IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 44
File Number: 5292103

	BETWEEN	Tony Johnston Applicant
	AND	Livestock Improvement Corporation Limited Respondent

Member of Authority:	Denis Asher
Representatives:	Ian Hard for Mr Johnston Gillian Spry for the Company
Investigation Meeting	Palmerston North, 1 March 2011
Submissions Received	14 March 2011
Determination:	16 March 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Johnston unjustifiably dismissed by the Company? If Mr Johnston was unjustifiably dismissed, did his actions in any way contribute to the circumstances giving rise to his grievance?

[2] Each party seeks costs.

The Investigation

[3] During a telephone conference on 27 September 2010 the parties agreed to a one-day investigation of the employment relationship problem on 1 March 2011 and to a timeline for the provision of witness statements.

[4] Efforts by the parties to settle this matter on their own terms during the investigation were unsuccessful. Arrangements for providing submissions were agreed.

Background

[5] Mr Johnston was employed by the Company as its Territory Area Manager, lower North Island.

[6] On 14 October 2009 he was involved in a motor vehicle accident involving a third party. Conversations about the accident between the applicant and representatives of the Company followed: the parties dispute the content of those discussions.

[7] Mr Johnston advised that, as at the date of the Authority's investigation, he was still awaiting a judgement from the court in respect of the accident and a subsequent Police prosecution.

[8] By letter dated 27 October the respondent advised the applicant of its concerns regarding the accident and that the termination of Mr Johnston's employment might result.

[9] Following a meeting with the applicant on 9 November and consideration of information provided by him in respect of the circumstances of the accident, the Company summarily dismissed Mr Johnston.

[10] The basis of the decision to dismiss the applicant is set out in a letter from the Company dated 18 November 2009, and includes a finding that:

a. Mr Johnston gave different versions of events surrounding a motor vehicle accident on 14 October 2009 such that he lied to the respondent; and

b. He drove a Company vehicle when he had been drinking beforehand and that was a breach of the respondent's code of conduct.

Discussion and Findings

[11] Per s. 103A of the Employment Relations Act 2000 (the Act), the relevant question of whether the dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[12] In *Air New Zealand Ltd v V* [2009] ERNZ 185, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances. It is not a question of what the Authority or the Court might apply.

[13] Credibility findings are required in respect of this employment relationship problem because of profoundly differing recollections of events by the applicant and his managers immediately following the accident. In particular, the managers say that Mr Johnston admitted at the time, on 15 October 2009 and shortly thereafter, to having drunk alcohol before the accident; later, on 19 October and after advising he had seen his lawyer, the applicant altered his explanation to say he only drank alcohol in the car after the accident and after it became stuck in a paddock (which was where the Police found him and conducted a breathalyzer test).

[14] The applicant denies making the admissions claimed by the respondent and says that at all times he made it clear to the Company he did not wish to formally discuss the matter until he had taken legal advice, that he had not been abusive to the

other party to the accident, denied any consumption of alcohol prior to the accident and that he was of the firm belief the other party was responsible for the accident.

[15] Because of the parties' conflicting recollections, and in the absence of any independent evidence, and as I explained to the parties during the investigation, my role is to make a finding not as to what happened but – in respect of their conflicting evidence – what, on a balance of probabilities, was more likely to have happened.

[16] I am satisfied the respondent's managers' version of events is to be preferred to that of Mr Johnston for the following reasons. The evidence provided by Messrs McHale and Ley, respectively the Company's human resource advisor and the applicant's regional manager, is consistent, both in respect of what they say Mr Johnston separately informed them, and with the complaint received by the Company from a member of the public. Both men spoke separately with Mr Johnston very shortly after his accident: Mr McHale telephoning the applicant, and the applicant telephoning Mr Ley. Mr Ley later visited Mr Johnston. Their recollections of those discussions with the applicant contain the same key elements, in particular that he admitted to drinking prior to the accident, and had asked whether he should now resign or could he be made redundant. Mr Ley gave evidence of a later conversation with Mr Johnston, after the applicant had seen his lawyer, during which Mr Ley said the applicant explained how, as there had been a period of time between the accident and being breathalysed, he intended making the claim his drinking post-dated the accident, and had not taken place before. I have no reason to doubt the credibility of this evidence.

[17] There is no evidence before the Authority of any reason why Messrs McHale and Ley would invent their evidence: they impressed as credible witnesses with no axe to grind.

[18] In the background to these events were two uncontested final written warnings involving the applicant during the two and a half years he had been with the Company relating to his conduct after consuming alcohol. Employee assistance programme support had been offered the applicant by the respondent in August 2008.

[19] Mr Johnston was less credible. That is because he had something to lose: at risk was his job, a conviction that could limit if not prevent him from undertaking his employment, and other penalties. I find it more likely that, in the immediate trauma following on from his accident, Mr Johnston provided more accurate data about his accident than he did later, following reflection and advice on the implications of the accident.

[20] Mr Johnston's evidence was less credible for other reasons: he was obliged to make significant concessions in respect of claims he had lost his marriage and house because of his dismissal. Mr Johnston also backtracked on an answer to me in respect of initially accepting he may have told his managers he drank alcohol, to a claim he did not make any admission and did not drink before his accident.

[21] Having properly satisfied itself that the applicant had admitted to drinking before the accident (and thereby misusing a Company vehicle), and that he then changed significantly his version of events (i.e. lied to his employer), I accept that, objectively measured, the respondent's actions and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[22] There is no evidence of procedural unfairness by the Company in its investigation of Mr Johnston culminating in his dismissal.

[23] In the alternative, where I to find Mr Johnston had been unjustifiably dismissed, I would be obliged to take into account in awarding discretionary remedies the applicant's admission – as he claims – of drinking alcohol after the accident (he says he consumed a bottle of wine and several bottles of beer in the back seat of his employer's vehicle), when he had managed to get his vehicle stuck on the side of the road. A finding would inevitably follow that he thereby contributed significantly to the situation that gave rise to his personal grievance would result, possibly to the extent that no award of compensation for humiliation and loss of dignity would be payable; s. 124 of the Act applied.

[24] I note here also Mr Johnston's evidence that, following his dismissal, he only applied for one job with a client of the respondent and thereafter elected to undertake

further study. It follows that the applicant failed to mitigate his losses in respect of wages claimed as lost by Mr Johnston and no compensation of this sort would therefore be payable to him.

Determination

[25] Mr Johnston's claim he was unjustifiably dismissed does not succeed.

[26] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority