IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 207
ARC 93/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HENRY NEE NEE Plaintiff
AND	C3 LIMITED Defendant

ARC 94/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANDY NATHAN Plaintiff
AND	C3 LIMITED Defendant

Hearing:	11 and 12 September 2013
Appearances:	Simon Mitchell, counsel for plaintiffs Phillipa Muir and Rebecca Rendle, counsel for defendant
Judgment:	20 November 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The two plaintiffs were employed by the defendant (C3 Limited) as stevedores at the Port of Auckland. They were delegates of the Maritime Union of New Zealand and health and safety representatives at the worksite. As well as being

senior employees they were regarded by the defendant as having leadership responsibilities.

[2] As a result of a previous incident on the defendant's premises at the waterfront, it imposed a liquor ban. Under this ban no liquor was to be brought onto or consumed on the premises.

[3] It came to the notice of the defendant that on the evening of 2 February 2012, a group of employees had been drinking alcohol in the locker room in breach of the ban. An initial investigation was carried out.

[4] The defendant decided as a result of its inquiries that four of its employees and two employees of another stevedoring company had been drinking in the locker room. The plaintiffs were members of that group. Following a disciplinary procedure the plaintiffs were dismissed from their employment.

[5] The plaintiffs raised personal grievances against their dismissal. Eventually these were subject to an investigation meeting in the Employment Relations Authority (the Authority). The Authority made a determination on 14 December 2012 that the plaintiffs were justifiably dismissed.[1]

[6] The plaintiffs filed challenges to the determination. The Court directed that they be heard together. The two matters then came before the Court for hearing. At the commencement of the second day of the hearing the plaintiff, Henry Nee Nee, indicated through counsel that he was withdrawing his challenge. Accordingly, an order was made dismissing Mr Nee Nee's challenge with reservation on the issue of costs. Timetabling was directed for the presentation of submissions on costs in the event that agreement could not be reached.

[7] This judgment deals with the remaining challenge by Mr Nathan. Of necessity, reference will be made to matters also relating to Mr Nee Nee and his challenge. It also deals with the application now formally made by the defendant for an award of costs against Mr Nee Nee.

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[1] [2012] NZERA Auckland 457.

Pleadings

[8] Mr Nathan claims that his dismissal was unjustified because:

a) Other employees who were not health and safety representatives or union delegates were not dismissed for their involvement with drinking on the night in question;

b) The actions of the defendant were discriminatory, due to the defendant taking into account Mr Nathan being a union delegate and health and safety representative as aggravating features in the decision to dismiss him;

c) The actions of the defendant were disparate as to treatment between employees involved in the same incident;

d) The actions of Mr Nathan did not amount to serious misconduct in all the circumstances and dismissal was therefore unreasonable.

[9] As to remedies, Mr Nathan seeks:

a) Reinstatement;

b) Reimbursement of lost wages;

c) Compensation for humiliation, loss of dignity and injury to his feelings.

Factual outline

[10] The liquor ban imposed by the employer arose from an incident on 22 September 2011. There was a serious assault in the canteen resulting in injuries to an employee. Apparently this employee fell down a stairway leading from the canteen to the ground floor. He was badly injured. The ban came into force on the following day. The ban was well publicised around the workplace, and in addition

Ronald Neil, the Auckland Manager of C3 Limited, sent a text message to all staff notifying them of the ban.

[11] Both Mr Nathan and Mr Nee Nee were union delegates and health and safety representatives. As health and safety representatives they attended a health and safety meeting on 27 September 2011 where the liquor ban and its reasons for introduction were discussed. The minutes of that meeting record their attendance and that that discussion took place.

[12] On 2 February 2012, Mr Nee Nee and Mr Nathan, at the conclusion of their shifts, went to the locker room. Mr Nee Nee had been there earlier in the day. He claimed that he noted on the earlier occasion that there was a box of beer in the fridge located in the mess room. He also claimed that there were some bottles of ginger beer in the fridge. During the day he noticed some of the other employees fishing on the wharf. He informed them of the beer located in the mess room. When he finished his shift he went to have a shower and when he came back he noticed that the other workers were there and had started to drink the beer in the locker room. He initially claimed to have consumed only ginger beer but later conceded drinking a bottle of beer. This concession came late in the disciplinary procedure, which followed.

