

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 107
3021294

BETWEEN GLEN BAVISTER
 Applicant

A N D OCKHAM CONSTRUCTION
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Michael Smyth, Counsel for Applicant
 Anthony Drake & Naoimh McSparron, Counsel for
 Respondent

Investigation Meeting: 22 and 23 March 2018 at Auckland

Submissions Received: 19 & March 2018 from Applicant
 19 & March 2018 from Respondent

Date of Determination: 29 March 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The Applicant, Mr Glen Bavister, claims that he was unjustifiably dismissed by the Respondent, Ockham Construction Limited (OCL), on 31 May 2017.

[2] Mr Bavister further claims that he was unjustifiably disadvantaged by reason of suspension by OCL.

[3] OCL denies that Mr Bavister was unjustifiably dismissed or unjustifiably disadvantaged as a result of his suspension, and claims that he was justifiably dismissed for serious misconduct.

[4] The issues for determination are whether or not Mr Bavister was unjustifiably:

- disadvantaged by OCL suspending him on 15 May 2017

- dismissed by OCL on 31 May 2017

Background facts

[5] OCL carries on the business of construction and building. OCL is a subsidiary of OGL, Ockham Group Limited, and is a small construction company with approximately eight employees. OCL is a relatively young company and specialises in new-build apartment developments.

[6] One of the OCL construction sites was an apartment development in Auckland (SET Apartments). Mr Bavister was employed on 15 August 2016 in the role of Project Manager and also undertook the role of Site Manager when OCL had difficulty recruiting one.

[7] Mr Bavister was in charge of the site on behalf of OCL. He was the most senior OCL representative on site and was responsible for managing the various subcontractors engaged on the SET site.

[8] Mr Bavister reported to Mr Ben Statham who is both CEO and Director of OCL. Mr Bavister was provided with an individual employment agreement (the Employment Agreement) which stated:

16. Termination of employment

Termination for serious misconduct

Notwithstanding any other provision in this agreement, the employer may terminate this agreement summarily and without notice for serious misconduct on the part of the employee.

20. Health and Safety

- (a) The employee agrees to observe health and safety policies and procedures put in place by the employer at all times and to take all reasonable steps to ensure their own safety and the safety of others while at work.
- (b) The employee must ensure that they work in a safe manner and that no action or inaction on their part causes harm to the employee or any other person.
- (c) All hazards identified by the employee in the workplace must be reported to the employer as soon as practicable.

Alcohol and Drug Policy

[9] Mr Bavister acknowledged receiving the Employment Agreement but said he had not received the OCL Alcohol and Drug Policy which was dated March 2016.

[10] Ms Kaylie Ng, Operations Manager at OCL, whose role included dealing with day-to-day operational issues with projects and work sites, and overseeing administrative functions, said she maintained and updated OCL staff policies and ensured that those policies were provided to employees of OCL.

[11] Shortly after her employment commenced in early March 2016 she was instructed by Mr Ben Statham, CEO and director of OCL at that time, to draft an Alcohol and Drug policy as one of her first tasks. The finalised version of the policy dated March 2016 included the statements that:

This policy applies to all workers (employees, contractors, or labour hire) working for Ockham ...

Alcohol is defined as any intoxicating beverages including, but not limited to, beer, wine, RTDs, and spirits.

Drug and alcohol impairment in the workplace can create a range of problems ...

No alcohol is to be consumed on any Ockham construction site at any time. ...

... a breach of the Code of Behaviour is considered serious and may lead to disciplinary action.

[12] Ms Ng said that when a policy required updating she would finalise it and email it to employees, inform them where to access updated policy in OCL's shared document system, and ask them to ensure that they had read it.

[13] In addition, a hard copy of the OCL Drug and Alcohol Policy and other health and safety documents are kept on site, in a red health and safety site folder. The folder also contained forms for site sign-in and site induction forms.

[14] Mr Bavister said the Alcohol and Drug policy was not in existence when he commenced employment with OCL; however Mr Statham confirmed that he had instructed Ms Ng to draft a policy when she commenced employment. He said that the March 2016 policy had been redrafted subsequently in response to requirements specified by Mr Bavister.

