IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 8/08
CRC 3/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HARRY BUTCHER Plaintiff
AND	OCS LTD Defendant

Hearing: 11 June 2008
(Heard at Christchurch)

Appearances: Tim Oldfield, Counsel for Plaintiff
Paul McBride, Counsel for Defendant

Judgment: 16 July 2008

JUDGMENT OF JUDGE B S TRAVIS

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[1] The issue in this case is whether an employer can summarily dismiss an employee for serious misconduct, consisting of smoking in a non-smoking area while performing duties for the employer, when its policy handbook categorised this behaviour as misconduct which is to be treated by way of a series of escalating warnings before dismissal. The employer chose to regard the plaintiff's conduct as a failure to obey a lawful order, which its handbook defined as serious misconduct and allowed for the penalty of dismissal without the need for warnings.

[2] The plaintiff brought this challenge seeking a non-de novo hearing of a determination of the Employment Relations Authority (CA 1/08), which held that the defendant had discharged the burden of justifying the plaintiff's dismissal. Because a non-de novo hearing was sought the parties were limited to the factual

findings of the Authority and the directions given by Judge Couch when determining the nature and extent of the hearing pursuant to s182(3)(b) of the Employment Relations Act 2000. That enabled the parties to file an agreed statement of facts, which they have not chosen to do, and to provide a bundle of documents which were the same as the documents presented to the Authority. The hearing was confined to liability. Because of these limitations the following facts are drawn entirely from the Authority's determination or the agreed bundle of documents.

Factual background

[3] The defendant provides a range of services to the airport company at Christchurch International Airport. It employed the plaintiff as a trolley person from 1995 until he was dismissed on 15 November 2005. At the time of the dismissal the plaintiff was 64 years old. The plaintiff was a heavy cigarette smoker.

[4] The defendant had a handbook which contained the following provisions:

> ***CODE OF CONDUCT***
>
> *The OCS Code of Conduct should be read in conjunction with any House Rules relating to the premises operated by our customers. It is expected that our employees will observe such rules as if they are included herein.*
>
> ***A. DISCIPLINARY PROCEDURES***
>
> *Disciplinary action is a corrective action process and should not be seen as punishment. The normal forms of disciplinary action taken within the company for poor performance and misconduct are:*
>
> - *Counselling (informal)*
> - *Verbal Warning*
> - *First Written Warning*
> - *Final Written Warning*

- *Dismissal*

Where misconduct is reasonably serious, but does not justify dismissal, the first and final warnings may be combined and follow the first occurrence. In some cases, a verbal warning, may not be sufficient, therefore the first warning may be a written one.

Unless otherwise advised, all written warnings are valid for one year. Verbal warnings are valid for 6 months.

Disciplinary action might also involve:

- *Suspension on full pay*
- *Summary dismissal*
- *Transfer or change of duties*

…

B. SERIOUS MISCONDUCT

The following offences are grounds for summary dismissal from the company.

…

- *Refusal or failure to obey lawful written or verbal instructions of company management/supervisors except where there is a real and immediate danger of injury to an employee or others.*

…

C. MISCONDUCT

Offences that may constitute less serious misconduct and for which the penalty may be verbal or written warnings shall include, but not be confined to, the actions listed below. The giving of a warning is not limited

to the repetition of the same offence. Following due disciplinary procedure, further/repeat misconduct may lead to dismissal as result of:

…

- *Smoking in any non-smoking area and/or while performing duties for the company.*

…

[5] On 18 November 2004 the defendant through Mr Beeby, its branch manager, sent the following letter to the plaintiff:

Dear Harry

Following our meeting of 12 November regarding disciplinary action with smoking on duty in uniform I advise as follows.

Your reason being you are attempting to give up smoking and had forgotten your patches on the day in question leading to you needing a cigarette is accepted. Whilst accepted it is a clear breach of our Code of Conduct and that of the airport authority and you have been reminded of this on several occasions.

The outcome of this meeting is that you have been given a verbal warning and a very clear instruction on behaviour in this regard. As this verbal warning was quite detailed, I wish to reiterate the instructions to you in writing (this is not a written warning)

You are not permitted to smoke in any restricted area of the airport. You are not permitted to smoke in the OCS uniform at any time outside of permitted areas of smoking and at any other time than official breaks.
With the new law regarding smoking to come into effect 10 December 2004 you are not able to smoke at any time and any place within the confines of the airport other than any designated area that may be provided by the airport authority. You will be personally liable for any fines that you may incur.