[13] Mr Nathan later went to the locker room following the conclusion of his shift. When he was in the locker room he was offered beer. He initially denied consuming alcohol but much later stated that he unwisely accepted the beer offered to him. He said that he drank one bottle of beer. He indicated that knowing of the liquor ban he informed the other workers of the risk of breaching the ban and encouraged them to leave the locker room. He claimed that they then all went downstairs. He went to a nearby supermarket and bought some more beer. They drank this on the footpath outside, which is off the employer's premises. It appears that the drinking session, which occurred partly upstairs on the defendant's premises in its locker room and partly in the public area outside the premises, must have continued for some time. Mr Nathan reiterated during his evidence what he had told the initial inquiry and subsequent disciplinary meetings, that not being in a fit state to drive home he had contacted his niece to come and collect him. Other employees present claimed Mr

Nathan drove himself home. From the defendant's inquiries it appeared that in total 66 bottles of beer were consumed. It was accepted that one of the six present did not drink any alcohol.

[14] The employer became aware of the drinking session and, therefore, the breach of its liquor ban, the following day. An inquiry was commenced. As part of the inquiry photographs were taken of the number of beer bottles that were left in rubbish bins outside the premises and where the canteen, mess room and locker room are located. There was uncontested evidence from the employer's gear store manager that on the morning of 3 February 2012 he noticed that the wheelie bins inside the smoko room and the 20 litre paint tin outside the building were full of empty beer bottles and beer boxes. He also gave evidence of some significance that after the ban was first imposed he had been asked to monitor the situation and report to the Auckland Manager if he found empty beer bottles or cans in the bins. He stated in evidence that before the ban was imposed there would regularly be beer bottles or cans in the rubbish bins and they would smell of beer. After the liquor ban he could not recall finding any empties in the internal rubbish bins. He stated that the external bins outside in the street would have the odd empty beer bottle in them from time to time. This evidence has some significance in meeting an assertion of Mr Nee Nee and Mr Nathan that following the liquor ban the company was inconsistent in monitoring the ban and that drinking had been allowed to take place on the premises. The company denied this.

The investigation

[15] Once it was ascertained that there had been a serious breach of the liquor ban involving the six employees, the company carried out interviews. There was some delay in the commencement of the inquiry because of work pressures and the Waitangi Day holiday weekend intervening.

[16] The inquiry also involved separately interviewing each of the participants known to have been present. Mr Nee Nee denied drinking any beer and said he had only consumed ginger beer. During the course of the investigation he produced

some bottles, including a ginger beer bottle he claimed to have retrieved from the bins, to corroborate his assertions.

[17] Mr Nathan denied drinking beer on the premises but admitted drinking outside the premises as he was permitted to do. During the course of the disciplinary investigation, but not initially, he also indicated that he had gone to the supermarket to buy more beer and raised an assertion that he had only consumed ginger beer on the premises.

[18] As the inquiry and interviews proceeded, and with three other employees freely admitting consumption of alcohol on the premises and their assertions that Mr Nee Nee and Mr Nathan also did so, the truth began to emerge.

The disciplinary process

[19] The investigation was initiated by the Auckland Manager and was then continued by Warren (Baz) Pritchard, the General Manager of the defendant. The fact gathering inquiry commenced in early February soon after the drinking incident. That inquiry ascertained that there had been a breach of the liquor ban by some of the employees. It also ascertained the names of the employees present.

[20] When Mr Nathan was interviewed in the preliminary stages he falsely alleged that Mr Nee Nee was not present. He also alleged that knowing of the liquor ban he encouraged the other employees who were drinking in the locker room to go off the premises. He stated that the others had been with him but that he did not drink on the premises. He made no assertion at that stage that he had only consumed ginger beer.

[21] Enquiries of the other employees eventually ascertained that both Mr Nee Nee and Mr Nathan were on the premises with the others and consumed beer. The enquiries also revealed that the assertion by Mr Nee Nee that the beer and ginger beer had been earlier left in the fridge might have been false. His claim as to consumption of only ginger beer and production of an alleged ginger beer bottle

from the premises was also subject to scrutiny and subsequently treated with scepticism.

[22] Initial disciplinary interviews took place with both Mr Nee Nee and Mr Nathan on 26 March 2012. Both denied drinking alcohol on the premises. They disputed the assertions of the other employees who were present. Mr Nee Nee continued with his claim that he was drinking only ginger beer. Mr Nathan, during the first disciplinary interview, stated for the first time that he had consumed only ginger beer and that a box of four bottles of ginger beer had been purchased. He had not mentioned this during the earlier investigations. Any beer he consumed on the night in question he claimed was off the premises.

[23] Following consideration of the statements made by Mr Nee Nee and Mr Nathan the company notified both of them that it did not accept their version of events. They were advised that their behaviour was believed to amount to serious misconduct and in view of their status and failure to be open about the matter as the other employees had been, the company needed to consider whether trust and confidence in both of them remained. The meetings were adjourned to enable them to make further representations after considering the company's preliminary conclusions.

