IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 225/09
5143689

	BETWEEN	JOHN FRASER Applicant
	AND	CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Mark Ryan for Applicant Bridget Smith for Respondent
Investigation Meeting:	16 and 17 March 2009
Submissions received:	26 March 2009 from Applicant 3 April 2009 from Respondent
Determination:	08 July 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent ("the Department") employed Mr Fraser in August 2001 as a Corrections Officer. Within the next four years he was promoted first to Senior and then to Principal Corrections Officer at the Auckland Central Remand Prison. In 2008 he was charged with and convicted of "Driving with Excess Breath Alcohol, Third or Subsequent Offence" which carried a possible prison term. After expressing a commitment to rehabilitation for his alcoholism he successfully avoided a custodial sentence. Instead he was fined and lost his licence.

[2] Mr Fraser disclosed these events to his employer as they arose. Upon learning that he had been convicted, the respondent first placed him on special leave and later suspended him. After meeting with Mr Fraser, Gary Stock, acting manager of the

Auckland Central Remand Prison, told him that The Department believed that his actions breached its Code of Conduct. This Code provided:

"If you work with offenders you will be held to a particularly high standard of personal behaviour and compliance with the law as you should be a role model for offenders."

The Code included amongst examples of serious misconduct:

"Admitting to or being convicted by a court of law of an offence which would give reasonable doubt as to suitability for continued employment."

[3] Mr Fraser was given an opportunity to respond to these preliminary conclusions. In submissions on his behalf, his representatives confirmed that he did not dispute the facts outlined to him by the Department, but requested that it consider disciplinary sanctions other than dismissal. The Department was reminded that Mr Fraser had been employed in late 2001 after full disclosure (at the time) of his previous convictions, which were:

i. 1968- disorderly behaviour;

ii. 1974- impersonating police;

iii. 1974-driving with excess blood alcohol;

iv. 1984-offensive behaviour, and

v. 2001- driving with excess breath alcohol.

[4] It was also reminded that in 2003, he was convicted of a further drink driving charge[1], and had again made full disclosure. He received no warning or other disciplinary sanction and a short time later, he was promoted.

[1] During the early part of the disciplinary process, neither the respondent's own correspondence nor Mr Fraser's submissions correctly identified this charge, which was "Driving with Excess Breath Alcohol,

[5] Finally Mr Fraser's representatives noted his good work record and asserted that the respondent should take account of stress in his personal and work life in the time leading up to his offending.

[6] The Department's decision maker was not Mr Stock but Grace Smit, newly appointed to the role of Assistant Regional Manager, Mt Eden Men's and Auckland Central Remand Prisons. After meeting with Mr Fraser herself, and considering all his submissions, she concluded that she did not have trust and confidence in Mr Fraser not to repeat the behaviour. On 20 August 2008 she wrote to him advising that he was dismissed him with immediate effect. The reason given for dismissal was that he had:

i. *"Breached the Department of Corrections' Code of Conduct by having been convicted by a court of law for both current and prior convictions; and*

ii. *Irreparably breached the trust and confidence the Department of Corrections must have in its Principal Corrections Officers."*

[7] Mr Fraser does not challenge the form of the disciplinary procedure the respondent followed but says that the respondent unfairly took into account his previous convictions. He asserts that his dismissal was unjustified because:

i. the respondent does not have any national guidelines or policies in place regarding the implications for a prison officer if he is convicted of drunk driving;

ii. the respondent did not initiate any form of disciplinary action against him after his conviction in March 2003 and did not advise him that if he were to be convicted again of a drink driving charge his employment would be in jeopardy;

Third or Subsequent Offence." The decision maker, Ms Smit, could not recall exactly when this was clarified but says it was shortly before she made her decision to dismiss.

iii. since 2003 he had been rated highly in his role and indeed had been promoted;

iv. he was not suspended when he first advised his managers that the 2008 charge had been laid;

v. the code of conduct relied upon by the respondent had not been changed since 2003;

vi. a fair and reasonable employer would not dismiss for conduct for which not even a warning had been issued in 2003;

vii. the respondent failed to take into sufficient consideration the personal and work related stress Mr Fraser was under at the time of his offending, and

viii. In all of these circumstances, the respondent cannot objectively justify the allegation that the trust and confidence it had in the applicant was irreparably broken in August 2008.