Any breaches of this instruction will be deemed as serious misconduct and may result in disciplinary action being taken which could result in your dismissal.

You have acknowledged your understanding of this action in the presence of Andy Lea, Organiser of the Service & Food Workers Union – Jacqui Hale, Contract Manager, OCS – Airport Site and the writer.

[6] The Authority found there was some merit in the argument that the verbal warning confirmed in the 18 November letter had expired. The verbal warning does not appear to have been challenged by the plaintiff.

[7] On Thursday 6 October 2005, while the plaintiff was on his tea break and walking to a permitted smoking area, he observed there was a shortage of trolleys in the domestic baggage area. The plaintiff says he went out to the carpark and picked up a load of trolleys and took them to the luggage area. At 7pm he undertook a regular cleaning task. While returning from that task and driving a tow cart pulling trolleys the plaintiff told the Authority:

…it was starting to get dark and there was no one around and I decided to have a smoke on the way back. Then I heard Dean Christie yell out, "Harry, put that smoke out". I looked around. I didn't even see the guy and I could not tell where he was. I just carried on and took the trolleys back to baggage inside.

[8] Mr Christie wrote a letter dated 14 October 2005 to the defendant. Mr Christie signed the letter as the building maintenance co-ordinator of airport maintenance services at Christchurch International Airport. The relevant portion of this letter reads as follows:

The purpose of this letter is to express my disappointment and frustration at recently witnessing an OCS staff member smoking while carrying out their work duties.

On the evening of Thursday 6 October 2005 and approximately 7.30pm I was walking home from work when I noticed Harry Butcher riding the

baggage Trolley Tow cart near the Main Car Park Exit (water Tower). While Harry was carrying out his duties he was smoking a cigarette in full view of the public.

We have spoken in the past regarding OCS staff smoking in public while carrying out their duties. As mentioned previously this type of behaviour reflects badly on the image of the airport as the public assume that all workers in the area are employed by Christchurch International Airport.

I would expect that OCS to take appropriate action to ensure that this behaviour ceases and desists immediately.

[9] On 17 October 2005 the plaintiff received written notification of a disciplinary meeting "*to discuss a serious matter further*." The letter encouraged the plaintiff to bring a representative. The relevant parts of the letter state:

The serious misconduct that you are charged with is as follows:

Failing to follow a reasonable and lawful instruction – in that you have been instructed previously in a disciplinary meeting with full union representation, that you are not allowed to smoke in public areas at the airport and may only smoke in the designated areas and in your break times. This has led to a serious complaint from our client.

This misconduct is of a serious nature and could result in your dismissal.

… At this meeting we will discuss your serious misconduct and you will be given every opportunity to present your side of the story.

[10] The disciplinary meeting was held on 3 November 2005 and the plaintiff was represented by John Miller of the Service and Food Workers Union. The typewritten notes of that meeting include the following material:

On his way back to from the taxi toilets he decides that there was no one around so he thought he would have a cigarette and said at that time of night he did not expect Dean to be there.

…

At this point Clive says that we will be dismissing Harry however we would be happy to look at alternatives for Harry in other employment from the OCS town office.
Harry goes on to say that it is his own entire fault and no one else is to blame and that he is unlucky that he sometimes gets caught.

[11] The handwritten notes of the meeting are somewhat different and record the plaintiff as having said:

That time of night do not expect anyone to be there.

…

Hoped not to be seen.

[12] They also record the defendant's representatives as saying that there was no choice but to dismiss the plaintiff who:

-has habit of taking chances & trying a smoke in out of the way areas

-does not guarantee he will not be caught again.

[13] At the conclusion of the meeting Mr Miller and Clive Menkin, the defendant's general manager of human resources, agreed that the decision to dismiss the plaintiff would be suspended to enable Mr Miller to present options apparently as an alternative to dismissal. On 4 November 2005 Mr Miller wrote to Mr Menkin expressing the view that the dismissal of the plaintiff would be unjust and must be rescinded on the basis that the disciplinary policy and procedure in the "*OCS Employee Handbook*" provided that smoking was misconduct and not serious misconduct, and required the warning procedure. Mr Miller noted that verbal warnings were valid for 6 months and the warning in the 18 November 2004 letter had therefore lapsed and any intended dismissal of the plaintiff would be invalid in terms of the defendant's own policy.