[24] Letters were written to both Mr Nee Nee and Mr Nathan confirming the company's views. Russell Mayn, the union representative of the plaintiffs indicated a desire to meet with the management of the company. This meeting could not be resumed for several days in order to accommodate the other commitments of the union representative. The second meeting took place on 2 April 2012. Only the union representative was present at this meeting with the company managers. He made submissions on behalf of the employees that a step short of dismissal would be the appropriate response. He indicated that he had given both the plaintiffs a "dressing down". This caused some concern to the company managers in view of Mr Nee Nee's and Mr Nathan's assertions up until that time. The managers considered that the fact that the union had considered dressing the plaintiffs down was inconsistent with the version of events they had given. There would be no need for such a dressing down if they had not breached the liquor ban as they were

maintaining. By this stage it was apparent that the stance taken by Mr Nee Nee and Mr Nathan was unravelling.

[25] On 5 April 2012 following discussions with their union, Mr Nee Nee and Mr Nathan each attended a meeting with the company at which they presented written statements confessing to consuming alcohol on the premises in breach of the liquor ban. At that stage they were seeking the company's indulgence to impose disciplinary measures short of termination of employment.

[26] In view of Mr Nee Nee's withdrawal of his proceedings, his statement does not need to be considered further. Mr Nathan's statement presented at the meeting reads as follows:

> I, **ANDY NATHAN** state:
>
> 1. I have been advised by the Maritime Union of New Zealand that the Company is considering my explanation following an allegation that I have been drinking in the workplace.
>
> 2. I have thought very hard about what has happened, including my initial denial that I had been drinking on the night.
>
> 3. I did accept that I did drink on the night, and should have immediately admitted that I did so, when I had the first opportunity at the disciplinary meeting.
>
> 4. I regret that I did not do that. I panicked as I was worried about my job. Both myself and my family will be hugely affected if I am dismissed from my job.
>
> 5. I would like to apologise to the Company, not only for the events of the night, but also for not stating the full story when I first had the opportunity.
>
> 6. I am very keen to stay working for C3 Limited. I love my job. I do not want to be dismissed.
>
> 7. I did not play a big role on the night. I did not buy the alcohol. I did not take it to work. I accepted a bottle when it was offered to me. I regret that and know it was a very stupid thing to do.
>
> 8. However, I believe that these are mitigating factors. Even in the face of my not being up front when I was first questioned, I believe that I can remain working at C3, and make a positive contribution to the Company.

[27] Despite that clear written concession made by Mr Nathan during the course of the meeting that he had breached the liquor ban by drinking alcohol on the premises, the managers were concerned at his attempt to downplay his role. Despite stating that he did not buy the alcohol, he conceded under cross-examination to purchasing two boxes of beer. He claimed, though, that these were consumed off the premises.

[28] Following the meeting on 5 April 2012, the managers took time to consider what had been submitted at that meeting and to review the written statements that had been provided. Matters taken into account were the roles which both plaintiffs had played. There were also their positions as union delegates and health and safety representatives which meant, in the company's eyes, that they had a greater awareness of the reasons for the liquor ban and its importance, and the company relied upon them in their roles to provide an example for the other employees. Also taken into account was the fact that over a long period during the disciplinary process they had maintained falsely that they had not consumed alcohol when in fact they had, as indeed they eventually admitted.

[29] On 10 April 2012 both Mr Nee Nee and Mr Nathan were sent a letter terminating their employment on the grounds of serious misconduct. The letter sent to Mr Nathan reads as follows:

> **TERMINATION OF EMPLOYMENT**
>
> This letter serves to confirm our decision to terminate your employment effective immediately for serious misconduct.
>
> We have made the decision to summarily terminate your employment, because we have concluded that you had breached the liquor ban policy which is in place at the Auckland site. This amounted to a breach of our Code of Conduct: Section b. bringing or consuming liquor on company premises without the permission of management, and Section m. refusing to carry out an instruction from a manager (being non-compliance with the liquor ban policy). Both of these sections are specified as serious misconduct.
>
> We concluded that you had breached the liquor ban and that this was a breach of the Code of Conduct because:

- You acknowledged that you had consumed beer on company premises and others had told us that they observed you drinking beer. This was a clear breach of the liquor ban (which you acknowledged you knew was in place) and, therefore, the Code of Conduct.

- You are a Health and Safety delegate and a union representative and you have failed to display the behaviour that we would expect from you.

- Despite the alcohol consumed, you appeared to be the only one in the group who failed to remember details of the day's events.

- You were inconsistent in your accounts given during the process – for example, only mentioning ginger beer during the disciplinary process (you never referred to it during our investigation), and at the disciplinary meeting you started by saying you drank ginger beer, but then admitting to drinking beer.

- You acknowledged that you were intoxicated and said you did not drive home, but the other people present that night, Josh Iosua and Tangi Williams said that you did drive home.

In light of all of these factors, we told you on the 26th of March that our preliminary view was that the allegation of serious misconduct (ie breach of the liquor ban policy and Code of Conduct) has been upheld against you and that we were proposing termination of your employment. We proposed termination as a result of our concerns about your behaviour and the fact that you did not appear to have been honest or up-front with us during the process. You were also in a position of trust as a Health and Safety representative.

We invited some comments from you and your union on the proposed outcome and gave you time to take advice.

We then met with Russell Mayn on 2 April so that he could give us feedback on the proposed decision on your behalf. Russell made the following suggestions as alternatives to our proposal:

- A meeting be held by the company and the union to reinforce the liquor ban;

- Removing you from the position of Health & Safety representative;

- A discussion about removing you as a union delegate;

- A couple of weeks suspension without pay;

- Possibly a warning (although Russell did not accept this could be a final warning); and

- Attendance at an alcohol management course.

After hearing from Russell and considering the points he had made, we contacted him again to emphasise that we wanted to hear from you about our proposal.

Following this, Russell told us that you would like to meet with us again to respond to our proposal and so Ron met with you and Dave Phillips (from your union) on the morning of 5 April 2012 to hear your further comments. Baz attended by telephone link from Tauranga. At this meeting you acknowledged that you had been drinking and you also acknowledged that you should have admitted your involvement right away.

We took time to consider the statement you made at the 5 April meeting, and your union's suggestions about alternatives, before reaching our final decision.

However, we have ultimately concluded that immediate termination of your employment is the appropriate outcome.

In relation to the union's alternative suggestions, we did not accept that they were viable or appropriate for the following reasons:

- Reinforcing the liquor ban: The liquor ban was discussed at a Health and Safety meeting you attended and widely publicised and we did not accept that there was any benefit in reinforcing this with you – you should have been well aware of it, and we believe you were.

- Removal as Health & Safety representative: Removing you from the role of Health & Safety Representative would not address the wider concerns we had about your behaviour and the fact that you were not honest and up-front with us during the investigation and disciplinary process.

- Removal as Union delegate: This is a Union issue and a Union imposed sanction, not something which addresses the concerns we have.

- Suspension without pay/warning: In light of your failure, until the "11th hour", to admit that you had been drinking and to acknowledge responsibility for your actions, we did not consider that a suspension for a couple of weeks or issuing a warning would address our concerns. In light of your failure to accept responsibility for your actions early on in the process and in view of the fact that you have not, at any point, seemed to understand the seriousness of the issue from the company's perspective, we do not believe these steps will be sufficient to mitigate the risk that there might be another breach of the liquor ban (with the safety risks that would then arise), or to give us trust and confidence in you moving forward. We were also concerned that you had told us that other staff were drinking – but you had not admitted your own involvement.

We recognised that, on 5 April 2012, you did acknowledge by reading from a prepared statement that you were drinking and also expressed regret that you did not admit this immediately, but we were concerned about the fact

that this acknowledgement came very late, and only after we had advised you that we were considering dismissing you and emphasised the seriousness of the situation to your union representative. We had already had two previous meetings with you by this time and you had seen our investigation report. You had plenty of time to tell the truth and you did not do so. In fact, even at the disciplinary meeting you changed your account again, referring to the fact that you and Henry Nee Nee had ginger beer; not beer (although later in that meeting you said it was highly probable you had consumed beer).

Further:

- Even in your statement presented at the 5 April 2012 meeting, we consider that you understate your part in the matter – saying that you did not "play a big role on the night". We do not accept this as our investigation showed that you were drinking in the locker room with the other staff for a few hours.

- Your union representative has asked us to consider what it has taken for you to come forward and admit your part, and we are concerned that it appears to have taken pressure from your union for you to tell us the truth.

- We also considered your statement was all but for one or two paragraphs identical to another produced on the 5th by Henry Nee Nee and that this detracted from the sincerity of your admission and apology.

Weighing all of this up, we concluded that your actions amounted to serious misconduct and that we could no longer have trust and confidence in you. Therefore, your employment would be terminated without notice effective immediately.

We will calculate your final pay entitlements and provide you with you[r] final payslip in the coming days. Please return immediately your Ports of Auckland Hoist card, Ports of Auckland Gate pass and all C3 branded protective clothing.

You are entitled to appeal this decision within three days of receiving this letter. If you wish to lodge an appeal, you must notify our CEO Dean Camplin in writing the specific grounds upon which you wish to appeal the decision in accordance with the process advised in our code of conduct.

