

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 256/08
5116157

BETWEEN GRANVILLE DUFF
 Applicant

AND CHIEF EXECUTIVE,
 DEPARTMENT OF
 CORRECTIONS
 Respondent

Member of Authority: Vicki Campbell

Representatives: Louise Foley for Applicant
 David Traylor for Respondent

Investigation Meeting 21 May 2008 at Hamilton

Submissions Received: 4 June 2008

Determination: 17 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationships problem

[1] Mr Granville Duff was employed as a Prison Officer for approximately 19 years. Mr Duff says that on 28 August 2006 Mr Gary Whiting a Senior Corrections Officer, approached him at work and told him he had been removed from the Gang Officer position and was being given two weeks notice.

[2] Mr Duff says the statement by Mr Whiting caused him extreme distress as he believed he had been dismissed. On his return from his work for the day Mr Whiting then advised Mr Duff that he had been joking.

[3] Mr Duff says that he was so distressed by what Mr Whiting did that he was unfit to continue working. Mr Duff raised a personal grievance for unjustified disadvantage, claiming that he was suffering from Post Traumatic Stress Disorder and that his medical condition was a direct result of the wrongful actions of the Department.

[4] The parties attended mediation in November 2006 to resolve Mr Duff's employment relationship problems. At mediation it was agreed Mr Duff would attend an Occupational Physician and a specialist Psychiatrist.

[5] Mr Duff attended an appointment with Dr David Ruttenberg on 28 November 2006. Mr Duff says that when he attended this meeting he was still suffering from immense pressure and stress as a result of his personal grievance and the handling of the matter by the Department of Corrections (DOC).

[6] Dr Ruttenberg concluded that there was no physical reason why Mr Duff could not return to work. Included in Dr Ruttenberg's report, was information pertaining to drug use. Dr Ruttenberg reported that Mr Duff was using marijuana daily and that Mr Duff reported using "heaps".

[7] Dr Ruttenberg reported that Mr Duff's admitted increased recreational drug use should be managed within the usual departmental procedures in terms of Drug and Alcohol Abuse within the working environment. Dr Ruttenberg also recommended the involvement of an industrial psychologist and further mediation. Dr Ruttenberg also recommended that, in the absence of resolution of Mr Duff's personal grievance claims, Mr Duff be transferred to a different prison. Dr Ruttenberg could see no impediment to Mr Duff continuing to work as a Prison Officer.

[8] On receipt of Dr Ruttenberg's report, the Department of Corrections were very concerned about the disclosure made by Mr Duff as to his drug use and undertook an investigation into the statement made by Mr Duff that he was using illegal drugs.

[9] Mr Duff says that the department's investigation into the reported drug use, did not take into account relevant matters, such as the fact that he had been drug free for a particular period of time and that to dismiss him in such circumstances was unjustifiable.

[10] In its letter confirming his dismissal, Mr Duff was advised that he had been dismissed as a result of compelling evidence that he was using marijuana on a daily

basis. The Department says that given Mr Duff's role as a Corrections Officer, particularly being responsible for the custody of offenders, and thereby the health and safety of those offenders, himself and his colleagues, any drug use was a sufficient basis on which to justify a decision to dismiss.

[11] The Authority is required to examine the Department of Corrections actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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.

[12] The section requires me to ascertain whether the Department carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

The dismissal

[13] Following receipt of Dr Ruttenberg's report dated 29 November 2006 the Acting Regional Manager, Mr Dalziel, met with Mr Duff on 22 December 2006. On 9 January 2007 Mr Duff was advised that an employment investigation was to be carried out into his disclosure to Dr Ruttenberg. Mr Duff was advised that the matter was serious and may constitute serious misconduct.

[14] In accordance with the Department's HR Manual Mr Duff was put on special leave with pay until 11 January 2007 at which time submissions would be heard and a decision made as to whether he would be suspended during the investigation.

[15] As a result of the meeting on 11 January 2007 Mr Duff was suspended on pay. From 23 January through to 1 March 2007 the Department attempted through telephone messages and emails and posted mail, to make contact with Mr Duff to arrange a meeting to discuss the disclosure he had made to Dr Ruttenberg. A

disciplinary meeting had been scheduled for 1 March 2007, however, Mr Duff did not attend that meeting.

[16] Following his failure to attend the meeting, Mr Duff was advised in writing that the Department considered Mr Duff's actions of not responding to messages, and not attending the meeting on 1 March, to constitute abandonment of his employment.

