

[33] Mr Seque wrote again on 28 March 2007 to the applicant regarding the continued suspension on pay and said:

*I consider that the factors that gave rise to that original proposal to suspend you have not altered. Therefore, the NZFS proposes to continue suspension on full pay until at least 11 April 2007. We shall review the suspension and its terms again at that date.*

[34] In his letter of 3 April 2007, Mr Seque, while referring to six points contained in the respondent's Standards of Conduct, goes on to state:

*The NZFS employs an almost unique status in New Zealand. Polls consistently show that firefighters are our most trusted profession. Firefighters require such a level of trust. They often deal with people when they are at their most vulnerable. Firefighters rescue people from motor vehicle accidents, go into their homes unsupervised in a number of situations and undertake community education to school groups.*

*The NZFS and our public demand that our staff be of high moral standing. It would be quite inappropriate to have a personnel member alleged to have behaved in a manner of which you are accused performing their normal duties. This is regardless of the principle that someone is innocent until proven guilty. Naturally, we fully support that principle.*

*Given the characteristics of our staff, they also do not look favourably on a co-worker alleged to have committed the act in respect of which you face criminal charges. Your presence at the work place could cause disruption for this reason. Such disruption could adversely affect you equally as much as it may affect other staff.*

[35] The emphasis on trustworthiness is plain in these formal letters and formed a considerable portion of the evidence deposed by Messrs Rooney and Seque at the investigation meeting.

[36] In the course of the investigation meeting, Mr Homan appeared to make light of the seriousness of the assault charges and placed over-emphasis on the interim suppression of his name and occupation in the District Court hearing. Perhaps of greater concern is his attempt to put blame on others within NZFS, and in particular the course instructors in Rotorua, for advising others about his situation. It seemed that even at the investigation meeting Mr Homan clung steadfastly to his claim that he had not broken the NZFS Code of Conduct due to his name and occupation being suppressed and the fact that the events happened outside work hours.

[37] In respect of his suspension, Mr Homan claims it to have been unfair and unreasonable saying that none of the grounds set out in the collective agreement had been met. He said:

*The incident leading up to the criminal charges occurred out of work time and in Rotorua, out of the district of my employment, which is Dunedin. I successfully completed my phase 3 training at National Training Centre at Rotorua from 26 February 2007 to March 2007 proving that my out [sic] character and out of work behaviour did not in any way affect my ability to do my job. I was and had been fully cooperative with my employer throughout and did not and would not have hampered the investigation, nor was I a threat to the operating procedures.*

[38] I think it fair to say that while the applicant cooperated with his employer in terms of keeping the respondent informed, he continued in a state of denial. This behaviour was succinctly expressed by Mr Rooney in the letter of 30 April 2007 to the applicant in which he said:

*We consider that in our discussions with you regarding your suspension from work, you demonstrated a lack of insight into the significance of your situation and the implications for the NZFS and your employment if the allegations were true.*

*You will recall that just after you were recruited to the NZFS, you were discharged without conviction in relation to taking a wallet from a Dunedin bar. We became aware of this and discussed it with you. You stated then that you had an alcohol problem and undertook to address it. Largely on the basis of that assurance, we allowed you to proceed to the NZFS recruits course. Clearly this undertaking was not honoured. Therefore we are not inclined to give you the benefit of the doubt based upon your supposed acknowledgment of problems with alcohol.*

*Furthermore, even if you do have insight into your actions, we consider that your current actions are so serious, that any alleged insight by you into those actions is of relatively minor significance.*

[39] It is also clear from the evidence that the respondent, having been made aware of the criminal charges facing one of their firefighters, did not seek to rely on the Police prosecution of these matters. Quite properly, it undertook its own investigations into what it regarded as potentially serious misconduct and at all points in the course of that investigation ensured the applicant had representation and communicated its proposed action by way of formal letter at each stage of the process. This even went so far as to convey to the applicant its proposal to dismiss and allowing him the opportunity, assisted by legal representation, to propose sanctions other than dismissal. Having heard from both the applicant and his counsel, and considering that input, the respondent declined to alter its views and dismissed the applicant on one month's notice.

[40] The letter of dismissal is quite clear:

*Given all this, there is nothing that has arisen from our recent discussions that alters our earlier provisional view that you should be dismissed. Your admitted behaviour has so deeply eroded our trust and confidence in you that we consider that dismissing you is a decision that a fair and reasonable employer would take.*

### **The determination**

[41] Returning to the issues set out above:

- I find the initial suspension of the applicant was agreed to by the applicant. The extension of that agreed suspension was occasioned by postponement of the District Court fixture alone. While this irked Mr Homan, the justification of the extension was unaffected. I find that the suspension did not constitute an unjustified action on the part of the respondent.
- I find, applying the test as set out in s.103A of the Act, the dismissal of the applicant was justified in all the circumstances of the case. In particular, I have been mindful of the particularly high standard of personal integrity demanded of members of NZFS and the breach of the undertaking given to his employer over the wallet incident at the time he was being considered as a recruit.

[42] The applicant does not have a personal grievance and the Authority is unable to assist Mr Homan further.

### **Costs**

[43] Costs are reserved.

Paul Montgomery  
Member of the Employment Relations Authority