[14] Mr Menkin responded on 8 November 2005, referring to the defendant's code of conduct which allowed summary dismissal for refusal or failure to obey lawful written or verbal instructions. Mr Menkin noted that the plaintiff had freely

admitted to the re-offending and had also admitted that he was unlucky that he occasionally gets caught. Mr Menkin referred to his offer of a position for the plaintiff away from sensitive sites as an alternative to dismissal. Mr Menkin sought the plaintiff's response because, if he did not avail himself of this alternative, Mr Menkin would have no option but to confirm the termination of the plaintiff's employment. It appears the offer of alternative employment was rejected by the plaintiff who was then dismissed on 15 November 2005 with effect from 3 November for failing "*to follow a reasonable and lawful written instruction not to smoke in the workplace*" with no reassurance that this would not happen again.

The Authority's determination

[15] The Authority applied the test for justification in s103A of the Act which it correctly observed required the Authority to consider, on an objective basis, the defendant's actions and how it had acted and what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. It found the investigation of the October 2005 incident was full and fair and that the defendant's actions were what a fair and reasonable employer would have done in all the circumstances of the case.

[16] It found that the 18 November 2004 letter confirmed a verbal warning which had been given following a disciplinary meeting earlier and also confirmed verbal instructions to the plaintiff that any breaches of that instruction would be deemed to be serious misconduct which might result in disciplinary action being taken, and which could lead to the plaintiff's dismissal. The letter indicated that the defendant wanted to ensure the plaintiff was left in no doubt as to the possible outcome should he breach the smoking regulations in the future. The letter also recorded the plaintiff's acceptance of the warning and the instructions in the presence of Mr Lea, a union organiser.

[17] The Authority recorded the plaintiff's acceptance of the accuracy of the notes taken at the disciplinary meeting of 3 November which recorded that Mr Miller had told the meeting there was no point in disputing what had happened on the evening of 6 October 2005. The Authority found this amounted to a straightforward

admission of the behaviour complained of which was a breach of the clear instructions issued in writing almost a year earlier. It found that the 18 November 2004 letter refuted the plaintiff's claim that the defendant was acting in breach of its own policies by considering the final incident as serious misconduct. It commended the approach adopted by the defendant in attempting to assist the plaintiff to remain in its employment and said it showed compassion and understanding which did the relevant company executives considerable credit. It found the defendant was justified in relying on the specific instructions issued to the plaintiff in the 18 November 2004 letter and that it was entitled to consider the incident on 6 October 2005 as serious misconduct. It found that the defendant had met the test for justification in s103A of the Act.

The submissions

[18] Mr Oldfield for the plaintiff accepted that in a non-de novo challenge the onus was on the plaintiff to persuade the Court that the determination was wrong: *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] ERNZ 157. He accepted that while the issue was whether the Authority was right to hold that the plaintiff had committed serious misconduct, the Court must make its own decision on the matter: s183. He submitted the Authority was wrong to have concluded that the defendant was entitled to regard the misconduct complained of as serious, having regard to the facts, the handbook as a whole and specifically the section that defines smoking as misconduct and not serious misconduct. He accepted that s103A was the applicable test and contended that a reasonable employer would have followed the handbook and issued a warning and would not have dismissed the plaintiff.

[19] Mr Oldfield submitted that the defendant's justification for the dismissal hinged on one ambiguous sentence in the 18 November letter. As with all warnings, he submitted the 18 November letter was an instruction as to what conduct was expected in the future. Because the letter specifically stated it was not a written warning, it brought the matter squarely within the disciplinary procedure for misconduct. The appropriate step for a further infraction following this verbal warning, he submitted, was a written warning, not a summary dismissal. He accepted that part of the letter, from one reading, could be seen to be contradictory

but stressed it also stated that the next infraction would be "*deemed*" to be serious misconduct which could result in dismissal. He submitted the letter was not a final warning on its face although it refers to the possibility of dismissal, but at the same time it minimised the conduct by stating that the warning was not a written warning. He submitted that any ambiguity should be construed against the defendant on the *contra proferentem* principle. He also submitted that the "*deeming*" sentence did not unequivocally state that the next infraction would lead to dismissal but that it might lead to disciplinary action which included warnings that might eventually result in a dismissal. Further, the 18 November letter could not deem the next infraction to be serious misconduct as this was not fair or reasonable and contravened the defendant's own code of conduct. It was not fair or reasonable to purport to define the particular conduct as serious misconduct for one employee but not others.