[8] The respondent acknowledges that current human resources practice within the organisation has departed from previous practice but argues that this is justified.

[9] Mr Fraser also says that his treatment was inconsistent with recent treatment of other staff. The respondent denies that Mr Fraser has been treated in a way that is inconsistent with other recent cases of misconduct which have come to the Department's attention.

Issues

[10] The respondent has submitted that the concessions made by Mr Fraser during the disciplinary process (and confirmed to the Authority) constituted acceptance that his conduct amounted to serious misconduct and that dismissal was a possible outcome (within the range of appropriate penalties that the Department was entitled to

consider.) On that basis, the respondent argues that the only live issue for the Authority is whether the respondent has met the test in section 103A of the Employment Relations Act.

[11] These submissions are accepted. Section 103A provides:

"the question of whether a dismissal …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 occurred."

[12] What a fair and reasonable employer would have done in the circumstances of this case will depend on the following issues:

i. whether the procedure which led to the decision to dismiss was rendered unfair by the taking into account of prior convictions;

ii. whether, in making the decision to dismiss, the respondent gave appropriate consideration to all the circumstances, including the work environment, Mr Fraser's work record and any personal and work related stress he was suffering, and

iii. whether an alleged disparity of treatment (historical or current) renders the dismissal unjustified.

(i) Procedural fairness- the prior criminal history

[13] Ms Smit told me that Mr Fraser's prior excess alcohol convictions became relevant, and were considered, only insofar as they formed an inherent part of his 2008 conviction for Driving with Excess Breath Alcohol, Third and Subsequent Offence. In submissions for the respondent it was argued that:

"the respondent did not rely on those earlier convictions as separate breaches amounting to serious misconduct which contributed to its decision to dismiss. The

only reason the earlier charges were taken into account was on the basis that they were intrinsically linked to the applicant's most recent conviction."

[14] The respondent argues that it was entitled, indeed required, to take the earlier convictions for excess alcohol into account in the sense that they had led to Mr Fraser being charged with the more serious Driving with Excess Breath Alcohol, Third and Subsequent Offence, and in that way could not be separated from it.

Determination

[15] This argument is accepted. I conclude that there was no unfairness associated with the consideration given to Mr Fraser's prior criminal history.

(ii) The circumstances

The employment environment

[16] The respondent has argued that the particular employment environment is a factor to be considered in determining whether the test in s.103A has been made out. It also asserts that it necessarily requires a high standard of conduct from its prison officers, which it sets out clearly in its code of conduct. Ms Smit told me that in making her decision to dismiss:

"The main factor…was that Mr Fraser had been charged with and convicted of an imprisonable offence, for which there are a number of prisoners convicted of the same offence within our prison system…Continuing to have Mr Fraser employed by the Department after having been convicted of such an offence …would undermine the credibility of the uniform, the credibility of the Department, and the service that we are providing."

[17] Ms Smit also told me that in the month of December three prisoners were being held on remand on charges of Driving with Excess Breath Alcohol, Third and Subsequent Offence.

[18] The respondent notes that Mr Fraser has never disputed that his conduct was capable of amounting to serious misconduct and that he was always aware that dismissal was a possible outcome and within the range of appropriate penalties. Given the high level of trust required of a prison officer, other lesser penalties such as demotion, redeployment or transfer were not, in the respondent's submission, appropriate.

Determination

[19] On this issue, also, the respondent's submission is accepted. The specific employment environment is one of the circumstances to be taken into account in the decision making process. I conclude:

i. the Department is entitled (given the nature of its work) to hold its employees to a higher standard than might be expected in some other types of organisation;

ii. The standard set by the Department (and outlined in the Code of Conduct) is in keeping with its specific employment environment;

iii. It was proper for Ms Smit to assess Mr Fraser's offending against the standard set by the Code of Conduct, and

iv. the resulting assessment (that his misconduct was extremely serious) was justified.

[20] In short, in making the decision to dismiss, the respondent properly took into consideration the particular employment environment.