[15] Mr Bavister said that his role included the induction of the contractors on site, and this had involved taking them through the OCL induction and the policies it contained.

[16] The construction sites managed by OCL are high hazard sites and as such health and safety is a priority. Mr Bavister confirmed that his role required him to uphold health and safety requirements on site.

Alcohol on site

[17] Mr Bavister said during his employment he had discussions with Mr Statham who encouraged him to reward the contractors for good performance by giving them a box of beer. He had done so on several occasions and had been asked by Mr Statham to provide a secure place on site to hold a stock pile of beers. Beers bought by the contractors were also kept in the fridge on site.

[18] Mr Statham said that it was customary in the building industry for contractors to provide their employees with a beer after work had ceased on the site on a Friday evening.

[19] He had instructed Mr Bavister to provide contractors with a case of beer to reward them in the event of exceptional performance. His expectation had been that this beer would be taken off site, but he confirmed that he had not issued a written instruction to Mr Bavister about this.

[20] Mr Statham said there had also been planned events which he had authorised which were held to mark land marks in the building project. At these events OCL provided food and beer with a marking system in place to monitor a limited amount of beer, 2 per person, being allocated to the contractors.

Issues with Contractors

[21] Mr Bavister explained that there were a number of contractors on the SET Apartments site, including Lorenzen Builders Limited and R.G. Steele Limited. Lorenzen Builders was run by Mr Jay Lorenzen and his cousin, Mr Ray Lorenzen. R.G. Steele Limited was owned by Mr Ricky Griffiths.

[22] Mr Bavister said that in early 2017 he had become increasingly concerned with the drinking practices of those employed by Lorenzen Builders Limited. On several occasions he had observed employees of Lorenzen Builders Limited drinking on site during working hours. He had been very concerned about this due to the potential risk of them being intoxicated whilst working on a hazardous site and the fact that he had had to ask Lorenzen Builders Limited to redo work carried out by them on several occasions.

[23] On each occasion he had confronted Lorenzen Builders Limited and told them to stop drinking, however they appeared not to observe the instruction he had given them to stop drinking. As a result he had spoken to Mr Statham and asked that OCL introduced an alcohol policy.

[24] In response to the request Mr Statham sent an email to Mr Bavister dated 26 March 2017 which said:

Dear Glen and Bryce,

Please note that from this point onwards all OCL Construction building sites are to be “dry”.

To be clear, this means that there is to be no alcohol consumed on any building site, by any person, whether an OCL employee, contractor, or visitor.

The only exception to this will be when OCL provides alcohol as part of a planned event. Any such event will be authorised by myself, will take place outside of working hours or will be closely supervised.

Can you please inform all subcontractors of this policy and have them remove any alcohol from our sites.

In addition, from this point on this policy will need to form part of the induction of the formal site induction.

[25] Mr Bavister said he saw some of the contractors drinking again on 4 April 2017. As a result Mr Bavister had emailed Mr Jay Lorenzen and directed that Mr Ray Lorenzen be removed from the site due to his apparent inability to follow the OCL policy in an email dated 4 April to Mr Jay Lorenzen in which he stated:

I walk pass the shed at 5pm only to see all the boys drinking piss in the shed!

As this was a decision made by your site manager, driving to the shop to purchase the beer and encourage it? It seems he fails to understand the basic levels of communication I would expect from a 10 year old. Can you please replace him with a more suitable leader onsite that is can follow the instructions we require.

[26] Mr Bavister said in his written evidence that Mr Ray Lorenzen was then removed from the site. At the Investigation Meeting he said a trespass notice had been issued to prevent Mr Ray Lorenzen returning to the site.

[27] On the Thursday prior to the Easter weekend (13 April 2017) Mr Bavister said he was approached by Lorenzen Builders Limited who wanted to put out some beers for their employees because it was the start of the long weekend. However, being mindful of the policy, he refused their request. He said that they were dissatisfied he had refused their request and they went over his head to Mr Statham who gave approval for the beers on site.

