IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 30
ARC 91/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WILSON MINHINNICK Plaintiff
AND	NEW ZEALAND STEEL LIMITED Defendant

Hearing: 1 and 2 March 2010

Appearances: Mr P Wicks, Counsel for Plaintiff
Mr P Skelton and Ms A Borchardt, Counsel for Defendant

Judgment: 29 March 2010

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] By determination of the Employment Relations Authority (the Authority) dated 13 October 2009 Mr Minhinnick's dismissal from employment with New Zealand Steel Limited (the company) was found to be justified. He has challenged that decision. The hearing came before this Court de novo.

[2] A subsequent costs determination was issued by the Authority on 3 December 2009. That is not specifically the subject of challenge but needs to be considered as part of the outcome of the substantive challenge.

[3] If Mr Minhinnick is successful in his claim to have been unjustifiably dismissed he seeks an order for reinstatement, reimbursement of lost wages, compensation of not less than $15,000 and legal costs.

Factual discussion

[4] Mr Minhinnick at the date of his dismissal on 6 March 2009 was employed as a cold-strip mill operator on the company's pickle line. He had been employed by the company for 10 years.

[5] The terms of Mr Minhinnick's employment were covered by a salarised 12 hour shift agreement, part of the New Zealand Steel collective agreement effective from 1 June 2005. The shift agreement was reached to ensure manning and cover was available to meet the production schedules adopted by the company. Mr Russell Voigt, the manufacturing manager, giving evidence on behalf of the company, stated as follows:

> 5. Mr Minhinnick was covered by terms of [the] agreement. His salary therefore included 218 paid hours (referred to in the agreement as "banked hours") to be available to provide cover to ensure that the plant was fully manned to meet production schedules at all times. The operating procedures (which are attached as an appendix to the 12 hour shift agreement) are specifically designed to ensure that there is cover for employees who are on leave so the production can be maintained.
>
> ***Roster patterns are known and predictable***
>
> 6. At the relevant time, the pickle line (where Mr Minhinnick was employed) operated four seven man crews who worked on a 12 hour shift roster, four days on, four days off.
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> 7. Mr Minhinnick was employed on the "A" crew. A copy of the availability roster for the A crew for 2008/2009 is attached marked "**A**". As can be seen from the availability roster, there is a colour-coding system that operates to inform employees whether they are employed to cover for day or night shifts.
>
> 8. The supervisor who is responsible for the crew provides each crew member with a hard copy of the roster. In addition, employees can access a copy of the roster from the company's computer system.

[6] The following clauses as they appear in the Rolling Mills Salarised 12 Hour Shift Agreement provide context to the present dispute:

> 2. **Intent**
>
> Teams shall meet **all** production requirements to work safely, produce quality product at the best cost and deliver to the customer on time.

> Individuals will train to be flexible capable operators.
>
> Individuals will provide one day per month for Business Improvement at Management's request.
>
> Teams will 'self manage' the additional time required to ensure that the plant is fully manned to meet production schedules; leave and lieu time is taken and does not build up.
>
> …
>
> 9. **Demonstration of commitment**
>
> As a measure of commitment, an initial performance standard is to be met which is to be personally agreed to by each person working to this agreement.
>
> For a period of 9 months for any area working a 12 hr shift pattern where manning drops below the agreed operating level as per item 4, for four single or consecutive shifts due to lack of availability to work by a person, or where on 4 occasions operators fail to attend business improvement, or consultation meeting as requested, this agreement is considered to be broken, at that time a management decision to return to a 8 hour shift pattern may be made. Individuals who fail to cover as requested leave themselves open to normal disciplinary procedures.

[7] The circumstances giving rise to Mr Minhinnick's dismissal are not in dispute. On Saturday 26 January 2008, Mr Minhinnick failed to be available for work as required under the roster for the day shift. Attempts had been made to contact him at his home and on his mobile phone when it was discovered that another employee who had been rostered on was not available. Mr Minhinnick was required to cover for that particular employee. When he could not be contacted the pickle line then had inadequate manning levels and could not be operated for a period of 12 hours. The balance of the crew rostered for the shift was stood down and given housekeeping jobs. Mr Voigt in his evidence stated that on a normal day the pickle line would process 800 tonnes of coil over a 12 hour period. In January 2008, 800 tonnes of coil would have had a market value of approximately NZ$1.1 million. He goes on to state that while it may have been possible to make up some of this lost production during subsequent shifts a significant cost to the company was incurred as a result of Mr Minhinnick's actions. He referred to the purpose of the salarised 12 hour shift agreement, which is to include generous payment to staff

rostered under the agreement in return for which the company expects compliance in a situation where production is to be maximised to meet demand and procure profits.

[8] Mr Minhinnick stated in his affidavit sworn 1 March 2010 that on 25 January 2008 he had checked the roster but misread it. Apparently he was not wearing his reading glasses at the time. He believed that he was on night shift cover the nights of Friday, 25 January 2008 and Saturday, 26 January 2008. The roster shows that he was in fact rostered on day shift as backup on both Friday and Saturday. He was not required for work on the Friday morning and was not contacted then. In his belief that he was in fact rostered for the night shift and not having been contacted by the company to work he decided to travel to Taumarunui for a golf tournament to be played on the Saturday morning. He would then have time to return to Auckland if he was required to be available for the Saturday night shift.

[9] He goes on to state that he played golf on Saturday, 26 January 2008 teeing off at about 8.00 am. After he had finished his round of golf he contacted the supervisor to see if there could be an early indication of whether he would be required for the night shift. He knew that if required for the night shift he would need to be back in Auckland by 5.30 pm that day.

[10] Of course when he contacted the supervisor he became aware that he had in fact been on the day shift for the Friday and Saturday and it was then that he discovered his mistake. He says it was an honest mistake and the company appears to accept that although I would have thought that he might have provided some explanation as to why he hadn't answered his cell phone when the company was trying to locate him.

[11] The company undertook a disciplinary process between 13 February and 5 March 2008. Throughout the process there was no dispute from either Mr Minhinnick or his union representatives that Mr Minhinnick had breached his obligation to provide cover on 26 January 2008. It was also accepted that Mr Minhinnick was at the time of the incident subject to a final written warning for his failure to meet 12 hour shift contract obligations on an earlier occasion in 2007.

Nor did the union dispute that disciplinary action was warranted but on behalf of Mr Minhinnick the union representative endeavoured to persuade the company to draw short of dismissal and redeploy Mr Minhinnick in another part of the plant. An alternative option put forward was a period of suspension without pay.

[12] The company did look at the issue of redeployment. In respect of one of the positions in the hot mill the manager was reluctant to employ Mr Minhinnick because of his previous attendance record. In respect of another position Mr Minhinnick was unable to accept the position because of a pre-existing back problem. The company therefore decided to proceed with a dismissal and this was confirmed in a letter dated 6 March 2008. Both Mr Voigt and Mr Minhinnick in their affidavits confirm that in reaching the decision to dismiss, the company took into account or was influenced by the fact that Mr Minhinnick was already under a final written warning dated 20 June 2007. That warning made plain that if during the period of 12 months from the date of the warning, disciplinary action was required to be undertaken that Mr Minhinnick's employment with the company was likely to be terminated.

[13] Following the decision to dismiss Mr Minhinnick his union representative requested Mr Anthony Wright, the vice president for human resources and external affairs at the company to undertake a review of Mr Voigt's decision. Mr Wright gave evidence by way of an affidavit dated 23 February 2010 sworn in Singapore. He was cross-examined during the course of the hearing by way of video link. In his evidence he sets out the reasons why he decided not to overturn Mr Voigt's decision to dismiss Mr Minhinnick. In summary he was satisfied that:

a) Mr Minhinnick had in June 2007 received a final written warning for not being available when he had been rostered to provide cover.

b) He had not challenged the issuing of that final written warning at the time.

c) He had breached the obligation that he had as an employee to provide cover in accordance with the 12 hour shift agreement.

d) The obligation to comply with the shift availability roster is a matter of fundamental importance to the company to ensure the effective, efficient and safe running of the company's cold-strip mill.

e) He was satisfied that management had appropriately considered and rejected other options that had been put to them, which may have avoided a dismissal outcome.

f) He was satisfied that in January 2008 when Mr Minhinnick again failed to provide the required cover he was well aware that he was the subject of a final written warning and that his job was in jeopardy in the event that he failed to provide cover as he was required to do in the terms of his employment.

[14] Mr Minhinnick's history of disciplinary matters during the course of his employment is set out in Mr Voigt's affidavit and is not disputed. The history is as follows:

a) 15 September 2001 – non-availability to cover overtime as required – verbal warning issued.

b) 13 April 2003 – failure to be available for work as cover – written warning issued.

c) 13 October 2004 – unsatisfactory performance – formal caution issued.

d) 23 December 2004 – poor performance – written warning issued.

e) 4 January 2005 – unavailable for call out.

f) 4 February 2005 – verbal warning issued.

g) 25-26 November 2005 – unauthorised absence – written warning.

h) 5 May 2006 – poor performance – final written warning issued.

i) 23 May 2007 – failure to provide cover – final written warning issued on 20 June 2007.

j) 26 January 2008 – failure to provide cover – dismissal on 6 March 2008.

[15] There is some dispute on the evidence concerning the final written warning issued on 20 June 2007. That this was issued partly as an extension of the 12 month duration of the warning issued on 5 May 2006 overlooked the fact that the 12 month duration period had expired by the time Mr Minhinnick committed the further breach for which he was disciplined. That 12 month period had well and truly expired before the further final written warning was issued on 20 June 2007.

[16] Finally, when dealing with the factual matters I note that Mr Wright in his review of Mr Voigt's decision indicated that the company primarily relied upon the fact that Mr Minhinnick had breached his obligations under the shift agreement while subject to the final written warning. Historical issues were not taken into consideration when determining the matter that led to the dismissal. This is adverted to also in the Authority member's determination. Nevertheless, it is clear that Mr Minhinnick's previous disciplinary history must have relevance by way of context in the same manner as the purposes for the establishment of the salarised 12 hour shift agreement. The seriousness of Mr Minhinnick's behaviour must be judged within that context.

Issues and principles applying

[17] At the outset Mr Wicks (for the plaintiff) set out four issues to be considered with which Mr Skelton (for the defendant) did not disagree:

a) Did the plaintiff's inadvertent mistake result in valid disciplinary action?

b) Was the plaintiff subject to a valid final warning when dismissed?

c) Were the company's actions and how the company acted, on an objective basis, what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred? (Section 103A Employment Relations Act 2000) (the Act)

d) If the dismissal was unjustifiable is reinstatement an appropriate remedy?

[18] I shall deal with each issue in different order.

[19] The basis upon which the analysis under s 103A of the Act proceeds was initially set out in *Air New Zealand v Hudson*[1] and reiterated in *Angel v Fonterra Co-operative Group*[2]. In the latter decision Judge Shaw summarised the considerations as follows:[3]

a) Justification for dismissal must be determined on an objective basis from the point of view of a neutral observer. It is not enough that an employer makes a decision which falls within an acceptable range of responses.

b) The standard against which the actions of an employer are objectively judged is that of a fair and reasonable employer.

c) The Court may reach a different conclusion from the employer provided it is the result of an objective inquiry rather than a substitution of the Court's decision.

d) The inquiry into justification must focus on all the circumstances which were relevant at the time of the inquiry and the dismissal.

[20] That the Court is endowed with flexibility in its approach under s 103A is confirmed by Judge Travis in *Butcher v OCS*[4]. The issue in that case was somewhat different from the present. Nevertheless it has applicability in light of the issue which has been raised in respect of the expired warning. Judge Travis at para [49] of the decision stated as follows:

> [49] Further, the authorities cited by counsel, including *Reid* in the Court of Appeal, make it clear that the policy does not necessarily have to be followed to the letter. This flexibility in considering the actions of an employer which has failed to follow its own policy has been enhanced by the introduction of s103A. The section requires a consideration of all of the employer's actions and whether the way the employer acted was what a fair and reasonable employer would have done in all the circumstances. This makes it clear that the issue is not whether or not an employer has properly followed every requirement of a promulgated policy document but whether, in all the circumstances at the time the dismissal occurred, the employer's actions were what a fair and reasonable employer would have done. Cases prior to s103A must be read in light of that more comprehensive and flexible objective approach.

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[1] [2006] ERNZ 415.
[2] [2006] ERNZ 1080.
[3] At [73].
[4] [2008] ERNZ 367.

[21] Dealing then with Mr Wicks's second issue, the submission made at the investigation by the Authority member and during these proceedings was that the validity of the dismissal is undermined by the error as to expiry of the previous warning. This in turn led to a technical defect in the subsequent 12 month final warning notice, which influenced and undermined the decision of the company to dismiss on this occasion. It was raised in that way for the first time during the Authority's investigation. The Authority Member did not accept the argument and nor do I. The Authority member in his determination made the point as did Mr Skelton in his submissions before me that even if there was some issue as to the validity of the warning dated 20 June 2007 no grievance was pursued at the time. Mr Minhinnick was aware that the earlier warning may have expired by the time the final warning on 20 June 2007 was issued because it was a matter raised during the then disciplinary interview. The notes of the interview do record that some enquiry was to be made as to that aspect but it is debatable in any event whether the 20 June 2007 warning was issued on the basis that the earlier warning was still extant. On that occasion Mr Minhinnick had apparently undertaken a trip to Australia without arranging backup as he was required to do. That was a serious matter in itself and would have justified the issuing of the warning on 20 June 2007 regardless of whether or not the previous warning had expired.

[22] I do not regard the expiry of the previous warning as undermining the disciplinary process, which followed for further misdemeanours, or impeaching the eventual decision to dismiss Mr Minhinnick. The submission made by Mr Wicks relating to the validity of the final warning issued in June 2007 is answered by the flexible approach, which can be taken to the matter as endorsed in *Butcher*. To submit that the dismissal became unjustifiable by virtue of a technical issue such as that would be to adopt too rigid an approach to the inquiry, which the Court must make under s 103A.

[23] In observing all the facts and objectively evaluating the decisions and actions of the employer at the time of the dismissal, it is significant that while in reality the company had overlooked the expiry of the earlier warning, all of the parties nevertheless believed that the final warning was valid and from the outset acted accordingly. As I have earlier indicated, even though the earlier warning had

expired, the later final warning was nevertheless justified on the basis of Mr Minhinnick's conduct and did not need to be separately justified on the basis of extending an earlier unexpired warning. While Mr Minhinnick appears to have raised some query at the time, he did not pursue the matter further to a grievance and must be deemed to have accepted the position as it stood. Certainly when he failed to perform under the roster approximately six months later he was still subject to the final warning. This clearly spelled out that further breach could result in dismissal.

[24] Mr Wicks has put the issue on the basis of whether the plaintiff was subject to a valid final warning when dismissed. If the question does need to be answered then regardless of the technical imperfection at the outset, the warning was nevertheless valid and accepted by the parties as such. Mr Minhinnick certainly acted on that basis as did his union representative during the disciplinary process.

[25] The next issue to be considered is whether the plaintiff's inadvertent mistake resulted in valid disciplinary action. Mr Skelton in his submission has really re-couched the issue as to one of whether negligent conduct (which falls short of wilfulness) can justify a dismissal. It is clear from authorities such as *Chief Executive of the Department of Inland Revenue v Buchanan*[5], *W & H Newspapers Ltd v Oram*[6], *Fuiava v Air New Zealand Ltd*[7] and *Angel v Fonterra Co-operative Group*[8] that even one-off acts of inadvertence, oversight or negligence can, depending upon the overall circumstances, amount to serious misconduct justifying dismissal. The approach to be taken is that stated by the Court of Appeal in *Buchanan*. Even though that decision dealt with an unjustified dismissal being considered under s 103 of the Act prior to the amendment introduced in s 103A the approach is unaffected. The Court stated at para [36] of the decision as follows:

> [36] In our view, the correct approach is to stand back and consider the factual findings made by the Authority and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal. We do not agree with the Chief Judge that a failure to establish wilfulness creates a presumption that the conduct is not serious misconduct. What must be evaluated is the nature of the

[5] [2005] ERNZ 767.
[6] [2000] 2 ERNZ 448.
[7] [2006] ERNZ 806.
[8] [2006] ERNZ 1080.

obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach. This was correctly done by the Authority and led to the Authority's finding that it was open to Mr Lavin to reach the conclusion that the conduct was serious misconduct and that dismissal was the appropriate sanction.

[26] The following passages from the judgment of Judge Shaw in *Angel* are also of assistance:

> [78] The classification of serious misconduct becomes more problematic where an employee acts out of ignorance, carelessness, or accident but causes serious or potentially serious consequences for the employer or the employer's business. In evaluating whether an employer is justified in believing that such an act has caused the irreparable breakdown of the employment relationship, the Court has to objectively assess whether it was the *consequences* of the employee's action which have led the employer to conclude that there was serious misconduct or whether it was the *actions* or omission of the employee that were so serious.
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> [79] In *Matatoa v Restaurant Brands (NZ) Ltd*[9] the Court stated:
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> > "The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical to the employer's interests. It will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty."
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> [80] With respect, the last four words may have overstated the position. If the behaviour has got to the point of dereliction of duty then that must come close to or even amount to serious misconduct. The word dereliction includes an element of shame[10] and impliedly a deliberate failure to fulfil the required duty.
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> [81] Where an employer investigates an employee's failure to adhere to a policy or code of conduct, it has to assess whether the employee's failure to comply was because of inadvertence, oversight, or negligence or whether it was done deliberately in the knowledge that it was wrong. If the employee did not have knowledge of the relevant policy or rule, a fair and reasonable employer should find out whether that was the fault of the employee for ignoring or failing to take proper care to be familiar with the policy, or whether there was genuine room for misunderstanding as to what the policy meant. This is not to say that it is necessary for an employer to be satisfied that an employee who breaches policy or a code of conduct has done so deliberately in the sense of having *mens rea* or criminal intent (an approach firmly rejected in the *Hepi* case[11]) but it is bound to investigate fully to establish why it occurred.

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[9] [1999] 2 ERNZ 311 at 319.
[10] Concise Oxford Dictionary 10th edn.
[11] *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* [1983] ACJ 656 at 660.

[27] Mr Skelton in his analysis of the *Angel* decision submitted that a careless act can lead to dismissal for serious misconduct. I do not perceive Mr Wicks to be necessarily disagreeing with that submission. Nevertheless, the matter needs to be considered in the light of all of the circumstances and ultimately must revert back to the primary consideration to be made under s 103A of the Act.

[28] There is no suggestion in the present case that the procedures adopted by the company were faulty. Mr Minhinnick was given the opportunity of representation. The company also considered the request made by the union representative that alternative positions within the company could be considered as an alternative to dismissal from the pickle line position, which Mr Minhinnick held. Mr Minhinnick was not summarily dismissed but in fact remained in employment on full remuneration while the inquiry was taking place and upon termination was given a week's pay in lieu of notice. *Coffey v Christchurch Press*[12] discusses the context of a personal grievance claim against the existence of a final warning and also in circumstances where the employer elects a dismissal on notice rather than summarily. Judge Travis in that case, while emphasising that the matter ultimately rested on a proper consideration under s 103A, recognised there was some point to the submission from counsel for the employer that where there is a dismissal on notice the standard of justification required may be lower than serious misconduct and that similar considerations apply where disciplinary action occurs for further behaviour of the employee while under a final notice.

Disposition

[29] The present case is not without difficulty for both parties. By virtue of the dismissal Mr Minhinnick has suffered financially and emotionally. Mr Wicks is to be commended for the comprehensive evidence placed before the Court on Mr Minhinnick's behalf in that regard. Similarly the company was faced with a difficult situation with an employee who apart from attendance issues was otherwise regarded as a competent employee.

[30] As I have indicated more than once the primary consideration is whether the employer's actions and how the employer acted in this case, judged on an objective

[12] [2008] ERNZ 385.

basis, were what a fair and reasonable employer would have done in all of the circumstances at the time the dismissal or action occurred. That consideration must be made in circumstances where the actions of the employee, which have led to his dismissal, were not wilful acts but acts of negligence or oversight. It must also have regard to the financial consequences of his actions; but merely as one not the over-riding feature to consider. The fact that the actions of and consequences for the employer arose in a context of previous similar behaviour by the employee for which warnings were given and that at the time he was subject to a final warning must be part of the consideration. That final warning had been imposed for the very same conduct for which he was dismissed. Finally there is the important contract where the company and the employee's union had negotiated wording and consideration in the collective agreement to reflect the importance of compliance with the salarised 12 hour shift agreement.

[31] Against those circumstances and in that context I am compelled to agree with the determination of the member of the Employment Relations Authority that the decision to dismiss Mr Minhinnick was what a fair and reasonable employer would have done in all the circumstances at the time of that decision. Consideration of Mr Wicks's fourth issue is therefore not necessary.

[32] I am aware that before the Authority there was an issue arising as to disparity of treatment. At the outset of the hearing before me counsel conceded that that was not an issue being pursued before the Court.

[33] The challenge therefore fails. If the costs determination of the Authority was also the subject of challenge, (and this is unclear) then for the sake of clarity I confirm the award of costs of $1,000 made by the Authority Member on 3 December 2009. Costs in the present challenge are reserved as requested by counsel. I allow 14 days for counsel for New Zealand Steel Limited to file a memorandum in respect of costs. Counsel for Mr Minhinnick shall then have a further 14 days to file a memorandum in answer and if necessary counsel for New

Zealand Steel may have a further seven days thereafter to reply. If a right of reply is not required then counsel could simply indicate that to the Court.

M E Perkins
Judge

Judgment signed at 2pm on 29 March 2010