Work record and stress issues

[21] In the period after his 2003 conviction Mr Fraser was promoted from Corrections Officer to Senior Corrections Officer and then to Principal Corrections Officer. For a time in early 2008 he relieved in the role of Acting Unit Manager.

During February and March 2008 however he was counselled about performance concerns and his unit manager, Paul Monzari, was aware that in the period leading up to his offending, Mr Fraser was "under a significant amount of stress."

[22] The issue was formally raised in the disciplinary process on 11 August 2008 when the lawyer who had represented Mr Fraser in respect of the criminal charge passed on to the respondent his pre-sentencing submissions. These included the following:

"John had had a history of problems with alcohol but had been on top of his drinking problem. The only reason he drank on this occasion was as a result of considerable stressors faced by him, including a serious problem involving his eldest son."

[23] On 18 August 2008, before the Department made its final decision, it accepted a further submission on Mr Fraser's behalf from his support person. It included the following references to stress as part of the circumstances surrounding the offence:

*"If the Department considers this type of offending a risk to its reputation and its employees (warranting dismissal) than [*sic*] what measures were put in place to support John, and to provide other staff with a safe working environment???? Did the Department have a duty of care to John and its employees to provide a safe working environment in 2001, and if so, did it adequately discharge its duty of care?*

…

On the evening of this latest offence, 13 June 2008 John had become engaged in an argument with his son, this argument took place at his home…

*The stress resulting from the argument had led John to consume an amount of wine that [*sic*] present in the home…after consuming alcohol he had gone to bed and slept for …six hours…when he awoke…he …decided to drive his son to his mother's home...At that time John gave no consideration to the fact his body may not have metabolized the alcohol he had consumed…*

…

John is both remorseful and embarrassed by his present predicament. He is a 60+ individual, has many problems that need to be addressed regarding his ongoing relationship with his children."

[24] Before she dismissed Mr Fraser, Ms Smit also saw an EAP report prepared as a result of assistance Mr Fraser had sought during the disciplinary process. This report was not provided to the Authority but Ms Smit confirmed that it referred to Mr Fraser's family problems.

[25] During the investigation meeting Mr Ryan also led evidence that Mr Fraser and his unit manager had a disagreement shortly before the offending occurred. This was not however raised with the respondent during the disciplinary process.

Determination

[26] Information about the employee's personal circumstances must be weighed and consideration given to whether these mitigate the conduct under scrutiny.

[27] In this case it is fair for the applicant to assert that the stress issue did not appear to loom large in Ms Smit's deliberations. Her own statement to the Authority does not refer to it. However, reduced to its essentials, the submission was simply that an argument with his son caused Mr Fraser to drink and drive. I do not consider this sufficient to mitigate the conduct in question and cannot conclude therefore that the respondent failed to give it sufficient weight.

[28] As for Mr Fraser's work history, it was squarely before Ms Smit, who was simply not persuaded that it was such as to outweigh the seriousness of his misconduct. I accept this assessment was open to her.

[29] In short, Ms Smit gave sufficient consideration to Mr Fraser's work history and to the submission that personal and work related stress mitigated his conduct.

(ii) Disparity of treatment

Current

[30] In his evidence Mr Fraser made general assertions regarding the criminal records of other staff employed by the respondent but did not provide specifics to

which the respondent could meaningfully respond, or which provided sufficient basis for further investigation by the Authority.

[31] Ms Smit told me that she has been employed by the Department for six years and took up her current role in June 2008. Ms Smit acknowledged that the Department was endeavouring to raise standards. She told me that in 2007 a Christchurch staff member had been formally warned after a conviction for "Driving with Excess Breath Alcohol." Soon after, unit managers were instructed to remind staff of the Respondent's policy on this issue, which was summarised in the following email to Christchurch staffing July 2007:

"Staff are reminded that the Department will not tolerate incidents which lead to their being convicted of any drink/drive offence. In this respect it is significant that we have prisoners in our custody for committing such offences, and staff cannot be effective role models if they too have drink/drive convictions.

Any staff member who is convicted of a drink/drive offence will in future face automatic disciplinary action, which will for a first offence almost invariably involve at least a Final Written Warning, and for subsequent offence, summary dismissal."