[28] When Mr Bavister had found out about the approval from Mr Statham he countermanded Mr Statham’s instruction because the subcontractor had not finished the work they were meant to do that day. In response they had shown their dissatisfaction by leaving without finishing the work and took the key to their container with them, meaning that Mr Bavister couldn’t access any tools the following day to complete the job.

[29] Mr Statham confirmed he had been approached by Lorenzen Builders Limited and asked for permission to supply beer to their employees, however he had denied the request.

Events weekend 14 May 2017

[30] On the weekend of 13-14 May 2017, Mr Bavister said he worked both days on the SET Apartments site. Also on site were Mr Ricky Griffiths and many other people that weekend, including workers engaged by Mr Griffiths and some block layers. At about 2:30pm on 14 May 2017 Mr Bavister said that, without his knowledge, the block layers went out to buy some beers which they drank while they were completing the work. He had not been aware of this at the time.

[31] Later that day, at approximately 3:00pm, Mr Griffiths had come to the site office to report that his employees had finished for the day and they had become thirsty watching the block layers drink beer. From the remark made, he had understood that Mr Griffiths was requesting a reward for his employees after working hard.

[32] Mr Bavister said he believed at the time that he had authority to allow a reward of beer because the work for the day was about to finish and the beer would not be consumed until that point. He believed that there was some flexibility in Mr Statham's email of 26 March 2017 to allow for this and, as the most senior person on site, he could authorise it.

[33] Accordingly, he went off the site to buy the beers and returned between 3:30pm and 4:00pm. He and the R.G. Steels Builders employees had each taken a beer.

[34] Shortly afterwards Mr Mark Todd, Director of OGL, arrived on the site accompanied by his brother. Mr Todd said he had seen Mr Bavister consuming alcohol on site whilst walking around on a concrete slab which had steel reinforcing rods pointing up out of it.

[35] Mr Griffiths said at the investigation Meeting that at the time Mr Todd had arrived he and Mr Bavister had been examining plans as he had been concerned there was an issue with the work which had been carried out.

[36] Mr Todd said Mr Bavister appeared to be working whilst holding the bottle of beer. He had seen Mr Bavister drink from the bottle several times during the time he was at the site. He had been very concerned by this as OCL and OGL sites are dry and it was the Site Manager who was drinking.

[37] When Mr Bavister saw Mr Todd's vehicle he approached it, and he (Mr Todd) had introduced him to his brother. Mr Todd said he greeted Mr Bavister and commented that he

appeared to be working on a Sunday. After a brief exchange with Mr Bavister he had left the site.

[38] Mr Todd said he had seen Mr Griffiths also drinking beer, but had not spoken to him.

[39] Mr Bavister said that Mr Todd had exchanged some friendly banter with him about working all weekend to meet a deadline for Monday.

[40] Mr Griffiths said Mr Bavister had walked to Mr Todd's car where they had spoken. He had been approximately 20 metres away but he had overheard part of the comments between them.

[41] Mr Todd said that at 6:30 a.m. the following day, Monday 15 May 2017, he called Mr Statham and told him what he had seen at the SET Apartments site the previous day. He had expressed his view that it is an unacceptable risk for OCL, and asked Mr Statham as the CEO to take some action.

OCL response to events on 14 May 2017

[42] Mr Statham said that after he had received the report from Mr Todd he had considered he had an obligation to take action. He had been immediately concerned about the report and the potential risk it created to the health and safety of those on site, including Mr Bavister himself. However, he had been very surprised by the report from Mr Todd and he believed Mr Bavister would have a reasonable explanation for what Mr Todd had seen.

[43] He engaged Ms Lisa Mackay, an external human resources advisor, and they drafted a letter together to Mr Bavister setting out the concerns, and also proposing to suspend him while it was decided what action to undertake. The letter dated 15 May 2017 set out the allegations which were:

- You were witnessed by a director of the company drinking alcohol whilst working on site on 14th May.
- That you were witnessed at the same time by the director under the influence of alcohol working on site.