[20] Mr Oldfield submitted that the defendant had properly treated the November 2004 incident as misconduct but not serious misconduct and should have reached the same conclusion about the 6 October 2005 breach. He observed that the second incident had occurred 11 months after the first and 5 months after the verbal warning had expired.

[21] Mr Oldfield submitted that the code of conduct had contractual force, citing *Stimpson v Auckland Health Care Services Ltd (t/a Auckland Health Care)* [1993] 2 ERNZ 614, 628 where Judge Finnigan stated:

> *There is, however, in every employment contract an implied term of fair dealing between the parties and where an employer has published a formal disciplinary policy an employee is contractually entitled to expect that an employer will not contravene that policy.*

[22] Mr Oldfield accepted that a minor deviation from the code of conduct would not of itself render a dismissal unjustified but in this case the defendant had fundamentally contravened its own code and the plaintiff was not guilty of serious misconduct. He submitted that *Reid v New Zealand Fire Service Commission* [1999] 1 ERNZ 104, 107 (CA) was distinguishable because here there was a major departure from the code of conduct, unlike *Reid.* Justice Tipping there found that the

employer had substantially followed its personnel policies as to warnings and the like.

[23] Mr Oldfield observed that the defendant's policy is couched in mandatory language using the word "*shall*". Having described smoking as misconduct the defendant cannot, as a fair and reasonable employer, turn what is specified as misconduct into serious misconduct. He submitted the defendant had provided in its code a particular sanction for a particular offence and therefore it was not open to it to summarily dismiss the plaintiff. Mr Oldfield cited a line of authority which he said was consistent with his submission that the defendant, having published a disciplinary policy with the consequent penalties, should adhere to that policy. The first proposition was from *Timu v Waitemata District Health Board* [2007] ERNZ 419 at 438:

> *[121] Mr Russell submitted that, even if there was no finding of assault, Mr Timu's conduct could properly be described as serious misconduct justifying dismissal. In support of this, he referred me to the decision of* Reed v Smith *unreported, Judge Palmer, 20 December 1996, CEC40/96 as authority for the proposition that abusive language can amount to serious misconduct. While I do not doubt the correctness of the decision in that case, Mr Russell's submission overlooks the provision in the Board's disciplinary policy defining "Irresponsible or unacceptable behaviour including using obscene or abusive language which could cause offence" as misconduct generally and the absence of any similar offence in the list of behaviour characterised as serious misconduct. The Board having instituted and promulgated such a policy, it must be reflected in the way I view Mr Timu's actions as one of the Board's employees.*
>
> *[122] I find that, although Mr Timu's conduct was clearly unacceptable and unprofessional, it was not capable of being regarded as serious misconduct justifying dismissal.*

[24] The second case was *Sloggett v Taranaki Health Care Ltd* [1995] 1 ERNZ 553. There the employer had a "*Guide to Disciplinary Procedures*" in which sexual harassment was defined as misconduct, which would "*generally lead to disciplinary*

procedures being invoked seldom amounting to dismissal." The male employee touched a female nurse in a sexual manner and made salacious comments. The employer argued that the employee's conduct was "*Behaving in a manner likely to affect ones safety, cause injury or unreasonable distress to a … employee…*" which was classified as serious misconduct under the guide. Chief Judge Goddard rejected the employer's argument, holding at p569 that the duty of trust and confidence:

> *…precludes employers from relying on clever wording to turn ordinary misbehaviour capable of attracting some minor discipline into a dismissable offence. In the present case, the employer had bound itself by contract to treat sexual harassment as a relatively minor infraction. I understand that this bizarre stance has since been reversed, but too late to have any impact on the appellant's rights.*

[25] The third case was *Carter Holt Harvey Panels Ltd v Nicholas* CC 32/00, 21 December 2000 in which Judge Palmer upheld the Employment Tribunal's conclusion that, because the employer's code of conduct had stated that anything less than wilful acts or deliberate damage was to be categorised as less serious misconduct for which the maximum penalty was a warning, a dismissal for such conduct was not justified.

[26] Mr Oldfield also submitted that the defendant had wrongly relied on an expired verbal warning to dismiss the plaintiff and this alone rendered the dismissal unjustified, citing *NZ Woollen Workers IUOW v Christchurch Carpet Yarns Ltd* [1989] 2 NZILR 14. He submitted that the plaintiff was entitled to consider that any subsequent conduct on his part relating to smoking could lead to dismissal but only in accordance with the warning procedures. Because the defendant had commenced the disciplinary procedure contained in the code of conduct, Mr Oldfield submitted it could not later renege on that procedure by summarily dismissing the plaintiff for another infraction of the same type. He submitted that what was deemed only to be misconduct on one occasion cannot then become serious misconduct on another.

[27] Mr Oldfield submitted that the Authority had erroneously concluded that the defendant was entitled to consider the 6 October 2005 breach as serious misconduct. He contended that the authorities showed that misconduct only justifies dismissal on

notice, and then only if it is repeated after a proper warning process has been followed. He submitted the law as to the distinction between misconduct and serious misconduct was settled, citing: *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) at 487 where the Court stated that definition of the kind of conduct that will justify summary dismissal: "*… is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship*."

[28] He submitted that the Authority was not correct to have apparently concluded that once there was a breach of a lawful and reasonable instruction, a summary dismissal for serious misconduct automatically followed. He contended that this was not a case of insubordination or wilful disobedience and, even if it was, not every such failure or refusal justifies dismissal: citing *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917 (CA). There the Court of Appeal endorsed a statement by Judge Finnigan in *Samuels v Transportation Auckland Corp Ltd* [1995] 1 ERNZ 462 at 472 that:

> *…the test is not whether there was wilful disobedience to obey a lawful and reasonable instruction, but rather whether the conduct of the worker justified dismissal.*

[29] The Court of Appeal also approved a passage from Justice Edwards in *Corry v Clouston & Co Ltd* (1904) 7 GLR 213, 241-242:

> *The best conclusion I can come to as to the meaning of [wilful disobedience], as used in the decided cases, is that disobedience, to be wilful disobedience within the meaning of the cases, must be either a refusal to obey a specific lawful order given at the time, intending to defy the authority of the master, and amounting to a dissolution of the engagements…, or an act of disobedience so repeated as to lead to the conclusion that the servant did defy the authority of the master.*

[30] The Court of Appeal noted the overlay of the Employment Contracts Act 1991 and its requirement that a dismissal must be justified by the employer both

substantively and procedurally and that there must be good faith and fair treatment. Mr Oldfield submitted that the position again needs to be read against the statutory regime of the Employment Relations Act and especially s103A. He submitted that there were no examples of cases of justifiable dismissals for breaching instructions a year after the instructions were given. Where dismissals for failure to obey instructions had been found to be justifiable, they involved outright defiance of instructions given at the time and he cited as an example: *NZ Food Processing IUW v Unilever New Zealand Ltd* [1990] 1 NZILR 35. He submitted it was improper for the defendant to have taken account, in Mr Menkins' 8 November letter, of the plaintiff saying that he was unlucky to get caught because this had been said after the decision to dismiss was conveyed to him and therefore could not be relied on to justify the dismissal. In any event he submitted that it did not suggest there was going to be future disobedience and the plaintiff was only caught smoking twice. He said that the Authority had not placed any weight on this aspect and that therefore there was no evidence that the plaintiff was intending to defy the defendant's authority.

[31] Mr Oldfield distinguished two cases in which the Court or its predecessor had upheld as justifiable a dismissal for smoking. The first was *NZ Food Processing IUOW v Golden Coast Poultry Industries Ltd* [1989] 3 NZILR 206 where the employer's house rules specifically provided that smoking was a ground for instant dismissal. The employee had been given a final written warning and smoked again in breach of the house rules 12 days later in a factory where strict hygiene requirements prevented smoking.

[32] The second case was *Mitchell v Te Reo Irirangi o Ngati Raukawa Trust (t/a 90.6/95.7 Raukawa FM)* AEC 73/96, 4 November 1996 where Judge Colgan declined an application for interim reinstatement where the employee had been warned on 28 and 29 July that smoking inside the employer's radio station studio would not be tolerated and, at a meeting on 7 August, all staff were told that smoking in the studio would lead to instant dismissal. On 13 August the employee was found smoking and was dismissed for insubordination. An arguable case was found, but reinstatement was declined. Mr Oldfield submitted that what is distinguishable about those cases was the presence of a live warning and a clear

policy that smoking was serious misconduct which would lead to dismissal without warning. He also submitted that although the defendant contended that the plaintiff was employed on a "*sensitive site*" there were no particular statutory regulations governing non-smoking at the airport. He pointed out there was no evidence that the airport company had asked for the plaintiff to be removed from the site. He therefore submitted that the Authority's conclusion could not be sustained and the challenge should succeed.

[33] Mr McBride, in supplementary submissions at the hearing, raised for the first time two preliminary issues as to the plaintiff's pleadings and the proper scope and nature of the non-de novo challenge. He submitted that the plaintiff's statement of claim had stated that the challenge was against those parts of the Authority's determination which held that the defendant had committed serious misconduct. He submitted that nowhere in the determination had this finding been made and that what was under scrutiny in the Authority was the employer's decision. He contended that the challenge should be dismissed on that basis alone.

[34] The second preliminary point was that because this matter was proceeding on the basis of the Authority's determination, without the advantage of a transcript, it was open to the Authority on the facts before it, having had the advantage of seeing and hearing the witnesses and making findings of credibility, to have reached the conclusion that it did. He submitted that this was a case where more than one answer as a matter of law was possible, but where the Authority had properly considered all the circumstances in terms of s103A the Court could not determine the matters substantially in a factual vacuum and the challenge ought to be dismissed on this basis.

[35] These preliminary points were not raised in the outline of submissions required by the directions of Judge Couch to be filed in advance of the hearing. The first is a mere pleading point which could have been addressed by an amendment of the pleadings had proper notice of this complaint been given. The issue was whether the Authority's determination was correct in law and this was made clear in the pleadings and in the plaintiff's summary of argument. This first preliminary point is entirely without merit.

[36] The second I also find to be without merit. It simply purports to recast the matter in a manner which the challenge clearly did not contemplate and to make the issue whether it was open to the Authority to reach the determination that it did. The plaintiff's challenge clearly raised an important question of law as to the effect of the defendant's disciplinary code and the earlier instruction in all the circumstances at the time, and whether the defendant had acted as a fair and reasonable employer would have done. That issue was clearly disclosed by the pleadings and understood by the defendant in the summary of submissions it previously filed.

[37] Turning to Mr McBride's substantive submissions and the issue properly before the Court on this challenge, he contended that the narrow issue could be stated as whether the plaintiff's construction of the defendant's handbook, excluding the actions complained of as comprising serious misconduct, was correct and whether it precluded the defendant from considering dismissal for the particular conduct. After dealing with the facts and s103A, he submitted that the proper approach to employers' handbooks is to regard them as a guide and that a failure to follow them rigidly is unexceptional. Even rigidly following the guides does not absolve an employer from their duty to act fairly and reasonably. He referred to *Reid* where the Court of Appeal stated in relation to personnel policies:

> *The Judge was fully entitled to conclude, as he did, that Mr Reid had been treated in a manner which was procedurally fair. That is the ultimate criterion, not whether policies laid down for general guidance have been minutely observed.*

[38] Mr McBride submitted that the plaintiff's actions went to the very heart of the productive employment relationship because of his failure to obey reasonable instructions. He submitted that the handbook expressly provided on its face that it was "*normative in nature*" rather than an exhaustive code, because it refers to "*the normal forms of disciplinary action taken within the company*".

[39] Mr McBride submitted that, at a purposive level, the aim of the document was to ensure a state of knowledge about what was and what was not permitted or required. He submitted that at a specific level there was never any doubt that the

plaintiff was fully aware of the requirements but chose to flout them. He referred to what he described as the specific lawful and reasonable directions given to him in November 2004. These, he submitted, brought the conduct in October 2005 within the category of a refusal or failure to obey lawful or verbal instructions which constituted serious misconduct. He observed that this was specifically advised to the plaintiff as the source of the disciplinary inquiry from the outset, in the letter of 17 October 2005.

[40] As an alternative, even if the Court was to take the view that the defendant's actions had departed from the "*normal*" disciplinary action contemplated by the handbook, Mr McBride submitted the plaintiff was already the subject of express personalised verbal and written instructions of the very matter again in contention, which was then the subject of a written complaint from the airport company about his flouting such instructions.

[41] Mr McBride also submitted that a recently expired warning for the same conduct cannot be completely disregarded as it is part of "*all the circumstances*" required to be considered by s103A. Mr McBride submitted this was not merely smoking but smoking in an extremely sensitive site, in public and while working in uniform.

[42] There is no finding of fact I can discern from the Authority's determination or the bundle of documents that this was an extremely sensitive site or that he was in uniform at the time, although the latter fact may be able to be assumed. It appears from the handwritten notes of the disciplinary meeting that the defendant was happy to make an arrangement as an alternative to dismissal by finding him another position on a site which was "*less sensitive to his smoking outside. (The smoking on duty rules still remains).*" The letter from Mr Christie shows the defendant had been smoking in full view of the public while carrying out his work duties and that this reflected badly on the image of the airport.

[43] Mr McBride submitted that the plaintiff's decision to engage in flagrant disregard of requirements that he knew applied to him, on the basis that he would only be caught if he was unlucky, rendered his dismissal justified, because this was

outright disobedience. He submitted that the description of the conduct as serious, when considered against all of the evidence, was entirely appropriate.

[44] Mr McBride referred to *Stimpson* which had been cited by Mr Oldfield for the proposition that the code of conduct has contractual force, and submitted that Mr Oldfield's citation was incomplete and taken out of context and therefore misleading and what had been omitted were the following crucial words from *Stimpson* at 628:

> *That is not to say, however, that the employee is contractually entitled to the benefit of the terms of the policy word by word. As the Court has remarked on more than one occasion, reinforced by the judgment of the Court of Appeal in* Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd *[1990] 3 NZLR 549 at p 553, the Court's judgment of the employer's disciplinary actions must ultimately rest on whether the employer's action was fair.*

[45] Mr McBride referred to a judgment I issued in *Alofa v Aotea Centre Board of Management* AC 50/01, 30 July 2001 at paragraph 32 where I stated:

> *If the procedure followed is fair and reasonable a failure to follow a manual procedure to the letter may not render a dismissal unjustifiable.*

[46] Mr McBride submitted that there can be no blanket approach to such matters and under s103A each case must turn on its particular circumstances and therefore the challenge ought to be dismissed.

Discussion

[47] The first difficulty I had in dealing with the competing submissions is that the Authority's determination, or any admitted pleadings or any documentary evidence do not provide a basis for determining whether the defendant's handbook formed part of the plaintiff's employment agreement and therefore is contractually binding on the defendant, or whether it was published or promulgated, or even whether it was acknowledged as having been received and read by the plaintiff. Its status at law is therefore entirely unclear.

[48] I accept the force of the statement of Judge Finnigan in *Stimpson* that the implied term of fair dealing, and today the statutory obligations of good faith, can lead an employee to expect that the employer will carry out the terms of a properly promulgated policy. That does not mean however that such a policy, unless it forms part of the employment agreement, cannot be unilaterally varied by the employer providing such variations are properly notified to the employee who might otherwise be relying on the old policy. In the absence of proof I make the same assumption as Judge Finnigan did in *Stimpson*, that the handbook was not incorporated into the plaintiff's employment agreement.

[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.

[50] *Sloggett*, for example, is clearly distinguishable, firstly because the employer was bound by the employment contract to proceed only in a particular restrictive way (p558) and second because the inquiry was carried out on one basis without giving the employee any notice the dismissal was to be made on another basis. Here, as Mr McBride submitted, the 17 October 2005 letter, notifying the plaintiff of the disciplinary proceeding, referred to an allegation that he had refused or failed to obey lawful written or verbal instructions, the precise ground of his later dismissal. Chief Judge Goddard said in *Sloggett* at p556:

> *Whether conduct justifies dismissal depends on the seriousness of its impact upon the employment relationship and not upon degrees of ingenuity in the*

> *drafting of manuals or subtlety in their later application. It is scarcely surprising on the facts of this case that the respondent's roundabout way of handling the matter has caused, and continues to cause, the appellant to harbour a sense of injustice that he might well not have experienced to the same acute degree if management had adopted a more direct, candid, and plain-spoken approach.*

[51] The case of *Timu* relied on by Mr Oldfield, is also distinguishable. Mr Timu was dismissed before the Employment Relations Amendment Act (No 2) 2004 incorporating s103A came into force and the test of justifiability therefore depended on *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448; [2001] 3 NZLR 29 (CA).

[52] The issue in *Timu* was the nature and extent of the inquiry carried out by the employer into an allegation that a nurse had assaulted and verbally abused a patient. There was no issue that an assault could amount to serious misconduct. There had not been any modification of the board's disciplinary policy, which did not define abusive language as serious misconduct. Unlike the present case, Mr Timu had not been warned that his employer was intending to take a far more serious view of the particular misconduct in the future.