[32] There was no evidence that a similar email went to Auckland staff and Mr Fraser cannot recall receiving a specific reminder. He does however concede that "*obviously [*the Department*] had tightened up a bit*" and candidly admitted that he did not initially think he would have any grounds for challenging his dismissal.

[33] Ms Smit told me that Mr Fraser was the only one of her 350 staff who had been convicted of an offence since she became manager of Auckland Central Remand Prison. Ms Smit could recall one other example (within her personal knowledge) where a member of Department staff had been convicted of an offence and had not been dismissed. She told me that the employee had chopped down a tree on his own property (an offence under the Resource Management Act.) Ms Smit argued that the disparity of treatment in that case was justified by the less serious nature of the offending.

Determination

[34] The evidence does not support a finding that there has been any unjustified disparity of treatment between Mr Fraser and other staff.

Historical disparity

[35] For the respondent, Ms Smith has expressed the issue here as being:

"Given the unchallenged finding that the applicant's conduct amounted to serious misconduct, whether the respondent's treatment of Mr Fraser following his earlier conviction in 2003 makes it unfair or unreasonable for it to dismiss him following his 2008 conviction for the same offence."

[36] It is submitted for the applicant that:

"In the absence of any form of warning being issued by the respondent to the applicant following his conviction in 2003… a fair and reasonable employer would not dismiss the applicant for exactly the same incident that occurred in 2008.

Furthermore, if the actions of the applicant in being convicted of a 3rd and subsequent drink driving offence in 2008 irreparably breached the trust and confidence that the respondent had in the applicant, then one would anticipate that the trust and confidence would have been equally irreparably breached following his conviction in 2003..

It is submitted on an objective assessment the allegation that the trust and confidence that the respondent had in the applicant had been irreparably breached cannot be justified."

[37] Although Ms Smit acknowledged that it was not appropriate to go back and review previous conduct, she said she did not agree with the lack of a disciplinary inquiry into Mr Fraser's 2003 conviction. She said she did not consider the

Department should be bound its former lack of action when reviewing the most recent conduct.

[38] The respondent's position is summarised in submissions as being:

*"the applicant's conduct [*was*] incompatible with his continued employment as it would:*

i. Undermine the respect in the respondent, the duties it performs and its uniform;

ii. Put the applicant in the position where he was supervising prisoners convicted of the same conviction.

The respondent determined that parity of treatment in 2008 was more important than a potential disparity of treatment arising from decisions (or lack thereof) made by managers in 2003. Ultimately, the respondent concluded that the respondent's decision not to dismiss the applicant in 2003 (for whatever reason) could not bar the respondent from considering dismissal in 2008."

[39] The respondent says that it should not be penalised for acting generously in the past in respect of its previous conduct and:

"should be entitled to change the way it responds to certain behaviours over a period of time and not be held to previous and potentially out of date decisions. Failure to hold otherwise would mean that an employer was not able to develop its practices or, more particularly, learn from its mistakes."

Determination

[40] The respondent's submissions are accepted.

[41] Notwithstanding the fact that the Department opted not to dismiss Mr Fraser in 2003 (for reasons which remain unknown) dismissal was within the range of possible outcomes then. It was again a possible consequence in 2008. There is no dispute that Mr Fraser was told so at an early stage in the disciplinary process, and accepted it. He

never disputed that his conduct was capable of amounting to serious misconduct and that he could be dismissed for it.

[42] This matter was not one involving performance (where it might be necessary for the employer to clarify the required standard of work.) It concerned serious misconduct, which had been clearly identified in the Code of Conduct. I consider that the respondent would have been entitled to dismiss Mr Fraser even if it had not been "tightening up" on its standards. As it was, (as already recorded) Mr Fraser was well aware that a higher standard of conduct was being required than previously.

[43] At the time of his dismissal, Mr Fraser had been convicted of his third drink driving offence in seven years. The evidence before the Authority indicated that he had a serious alcohol habit which has not resolved since his conviction. I accept that it would have been untenable and irresponsible for the respondent to have overlooked a further instance of serious misconduct.

[44] I conclude that the respondent has justified the termination of Mr Fraser's employment.

Costs

[45] This issued is reserved. If either party wish to make a request for costs this must be done within a period of 28 days.

Yvonne Oldfield
Member of the Employment Relations Authority