Principles applying

[30] The defendant must establish that the dismissal of Mr Nathan was justifiable. The statutory test of justification is contained in s 103A of the Employment Relations Act 2000 (the Act). That section states:

103A Test of justification

(1) 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 applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[31] In *Angus v Ports of Auckland Ltd*[2] a full Court considered recent amendments to s 103A, and the scope of the Court's enquiry with regard to its decision in *Air New Zealand Ltd v V*[3]decided prior to the amendments. The Court stated in *Angus* as follows:

> [24] There are substantial and significant parts of former s 103A that are unaltered. The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established, as was argued unsuccessfully for the employer in *V*. That has never been the position and is not so under the most recent amendments. The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer's response to those conducts.

[32] The Court, in analysing the section, emphasised that the role of the Court is not to substitute its view for that of the employer. It is to determine on an objective

[2] [2011] NZEmpC 160.
[3] [2009] ERNZ 185.

basis whether the actions of the employer fell within the range of actions that a notional fair and reasonable employer could have taken in all the circumstances at the time. In this regard, the Court stated as follows:

> [58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[33] Both Mr Mitchell and Ms Muir, counsel for C3, referred to *Angus.* Consideration of other authorities can in some cases be useful, but it is unnecessary to go beyond the statements made by the full Court. It restated the principles applying prior to the amendment to s 103A and set out how they are to be applied in the light of the statutory amendments.

[34] The following passages from *Angus* set out the effect of the amendments:

> [22] The change from "would" in former s 103A to "could" in new s 103A is not dramatic but, contrary to the submission put to us by Mr Mitchell, it is neither ineffectual nor even insignificant. The Authority and the Court must continue to make an assessment of the conduct of a fair and reasonable employer in the circumstances of the parties and judge the employer's response to the situation that gave rise to the grievance against that standard. What new s 103A ("could") contemplates is that the Authority or the Court is no longer to determine justification (what the employer did and how the employer did it) by a single standard of what a notional fair and reasonable employer in the circumstances would have done.
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> [23] The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So, to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.

The delay in the process

[35] An issue, which has been raised in defence of Mr Nathan, is that the company was being inconsistent with its assertion that it had lost trust and confidence in Mr Nathan. The reason for this, as submitted by Mr Mitchell, counsel for Mr Nathan, was that the company acted with inordinate delay in continuing and completing its investigation leading up to dismissal. If the company had lost trust and confidence in Mr Nathan, it would have suspended Mr Nathan at a far earlier time rather than keeping him working on the site until the conclusion of the disciplinary process before dismissing him. Whereas the investigation commenced with the initial inquiry on 3 February 2012, disciplinary meetings continued into March and April 2012 with the dismissals being confirmed on 10 April 2012 and the subsequent internal appeal process then taking through until 10 May 2012. The act of keeping Mr Nathan on the worksite for this lengthy period was submitted as being inconsistent with the assertion later made as to a loss of trust and confidence in him.

[36] Mr Nee Nee's and Mr Nathan's claims that they had not consumed alcohol on the premises became undermined as a result of the statements made by the other employees. Even so, well into the disciplinary interviews they maintained their position. Mr Nee Nee, continued with his original assertion that he had consumed only ginger beer on the premises and not alcohol, and Mr Nathan asserted that he only drank alcohol off the premises and then later asserted, after Mr Nee Nee had done so, that he also drank only ginger beer on the premises. Eventually as a result of intervention by the union Mr Nee Nee and Mr Nathan came clean and admitted consumption of alcohol on the premises. They minimised their involvement, even during the hearing itself. Mr Nathan, well into the interview process, insisted on using the words that it was only "highly probable" that he had consumed beer rather than making an outright confession.

[37] Once the game was up, Mr Nathan and Mr Nee Nee, accompanied by union representatives threw themselves at the mercy of the employer with a request not to terminate their employment. By this stage there was a distinction between Mr Nee Nee and Mr Nathan, on the one hand, who had persisted with misleading and thereby impeding the employer throughout the disciplinary process, and the other employees,

on the other hand, who had freely admitted their involvement from the outset. One of them had, for a short period, maintained that he had not consumed any alcohol. Another employee, it was accepted, had not consumed alcohol at all.

Conclusions

[38] The procedures adopted by the company in this matter were in full compliance with the requirements contained in s 103A(3). I did not understand Mr Mitchell to be arguing otherwise. However, his submission that the delay undermined the company's assertion as to a loss of trust and confidence is not tenable. It was open to the employer in the circumstances which prevailed not to suspend or act precipitously insofar as Mr Nathan was concerned, until all of the facts were known. It was not until the final meeting that concessions were made by Mr Nathan. This was some eight weeks after the original incident and during that period the company in its investigation and disciplinary procedures had been subject to claims by Mr Nathan and Mr Nee Nee that they had not consumed alcohol while other employees were maintaining that they had. The managers therefore clearly took care to ensure that a fair process was adopted and that out of fairness to Mr Nathan they ascertained the correct factual position. Certainly Mr Nathan had adequate opportunity to respond to the allegations as they were made.

[39] Mr Mitchell made the submission that the company's reliance on the fact that the plaintiffs were union delegates and health and safety representatives amounted to discrimination. As submitted by Ms Muir, no grievance is based on this claim and so the submission has to be aimed squarely at the criteria under s 103A of the Act and on the basis that absent those factors the employer in this case would not otherwise meet the threshold justifying dismissal.

[40] The company pointed to the fact that as union delegates and health and safety representatives, the plaintiffs were in a position of responsibility and therefore should have had greater awareness of the consequences of their actions. Rather than discrimination, it was recognition by the company of their status among fellow employees and upon which the company relied. With this responsibility came consequences. The facts cannot be interpreted as a case of the employees being

discriminated against because they held those positions, but rather they entitle the company to take a sterner view, particularly in light of the continual denials in the face of the overwhelming escalating evidence to the contrary. It was clearly a factor taken into account not by way of discrimination but rather as a factor going to the s 103A criteria. There was a basis for the company to say that unlike other employees, as delegates of the union and as health and safety representatives, the plaintiffs could not claim to be unaware of the seriousness by which the company would view a breach of the liquor ban.

[41] This leads into the submission made by Mr Mitchell that the dismissal was unjustifiable on the ground of disparity of treatment. Mr Mitchell submitted that all employees were guilty of the same misdemeanour, i.e. drinking alcohol on work premises. Only Mr Nee Nee and Mr Nathan were dismissed. The company's justification for this was that the other employees freely conceded the breach of the liquor ban whereas Mr Nathan did not. Another basis put forward was that Mr Nathan was in a responsible position as union delegate, health and safety representative and a senior employee. He should therefore have been more aware than the others of the consequence of his breach of the liquor ban. Mr Mitchell submitted that the issue of admission as a ground for not dismissing the other employees does not stand scrutiny as a basis for disparity. However, he gives no reasoning as to why this is so. In respect of the second ground, he submitted that this amounts to discrimination and therefore an unlawful basis for disparity of treatment.

[42] The level of deception and the context in which it occurs needs to be considered in the circumstances of each case. Mr Mitchell, in his submissions, referred to other authorities where the point had been considered. He attempted to distinguish Mr Nathan from them on the basis of the relative levels of seriousness. It is correct, also, that in the present case one of the employees who was not dismissed, initially set out to deceive but conceded his breach of the liquor ban at a relatively early stage.

[43] Mr Mitchell referred to a number of authorities dealing with the issue of dishonesty occurring during the disciplinary process. The Court has recently dealt

with this issue in *George v Auckland Council*.[4] The following statements of the Court have application here:

> [97] In determining the scope of the employer's obligations and what is and is not permitted, it is useful to return to first principle. There is no doubt that dishonesty in the context of an employment relationship can give rise to disciplinary action and dismissal. That is because trust and confidence lie at the heart of the relationship between employer and employee. This is reinforced by the statutory obligations of good faith provided for in s 4 of the Act. I see no reason in principle why an employee who is untruthful to their employer during the course of a disciplinary process should be immune from disciplinary action. It would undermine the obligation of responsiveness that rests on each party and would encourage deception, rather than openness and honesty.
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> …
>
> [99] In *Honda New Zealand Ltd v New Zealand Boilermakers Union*, a majority of the Court of Appeal observed that:
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> > ... in an employment situation the telling of a lie, or even prevarication short of a lie, strikes at the fundamental requirement of honesty and good faith, so that its true relevance is as part of the total factual context in which the justification for the dismissal is to be considered ... A proved lie, told in denial or explanation of an allegation of misconduct, may not necessarily assist in the proof of the misconduct, but may be misconduct in itself.
>
> [100] It will not suffice for an employer to merely assert that dishonesty has occurred and proceed to rely on it in determining what disciplinary action to take. This gives rise to a further issue, namely what steps the employer is obliged to take and the extent to which separate proceedings are required. This was considered by the Court in *Port Nelson Ltd v MacAdam (No 1)* where Chief Judge Goddard stated that:
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> > As a general rule, an employee who is called to answer an allegation that he has been guilty of conduct of a particular kind cannot be dismissed if suspicion emerges during the course of an inquiry into that allegation that the employee may have been guilty of conduct of a different kind, including lying to the employer. That needs to be the subject of a separate set of disciplinary proceedings.
>
> [101] In order to undertake a fair and proper disciplinary process an employer is obliged to meet certain minimum standards, including adequately particularising the concerns that he/she has; identifying the potential consequences of a finding against the employee; providing sufficient information and a reasonable time to respond; and giving adequate consideration to any explanation given. I do not accept, however, that an employer who becomes concerned that an employee is not being truthful in his/her responses is obliged to conclude a disciplinary process that is already in train and then embark on a new process, or initiate parallel processes. That would lead to unnecessary complexity, delay, and inefficiency. Provided that the requirements of fair process are met, an employer may

[4] [2013] NZEmpC179 (now subject to appeal).

> identify a concern about truthfulness and deal with that concern in the course of a pre-existing process. Whether the process that was adopted in this case met the minimum standards is answered by a consideration of what in fact occurred, rather than an application of blanket rules.

[44] In the present case, Mr Nathan and Mr Nee Nee set out to deceive from an early stage in the process and maintained their positions until it was apparent that the subterfuge could no longer logically continue. It was a serious deception. I have considered Mr Mitchell's submissions on discrimination, but cannot accept that this is a valid ground for excluding the employer's ability to rely upon their status within the workplace as aggravating their culpability and using it to provide a basis for disparity with the other employees. I accept Ms Muir's submissions in this respect. It is a factor the employer should be able to take into account in the overall assessment of misconduct and the appropriate response to it.

[45] For the reasons considered and enunciated in *George* and *Honda New Zealand*, the deception and the persistent maintenance of it until the bitter end of the disciplinary process, must seriously undermine the relationship. The employer in this case articulated its reaction in that very way.

[46] I have set out the termination letter in full in this case, because it outlines in a comprehensive way the employer's steps in first investigating the incident, the disciplinary process, the willingness to hear representation from the union (the union clearly acting on different information from that given to the employer to that point) and the final reasoning for dismissal as opposed to lesser disciplinary responses. The employer reached the view that it was serious misconduct. That was justifiable in the context of the reasons for the liquor ban in the first place and in a workplace where the consequences of a breach could have serious implications to health and safety.

[47] The reference to Mr Nee Nee and Mr Nathan being union delegates and health and safety representatives cannot be discrimination in this circumstance. They were not dismissed on the basis of any prejudicial attitude adopted by the employer to that status per se. I am in agreement with Ms Muir's analysis of the statutory provisions in this respect. What the employer did was regard their status as enhancing their positions of responsibility. This increased their knowledge and

notice of the liquor ban, the reasons for it, and, therefore, a heightened awareness of the consequences for any breach. Both employees conceded that in evidence. The whole matrix of facts also shows the plaintiffs' awareness of their leadership roles. Mr Nee Nee probably was the most culpable because he appears to have initiated the entire episode of drinking on the premises. Mr Nathan, however, was also fully aware. He gave evidence of being sensitive to the fact the breach was occurring and claimed to have encouraged the others to eventually leave the locker room and continue drinking outside. That, however, took a considerably longer period than Mr Nathan might have inferred from his evidence. What distinguished Mr Nee Nee and Mr Nathan from the other employees, however, was not only their positions of heightened responsibility but the protracted period during which they deliberately lied about their open defiance of the liquor ban.

[48] The submission on behalf of Mr Nathan, that the period of delay in progressing the disciplinary process weakens the employer's assertion as to loss of trust and confidence is somewhat facetious. The delay was primarily caused by the continued deception. It demonstrated, however, that the employer was prepared to take a fair and cautious approach before taking the drastic step of dismissal. If Mr Nathan had been suspended at an early stage, it is likely that that would then have resulted in criticism on that ground.

[49] In assessing whether there was serious misconduct the following can be taken into account:

a) The serious incident leading to the liquor ban in the first place;

b) Therefore the effects on health and safety in the workplace;

c) The nature of the workplace in that context; i.e. the imperative of ensuring an inherently dangerous site is made safe;

d) The rider in both the ban and the company policy that if breaches are regarded as being grave an instant dismissal may result;

e) The fact that in this case there was open defiance of a work policy which had already been introduced for a considerable period with no longer any room for doubt as to its effect;

f) The deliberate deceit in both plaintiffs attempting to divert the employer from the truth. This was not just a momentary reaction at the outset of the enquiry followed by frank concession after the first flush. This was a continued, blatant period of deception with admissions only when the case had built up to the point where denial was no longer feasible. Even then the admissions appeared to have been made grudgingly.

[50] In all of the circumstances, the employer's decision that this was serious misconduct was one that, viewed objectively, the employer could make and the employer's actions could not be criticised as being unfair or unreasonable. The procedures adopted on an objective assessment were beyond reproach. The circumstances were difficult and the managers involved were also required to attend to their normal day to day duties at a busy port. They should not have had to expect the type of dishonesty perpetrated by Mr Nee Nee and Mr Nathan. These factors provide solid grounds for dealing with Mr Nee Nee and Mr Nathan differently from the other employees. While the behaviour of those employees too must have been close to serious misconduct they did not indulge in the level of deception adopted by the plaintiffs.

[51] Ultimately the decision to dismiss was based on behaviour of Mr Nathan, which was not by then disputed by him. He had defied the liquor ban and consumed alcohol on the work premises. During the course of the disciplinary process he lied about his involvement in the drinking episode and deceived his employer. He was in a position of responsibility in his employment. He was a delegate of his union and the workers' representative on the health and safety committee. In those circumstances, viewed objectively, dismissal was an option the defendant could take as a fair and reasonable employer in all the circumstances. The decision was such that there could be disparity of treatment between him and other employees who also consumed alcohol in defiance of the ban. The positions were different between Mr Nee Nee and Mr Nathan and the other employees in the sense that the other

employees were less experienced and less senior. They admitted their behaviour at an early stage in the investigation and before the disciplinary process had even been advanced.

[52] Mr Nathan (and Mr Nee Nee) did not pursue the grievance as one of discrimination. That submission is one which has belatedly arisen from the evidence at the Authority's investigation meeting and the Court hearing. It was a question, which can only be considered in the context of whether the employer's actions are able to meet the criteria under s 103A of the Act and therefore enable the employer to establish a justifiable dismissal. There was no suggestion from the evidence that C3 Limited took a prejudicial attitude to Mr Nathan because he was a union delegate or because of his involvement as a member of the health and safety committee. All it had done was that, along with other factors, it had taken the stance that Mr Nathan in that role should have known better. In reaching the decision to dismiss, the employer considered also all of the positive factors applying to Mr Nathan in the necessary balancing exercise. It is likely that the decision to dismiss Mr Nathan, as an experienced and valuable employee, was taken with a heavy heart. Similar feelings would have no doubt prevailed in the decision to dismiss Mr Nee Nee. Nevertheless, the decision to impose the liquor ban was based on considerations of health and safety in a workplace where such considerations were paramount. The behaviour of the plaintiffs during the investigation and disciplinary process would have sorely tested the relationship of trust and confidence which needed to exist and continue. This was a persistent and concerted deception over quite a period of time and C3 Limited was entitled to assess the entire situation facing it at the time when the decision to dismiss was made.

Summary

[53] Applying the principles enunciated in the authorities prevailing, one of the options available to C3 Limited in such circumstances could be a dismissal. Proper procedures were adopted in the process following Mr Nathan's defiance of the liquor ban. The delay, upon which Mr Mitchell relied in his submissions to undermine the allegation that there was a loss of trust and confidence, was not excessive and was explainable. After all it was Mr Nathan and Mr Nee Nee who caused most of the

delay by obstructing the process. Once the employer was faced with competing allegations between the employees it would have the responsibility as a fair and responsible employer to make doubly sure it got to the truth. It took time to consider the position and at each step gave opportunities to Mr Nathan and his representatives, both union and legal, to make representations. Once the decision to dismiss was confirmed the internal appeal process was properly followed.

Disposition

[54] Having considered all of these factors objectively, the decision to dismiss was plainly one which C3 Limited could make in all the circumstances, having regard to fairness and reasonableness. The dismissal was justifiable. The challenge by Mr Nathan is accordingly dismissed.

Costs

[55] Ms Muir asked to be heard on the issue of costs. Costs are reserved. The defendant has 14 days upon which to be heard by memorandum on the issue of costs. It was my intention to finally deal with costs in respect of Mr Nee Nee's withdrawn challenge in this judgment. It seemed to me that as his challenge was withdrawn so late in the piece, with only submissions remaining to be presented on the last day of hearing, that any award of costs between Mr Nee Nee and Mr Nathan might be equal. Mr Mitchell made the submission that costs in respect of Mr Nee Nee's proceedings should await the outcome of Mr Nathan's challenge. He submitted that if Mr Nathan was successful in his challenge then there could be consequences as to Mr Nee Nee's position. While I accept the concerns expressed by Ms Muir in her memorandum in reply, I have some uneasiness in endeavouring to deal with the issue of costs between the two separately. Mr Nee Nee misled the Court. I have not heard from Mr Mitchell as to any consequences of that on costs. It is only fair, therefore, that I give that opportunity. In the plaintiffs' submissions on costs, Mr Mitchell is to

deal with the position both on behalf of Mr Nathan and Mr Nee Nee. He will have 14 days following receipt of Ms Muir's memorandum within which to do that.

M E Perkins
Judge

Judgment signed at 2.15 pm on Wednesday 20 November 2013