[17] This letter elicited a response from Mr Duff who advised that the 5 March 2007 letter was the first communication he had received from the Department since being suspended on 11 January 2007.

[18] Whether the Department accepted that explanation or not, a disciplinary meeting took place on 15 March 2007. An investigation report was completed on 29 March 2007 which contained the following conclusions:

- That while the overall content of Dr Ruttenberg's assessment report was accepted by Mr Duff, with the exception that Mr Duff did not accept the statement in the report that he had admitted to daily recreational drug use habit.
- That Mr Duff was vague in relation to the questions asked of him about his drug use.
- That more weight could be applied to Dr Ruttenberg's assessment report as a more credible source of information than to Mr Duff's comments.

[19] Mr Duff was provided with a copy of the investigation report. In his letter enclosing the investigation report, Mr Dalziel reminded Mr Duff that admitting to an offence which would give reasonable doubt as to suitability for continued employment constituted serious misconduct in the Department's Code of Conduct.

[20] Mr Dalziel also advised Mr Duff that he considered serious misconduct had occurred and that a preliminary view as to the penalty for serious misconduct was dismissal. Mr Duff was invited to make submissions on the findings of the report and the proposed disciplinary action.

[21] A copy of the investigation report including its conclusions and potential penalty was provided to Mr Duff in order to seek his response to the findings and the proposed disciplinary action.

[22] At a meeting on 10 April 2007 Mr Duff denied he used drugs and advised the Department that he had undergone a drug test. Mr Duff presented documents at that meeting which he claimed were drug test results. However the document was in fact a sample collection form and did not contain any test results. It was agreed Mr Duff would provide the results of the drug test following the conclusion of the meeting. However, the results were not provided to the Department during its investigation, before the decision to dismiss was made. The results were made available for the Authority and show that the drug tests undertaken on 13 March 2007 returned a negative result.

[23] Following the 10 April meeting and in the face of the denials by Mr Duff, further enquiries were made of Dr Ruttenberg, who confirmed that he stood by his report and advised Mr Dalziel that the comments reported as being made by Mr Duff were accurate.

[24] At a further meeting on 1 May 2007 Mr Duff was advised that the conclusions of the department following its further enquiries was that Mr Duff was not suitable to remain in the employment of the Department and he was dismissed with one months notice.

Determination

[25] The Department's Code of Conduct stipulates that Corrections Officers will be held to particularly high standards of personal behaviour and compliance with the law if they work with offenders. Corrections officers are expected to be role models for offenders.

[26] The Code of Conduct lists examples of conduct which are categorised as serious misconduct. Included in that list is the consumption of drugs, and admitting to an offence which would give reasonable doubt as to suitability for continued employment.

[27] During the investigation into the allegations that Mr Duff had admitted using marijuana on a daily basis, Mr Duff continually denied that he had made such a disclosure to Dr Ruttenberg. In the face of those denials, the Department clarified the matter with Dr Ruttenberg who stood by his report, which he confirmed in writing to the Department. Those denials are inconsistent with the evidence Mr Duff gave during the Authority's investigation meeting where in his written evidence he states:

I accept that I must have made comments about marijuana use and I accept that Dr Ruttenberg would have no reason and indeed did not make up those comments. What I do say though is that I do not recall being asked specifically about whether that could be disclosed to my employer.

[28] While Mr Duff does not recall being asked about the disclosure issue, Dr Ruttenberg includes in his report and in answers to the subsequent enquiries by the Department examples of the statements and questions put to Mr Duff following his disclosure which show Mr Duff provided his consent to Dr Ruttenberg passing on information relating to his disclosure on to the Department.

[29] The Department operates prisons that house serious offenders and is responsible for the health and wellbeing of those prisoners. Corrections Officers play a crucial role in the Department fulfilling its obligations. I accept the submissions from the Department that knowledge of the Applicant's use of marijuana could have led to manipulation of Mr Duff by prisoners and that his admitted drug use gives rise to a reasonable doubt as to his suitability for continued employment.

[30] Mr Dalziel reached his final conclusions following a full and fair enquiry. 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. I find the dismissal was justified and the conclusions reached by the Department of Corrections and the decision to dismiss were what a fair and reasonable employer would have done in all the circumstances.

[31] The circumstances in the case include the very high standards set by the Department for its employees against which they are scrutinised and the need to

maintain those high standards. The Departments Code of Conduct makes it clear that all employees of the Department are required to comply with the law and even minor offences against the law may call into question fitness for continued employment.

Mr Duff does not have a personal grievance and I am unable to be of further assistance to him.

Costs

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority