IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 165
ARC 23/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MICHAEL O'CONNOR Plaintiff
AND	PORTS OF AUCKLAND LIMITED Defendant

Hearing:	10 October 2011 (Heard at Auckland)
Counsel:	Simon Mitchell, counsel for plaintiff Kylie Dunn and June Hardacre, counsel for defendant
Judgment:	7 December 2011

JUDGMENT OF JUDGE C INGLIS

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[1] Mr O'Connor was dismissed by his employer, Ports of Auckland (POAL), on 22 January 2010 for serious misconduct. Five days earlier he and a friend had entered a secure car park owned by POAL in an unauthorised manner after he had been drinking, using a stick to unlock the security gate. That mode of entry to the car park was used because Mr O'Connor had given his POAL security card to another friend. Mr O'Connor then proceeded to jump on his car and broke one of its windows. There is no dispute that these events occurred. Mr O'Connor admitted this conduct during the disciplinary process.

[2] POAL considered that Mr O'Connor's actions constituted serious misconduct warranting dismissal. Mr O'Connor had previously been subject to a second offence written warning. That warning was taken into account by POAL in deciding to dismiss him.

[3] The Employment Relations Authority found that POAL had carried out a full and fair investigation into the concerns that had been raised. In light of the previous warning that had been given and the circumstances surrounding the incident at the car park, it held that the decision to dismiss was justifiable because it was what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.[1] Mr O'Connor challenged that determination and sought a full hearing of the entire matter.

[4] Mr O'Connor contends that his dismissal was unjustified. There are two principal planks to the argument advanced on Mr O'Connor's behalf: firstly, that the previous warning given to him had expired and could not properly be taken into account by POAL and, secondly, that his conduct did not amount to serious misconduct justifying dismissal in the circumstances of the case.

Factual background

[5] Mr O'Connor was employed by POAL in the Road Office as an Operations Clerk. During his relatively short time with the company he had received two warnings, though relating to different types of misconduct. He had been warned about excessive use of the internet during company time. He received a second warning in relation to driving dangerously on POAL property. That incident had occurred on 3 July 2009. He was invited to a meeting on 9 July 2009 to discuss the alleged misconduct and a subsequent meeting took place on 14 July. At the conclusion of the meeting Mr O'Connor said that he was unable to work and he was told that he would need to obtain a medical certificate, which he did. The parties met again on 21 July 2009. Mr Ward (Manager – Operations Planning and Customer Service) attended the meeting. His evidence was that Mr O'Connor was advised that he was being issued with a second offence written warning at the meeting. Mr O'Connor accepted that was so under cross-examination. He subsequently signed a letter dated 21 July 2009 as having read, received and understood the written warning.

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[1] [2011] NZERA Auckland 93.

[6] A further incident occurred on the night of 17 January 2010. Mr O'Connor had gone to the city with friends. Mr O'Connor left his car, along with a friend's car, parked at a secure car park area by the Tinley Street entrance to the Bledisloe Terminal. The car park is owned by POAL and is accessible using a POAL security swipe card.

[7] While no security officer was stationed at the car park, one was located nearby at the Tinley Street entrance to the wharf. It is apparent that use of the car park has, since this incident, been tightened up. However there is no dispute that, at the time, the car park was used from time to time by stevedores working for POAL, including for personal use when they went into town in the evening.

[8] Mr O'Connor and his friend had evidently made plans for the night and it had been decided that his friend would take on the role of sober driver. Mr O'Connor gave his car keys to his friend. Attached to his car keys was his POAL security swipe card. Later that evening Mr O'Connor returned to the car park with another friend. The friend with the car keys and swipe card had not yet arrived. Mr O'Connor went to see the security guard who let him into the car park area. He waited by the car and then left the car park again with his friend to buy a drink of water. He says that when they returned he did not want to bother the security guard again and so he and his friend used a stick, poking it through the security gate, to release the button and to open the gate. Having gained entry into the car park area via these means, they returned to the car. Mr O'Connor then jumped on the car and broke a window, apparently to enable him to gain access into it. They left the car park shortly afterwards, when his other friend returned. The incident was captured on CCTV footage and was reported to management by POAL security.

[9] A disciplinary meeting was held on 20 January 2010. Mr O'Connor was represented at the meeting by Mr Phillips, a Union delegate. Mr Ward raised concerns about the mode of entry into the car park area (which he regarded as a serious security breach). He also noted concerns about Mr O'Connor jumping on the car and breaking its window, leaving a substantial amount of glass lying on the ground. In his view this raised safety concerns and potential liability issues for POAL.

[10] Mr Phillips pointed out that the incident had occurred outside the "red fence area" and outside of work hours. The red fence is the fence that demarcates the operational area of the port, which is a customs bonded area and where heavy machinery, straddles and cranes operate. He also made the point that Mr O'Connor had damaged his own vehicle (rather than anyone else's) and that he had given his security swipe card to his friend because he wanted to avoid the temptation to drive, which was a responsible thing to do.

[11] A further meeting took place on 22 January 2010. Mr O'Connor was asked if he had anything further that he wished to say in relation to the matters raised at the earlier meeting. Mr Phillips accepted on Mr O'Connor's behalf that the incident reflected an error of judgment but submitted that dismissal was not an appropriate response. Reference was made by Mr Ward to three previous warnings having been issued against Mr O'Connor. In fact there had only been two. That error was corrected by Mr O'Connor, who said that only one was still in place. This was relied on by POAL in submissions as representing something of a concession by Mr O'Connor. It appears however that it followed an assertion Mr Ward had earlier made in the meeting about Mr O'Connor's previous warning. Mr Phillips said that he had not been in a position to query what Mr Ward had to say because he had been brought into matters at a late stage.

When did the earlier warning expire?

[12] The collective agreement provides that warnings will stand for six months: cl 4.2.6. The agreement does not expressly specify the date on which a warning takes effect. The argument advanced by POAL is that the six month period began on 21 July 2009, being the date Mr O'Connor received the warning at the meeting, and which was recorded by way of letter of the same date. On this analysis the six month period expired on 21 January 2010, some four days after the car park incident occurred.

[13] Counsel for Mr O'Connor submits that the commencement date for a disciplinary warning must be the date on which the incident giving rise to it occurred. If that is correct the warning had expired shortly before the incident giving

rise to Mr O'Connor's dismissal occurred. Counsel further submits that because the warning had expired, POAL was not entitled to have regard to it in reaching the decision to dismiss.

[14] The submission that a warning takes effect from the date of the incident, rather than the date the warning is given to an employee, faces a number of difficulties. It is at odds with the underlying purpose of a warning, namely to give an employee the opportunity to improve or otherwise allay the employer's concerns: *Trotter v Telecom Corporation of New Zealand.*[2] Nor does it accord with the express wording of the collective agreement that Mr O'Connor was subject to. The agreement provides at paragraph 4.2, "Code of Employment": "The company will only give a warning *after* a full investigation…" (emphasis added).

[15] To interpret the start date for a warning in the way contended for on behalf of the plaintiff would logically require a warning to take effect before an essential prerequisite for its issue had occurred, namely a proper investigation and a finding of misconduct. It would likely lead to confusion and debate about the scope of any 'warning' that had been given and the extent to which it could be relied on. It would lead to an employee being disciplined for something that had yet to be established against them. Such a result would cut across the requirements of fair process and proper procedure, potentially lead to significant prejudice for an employee, and puts the cart firmly before the horse.

[16] Further, it would mean that where conduct giving rise to concerns was not discovered by the employer for more than six months after it had allegedly occurred, the employer would be able to take no action in relation to it.

[17] There is an additional difficulty in the argument advanced on Mr O'Connor's behalf. The collective agreement expressly requires that a *written* warning be given for a second offence (clause 4.2.1, "Warning System"). Mr O'Connor did not receive a written warning until 21 July 2009.

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[2] [1993] 2 ERNZ 659 at 680.

[18] The plaintiff's argument also sits uncomfortably with s 114(1) of the Act, which sets out the relevant timeframe for raising a grievance. As counsel for POAL noted, the 90 day requirement for raising a disadvantage grievance in relation to a warning begins with the effective date of the warning or becoming aware of it rather than the date of the incident itself. If Mr O'Connor had wanted to take issue with the warning, he would have had 90 days to raise a grievance commencing on the date the warning was given to him (21 July 2009). As it happened, Mr O'Connor took no steps to challenge the warning.

[19] Counsel for the defendant referred to *Coffey v The Christchurch Press*[3] as authority for the proposition that the warning period commences on the date the warning is given. However, it was accepted in submissions that that issue does not appear to have been in contention in that case. It is likely that the dearth of authority on the point simply reflects the logic of adopting the date a warning is actually given, rather than some earlier date when either the incident occurred or an employee may have been put on notice that the employer had concerns about their conduct.

[20] In respect of the facts of this particular case, it is notable that Mr O'Connor was given written:

> …confirmation that your actions have resulted in your receiving a 'Second Offence' written warning and any further instances of misconduct, serious misconduct or poor performance may lead to your dismissal.

[21] He was asked to confirm his receipt and understanding of the warning, which he did (signing that he had "read, received and understood this written warning").

Date of dismissal relevant date?

[22] Counsel for the plaintiff argued, in the alternative, that if the six months started from the date on which the warning letter was given to Mr O'Connor, then it followed that the date for considering whether the six month period had elapsed was not the date on which the car park incident occurred (17 January 2010) but rather the date of Mr O'Connor's ultimate dismissal (which was advised to him at the

[3] [2008] ERNZ 385.

conclusion of the meeting of 22 January 2010 and confirmed by way of letter dated 5 February 2010). Any other interpretation would, it was submitted, lead to potentially unfair results.

[23] I do not accept that submission. The primary purpose of a warning is to put the employee on notice that steps must be taken to remedy the misconduct that has occurred and to avoid any repetition. The relevant time period must, as a matter of logic, be the date on which the next incident of alleged misconduct takes place.

[24] I find that when the incident occurred at the car park Mr O'Connor was subject to a second offence warning. The warning took effect on the date he received confirmation that his employer was issuing him with a warning (21 July 2009) and was current at the time the incident occurred (17 January 2010).

Reliance on expired warning permissible?

[25] A subsidiary argument was initially advanced by POAL that if the warning had expired (in terms of the six month timeframe) it could nevertheless be referred to in support of a finding of serious misconduct justifying dismissal. Reference was made to a decision of the Employment Court in *Butcher v OCS Ltd*[4] and a decision of the House of Lords in *Airbus UK Ltd v Webb*[5] in support of this proposition.

[26] It was accepted by counsel for the defendant at hearing that any reliance on such an argument was undermined by Mr Ward's equivocal evidence on the issue of what he might have done had he considered the warning had expired.

[27] Given my findings in relation to the currency of the warning at issue in the present case, and the evidence before the Court, I do not need to consider the extent to which a previous, expired, warning can be taken into account by an employer in determining an appropriate disciplinary response.

[4] [2008] ERNZ 367.
[5] [2008] EWCA Civ 49.

Was the dismissal justified?

[28] The decision to dismiss is to be assessed at the time the dismissal occurred. While s 103A of the Employment Relations Act 2000 (the Act) has recently been amended, the relevant statutory test is the one that was in force at the time of Mr O'Connor's dismissal on 22 January 2010. Section 103A relevantly provided that 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.

[29] As the full Court of the Employment Court observed in *Air New Zealand Ltd v V*:[6]

> ... s 103A imposes on the Authority or Court an obligation to judge the actions of the employer against the objective standard of a fair and reasonable employer. It is not the standards that the Authority or the Court might apply had they been in the employer's position but rather what these bodies conclude a fair and reasonable employer in the circumstances of the actual employer would have decided and how those decisions would have been made.

No procedural error

[30] No issue is taken with the disciplinary process that was followed by POAL. The plaintiff submits that the dismissal was not substantively justified as POAL wrongly took into account Mr O'Connor's warning, given that it was stale. I have already found against this submission. In my view POAL was entitled to take into consideration the warning that had been given to Mr O'Connor and which he remained subject to at the time the car park incident occurred. The second point advanced on Mr O'Connor's behalf is that his conduct was not serious enough to justify dismissal.

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[6] [2009] ERNZ 185 at [33].

Substantive justification?

[31] The decision to dismiss is contained in a letter to Mr O'Connor dated 5 February 2010. In that letter Mr Ward says that the incident raised serious concerns for the company. Those concerns were said to arise from Mr O'Connor giving his access and security cards to a person who was not an employee; gaining unauthorised access to POAL property; engaging in an activity and unsafe behaviour that could result in serious injury on POAL property and being on POAL property intoxicated. He confirmed his view that serious misconduct had occurred and that, in reaching that decision, he had taken into account Mr O'Connor's work history and performance, the fact that he was on a current final written warning, and other mitigating circumstances presented by and on Mr O'Connor's behalf. He concluded by saying that the incident had led to a serious breach of trust and confidence in the employment relationship and that Mr O'Connor was to be dismissed.

[32] Mr Ward accepted in evidence that, contrary to the reference in the dismissal letter, there had been no concession by or on Mr O'Connor's behalf that he had been intoxicated at the time the incident occurred. Mr O'Connor refuted the suggestion that he had been drunk, although he readily agreed that he had been consuming alcohol and, as is reflected in the notes of the disciplinary meeting of 20 January 2010, his representative (Mr Phillips) explained that alcohol had been a factor underlying the incident. Mr Ward accepted that it was not (of itself) a breach of any company policy to be intoxicated or to have consumed alcohol when in the car park out of work hours.

[33] Mr O'Connor told Mr Ward that he had given his keys and swipe card to one of the friends he was with as he did not want to lose them or risk being caught by the Police for driving with excess breath alcohol. In evidence Mr O'Connor said that he was aware that many POAL employees adopted the practice of attaching their swipe cards to their car keys. Mr Ward did not accept that this was so but readily conceded that there had been no written policy on the use of swipe cards at the time and that POAL had since introduced a policy in this regard. Mr Ward maintained the view that handing over a company security card, which provided access to POAL

property, to a person who was not a POAL employee posed a serious security risk and was a valid issue of concern for the company. He made the point that Mr O'Connor's security card gave access not only to the car park, but also to the customs controlled red fence area.

[34] Mr Ward accepted that at the relevant time POAL allowed staff members to use the car park where Mr O'Connor parked on 17 January 2010. He said that his concerns centred on what occurred at the car park, rather than the plaintiff's presence there. He was concerned about the way in which access was gained to the secure area of the car park and the safety risks associated with Mr O'Connor's actions there, including the quantity of glass left on the ground after he had broken the car window.

[35] It is clear that Mr Ward took the final written warning into account in reaching his decision to dismiss. It is also clear from the evidence that Mr Ward took into account Mr O'Connor's work history and performance, and other mitigating factors identified by and on his behalf before reaching the decision to dismiss. He concluded that the incident on 17 January 2010 had led to a serious breach of trust and confidence and that Mr O'Connor ought to be dismissed.

[36] The plaintiff submits that there was no basis for Mr Ward's conclusion that there had been misconduct sufficient to justify dismissal.

Relevance of prior warnings

[37] Where an employee has received a final warning for misconduct a further instance of misconduct may justify termination of their employment even though the subsequent misconduct may not, of itself, be classified as serious misconduct.[7]

[38] The position is reflected in the collective agreement, which provides that issues of employee misconduct are to be dealt with in a fair manner, including by way of a warning system. The warning system is set out in cl 4.2.1. Clause 4.2.1(b) provides that a written warning will be issued by the manager or supervisor and a further offence "of any kind" may result in dismissal.

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[7] See also Brookers Personal Grievances at [3.1.08]; *Coffey v The Christchurch Press* [2008] ERNZ 385.

[39] In *Coffey v Christchurch Press*[8] the Court found that, despite swearing and bad language being relatively prevalent in the workplace, it was still justifiable to dismiss the plaintiff for bad language. He had received two written warnings and a final warning about the use of his bad language before he was dismissed. In the present case Mr O'Connor had received two previous warnings in relation to misconduct. The first was in respect of unrelated behaviour (excessive use of the internet during company time). Mr Ward made it clear that he did not have regard to this incident when reaching his decision to dismiss. The second incident involved dangerous driving. Mr Ward's evidence was that Mr O'Connor had been doing "dough-nuts" and driving very dangerously on a POAL car park. While it was not precisely the same conduct as the conduct committed on 17 January 2010, as Mr Ward pointed out, both incidents involved safety issues that the company was entitled to be concerned about.

[40] What is clear is that Mr O'Connor had been put squarely on notice as at 21 July 2009 that any further instances of misconduct might lead to his dismissal. Mr O'Connor can be taken as having appreciated this given that he signed the letter of 21 July 2009 as having "read, received and understood" the warning that had been given to him.

Failure to take into account mitigating factors?

[41] Counsel for Mr O'Connor submits that POAL failed to take into account the mitigating circumstances relating to Mr O'Connor's case, including the fact that he had been out drinking and was merely using his employer's carpark. Counsel also sought to characterise Mr O'Connor's conduct as "skylarking" and as having occurred in the context of a "silly, drunken incident".

[42] While it may have been common for employees of POAL to use the car park while they were attending events in the city, this could not of itself provide a license for what occurred. There were a number of concerning features about Mr O'Connor's conduct that his employer was entitled to regard seriously. While it did not, as was emphasised in evidence, occur within the red fence area it nevertheless

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[8] [2008] ERNZ 385.

involved gaining access to a secure area of POAL's premises by unauthorised means. And while it was put to Mr Ward that (as Mr O'Connor suggested) it was not uncommon for POAL employees to have their security cards attached to their key rings, Mr O'Connor had gone one step further and given his security card to another person, who was not a POAL employee and who he later became separated from.

[43] While the plaintiff made the point that it was not a stranger's vehicle that had been damaged, the fact remained that Mr O'Connor's actions included jumping on a vehicle, breaking its window and resulted in a quantity of broken glass being left on the ground at the car park. And while wanton damage to a stranger's vehicle would almost certainly have made matters worse, Mr O'Connor's actions gave rise to issues of security, safety and potential liability that POAL was understandably concerned about.

[44] There was no written policy in place at the relevant time in relation to swipe card use. However, the validity of POAL's security concerns appears to have been acknowledged by Mr O'Connor himself at the meeting of 20 January. He agreed that with the benefit of hindsight that it was not "the smartest move" in terms of the way in which access was gained to the car park and accepted that POAL might have "a serious issue with breach of security."

[45] And Mr Phillips, who attended the meeting in support of Mr O'Connor, accepted that what had happened did not look good and accepted that the company had an issue with security. He asked for some understanding, suggesting that the incident could be put down to exuberant youth and alcohol and was not that serious as there had been no damage to property and the conduct had occurred outside work hours and outside POAL's operational area.

[46] It is clear that Mr Ward did have regard to the mitigating factors identified by and on Mr O'Connor's behalf, and took time to consider matters before reaching a concluded view that dismissal was the appropriate disciplinary outcome. These included the plaintiff's relative youth, the fact that the incident occurred outside work hours, his work history, the fact that he was near the end of his warning period and other matters raised by and on his behalf.

Decision

[47] Mr O'Connor was on a final written warning at the time the incident occurred. He was squarely on notice that any further incident of misconduct could give rise to dismissal. The incident on 17 January involved a breach of security which Mr O'Connor candidly acknowledged POAL might have a serious issue with. It involved jumping on a car (albeit his own), breaking a window and leaving glass lying scattered about on the ground. It gave rise to health and safety issues on POAL property, and potential issues of liability, which the company was entitled to regard seriously.

[48] I am obliged under s 103A to consider whether the actions of POAL were what a fair and reasonable employer would have taken in all of the circumstances at the time the dismissal occurred. I conclude that they were and that Mr O'Connor's dismissal was justifiable in all of the circumstances, including having regard to the fact that a final written warning had been given to him not long beforehand.

[49] The challenge accordingly fails.

Costs

[50] Costs are reserved. If they cannot be agreed they may be the subject of an exchange of memoranda, the first of which is to be filed and served within 60 days of the date of this judgment. The memorandum in response is to be filed and served within a further 30 days.

C Inglis
Judge

Judgment signed at 2.45 pm on Wednesday 7 December 2011