[53] *NZ Shipwrights Union v Honda NZ Ltd* [1989] 3 NZILR 82, 84 demonstrates that the Court frequently does not derive any help from the labelling of misconduct in house rules. The issue is whether the employer has proved conduct on the part of the worker justifying the employee's dismissal in all the circumstances. The Court of Appeal said in dismissing the appeal in *Honda* [1990] 3 NZILR 23, 26, (1990) ERNZ Sel Cas 855, 858:

> *The Labour Court plainly took the view that however the offence was described or framed, it was one of misconduct justifying dismissal and so was of the greatest gravity. We consider that the Court was entitled to view it in that way. Particularly in present day economic circumstances, a Court charged with adjudicating upon the exercise of the right of dismissal must be free to make an assessment of the seriousness of the consequences of its decisions.*

[54] The contents of, and the adherence by an employer to, the policy and procedures contained in a handbook are highly relevant to the inquiry into the employer's conduct that must be conducted under s103A. As the authorities, even under the previous legislation, demonstrate, the precise wording in such handbooks is not necessarily determinative.

[55] I do not accept Mr Oldfield's submission that the defendant had wrongly relied on an expired verbal warning to dismiss the plaintiff. The recent decision of the English Court of Appeal in *Airbus UK Ltd v Webb* [2008] EWCA Civ 49 clarifies the position that if, but for the previous warning, the employer would not have had a reason for dismissing the employee, the expired warning cannot be relied on. An expired warning can be taken into account by an employer when deciding to dismiss an employee, and by a Tribunal in deciding whether the employer has acted reasonably or unreasonably. Previous misconduct referred to in the expired warning may be relevant in determining the reasonableness of the employer's response to the new misconduct. I therefore accept Mr McBride's submission that a recently expired warning for the same conduct cannot be completely disregarded as it is part of all the circumstances which have to be considered under s103A. However, in the present case the defendant was not relying on an expired warning but on a direction contained in the same document which evidenced that warning that any repetition of the same conduct could result in dismissal.

[56] The most important feature of the present case is the clear notification to the plaintiff in November 2004 that, in effect notwithstanding what may be said in the handbook, any future smoking was prohibited on the Christchurch Airport site and could be treated as serious misconduct justifying dismissal. In the face of such a warning, the smoking incident in October 2005 could properly have been brought under both the handbook categories of misconduct in smoking and also serious misconduct as a failure to obey a lawful and reasonable order in the November 2004 letter. Although general interpretation principles would indicate that the specific overrides the general, the warning given in the November 2004 letter made it clear to the plaintiff what the consequences of another breach could be.

[57] I hold that this instruction was a fair and unequivocal warning, both of the instruction itself and the consequences that were possible for its breach. Unlike *Sloggett*, as I have observed, right from the start of the 2005 disciplinary inquiry the plaintiff was notified that the employer considered that the incident could be regarded as serious misconduct for breach of a lawful instruction.

[58] I accept Mr Oldfield's submission that misconduct must be serious to justify a summary dismissal and must be conduct that deeply impairs or is destructive of "*that basic confidence or trust that is an essential of the employment relationship*": see *Northern Distribution Union* at p487. I also accept his submission that, as the *Sky Network Television* case points out, the test is not whether there was wilful disobedience to obey a lawful and reasonable instruction, but whether in all the circumstances, including the nature of the inquiry carried out, a fair and reasonable employer would have dismissed.

[59] In the present case it was made clear to the plaintiff the consequences of smoking in a public place at the airport. One of the features which the defendant took into account, as demonstrated by the letter of 15 November, was that neither the plaintiff nor his representative could give the defendant any reassurance that this would not happen again. This lack of reassurance was a material factor that a fair and reasonable employer could take into account in deciding whether or not to continue a warning process, in the hope that there might be a change of conduct. Here there were two obviously similar incidents within the space of 11 months, the second in the face of a specific warning, and a fair and reasonable employer was entitled to conclude that the plaintiff would not obey lawful instruction.

[60] The defendant was also entitled to take into account that the final incident was actioned as the result of a complaint from its client, the airport company, which required the defendant to take appropriate action to ensure "*that this behaviour ceases and desists immediately*." The defendant was also entitled to take into account the plaintiff's refusal to consider a transfer to another one of its less sensitive sites where he would be free to smoke outside, as long as he was not smoking on duty.

[61] For all these reasons I accept Mr McBride's submissions that the defendant has discharged the burden of showing that the defendant's actions were those which a fair and reasonable employer would have taken in all the circumstances.

[62] In substance the Authority reached the same conclusion by similar means and I conclude that its decision should be upheld and the challenge dismissed.

Costs

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

B S Travis
Judge

Judgment signed at 2.00pm on 16 July 2008