[44] The letter set out that due to the seriousness of the allegations OCL was considering suspending Mr Bavister on full pay pending the outcome of the investigation. It was pointed out that if the allegations were upheld Mr Bavister might be subject to disciplinary action up to and including summary dismissal and that he was entitled to bring a representative to the meeting if he wished to do so.

Suspension 15 May 2017

[45] On 15 May 2017 Mr Statham and Ms Mackay met with Mr Bavister. Mr Statham read through the disciplinary letter and proposed to suspend Mr Bavister on full pay. When Mr Statham proposed suspending Mr Bavister he said that Mr Bavister had said in response: “*Well if you’d had the day I had you’d be drinking too*”.

[46] When Mr Bavister started to make other comments Ms Mackay advised him that he didn’t need to comment any further on the allegations until he had taken some advice.

[47] Mr Statham said Mr Bavister had been asked if he had any further feedback about suspension and he said he understood the proposal.

[48] Mr Bavister said that at the time the suspension proposal had been made to him his mind had been a ‘complete blank’.

[49] The letter dated 15 May 2017 to Mr Bavister had also said:

We also need to make you aware that we have had concerns about your performance which we are intending to speak to you about more formally in the next few weeks. Although this is not the focus of this meeting, we reserve the right to raise these issues with you in the future after appropriate notification of the details of the matter of concern.

[50] Mr Bavister said that this issue was not raised with him during the course of the meeting on 15 May 2017, which he thought had been strange because he had not been made aware of any performance concerns previously.

[51] Mr Bavister said the allegation that he was under the influence of alcohol caused him significant concern because he knew that not to be the case.

[52] During the meeting Mr Bavister was asked to hand over his company telephone. He said this gave him an immediate sense that his employment was over, despite what was being said about a meeting the following week.

[53] OCL had agreed that he could delete personal apps and other personal information from the phone which he then did. He had also asked to retain the number for the phone, which again had been agreed.

[54] Mr Statham said the reason for retaining Mr Bavister’s work phone was because Mr Bavister was the point of contact for OCL on site and the subcontractors would be contacting him directly. In order for business to continue while Mr Bavister was suspended,

OCL needed to have the phone. However, it had not been his intention to remove the phone permanently from Mr Bavister and he had informed him of this.

[55] Mr Statham said Mr Bavister had agreed to the removal of the phone and removed some personal apps and information from the phone and had given it to him. OCL had also required Mr Bavister's laptop as many site communications were via email and he needed to be able to access the emails to continue to run the site during Mr Bavister's time on suspension.

[56] Mr Statham said he had not agreed to the transfer of Mr Bavister's phone number because this would have negated the purpose of retaining the phone, and he became aware of it only later after Mr Bavister had contacted another OCL employee who was unaware of Mr Bavister's suspension and obtained their authorisation for the transfer.

Disciplinary Meeting 18 May 2017

[57] A disciplinary meeting was held on 18 May 2017 attended by Mr Bavister, Mr Statham, Ms McKay and Ms Ng. Mr Griffiths who had agreed to be Mr Bavister's support person had not arrived by the start of the meeting. OCL had offered to delay it pending Mr Griffiths' arrival; however Mr Bavister had requested that the meeting commenced without Mr Griffiths.

[58] Ms McKay made minutes of the meeting in which she recorded Mr Bavister stating: *"We thought we were almost finished so we got a box of beer. But then, after I had the beer I went back and checked and discovered that some of the boxing had mistakes and I had to fix it so we had to carry on working ..."*

[59] During the meeting Mr Statham said he had become very concerned about the responses Mr Bavister was providing to him and Ms Mackay about the allegation that he had been drinking on site. Mr Bavister had admitted everything, and he did not attempt to give any reasonable explanation. Instead his explanation was that he had been working hard over the weekend, had arrived at a certain time of the day and thought he would open a beer. He had then discovered that the work had not been completed and continued working.

[60] Since Mr Bavister told them that he had been drinking with Mr Griffiths on site and therefore Mr Statham and Ms Mackay had asked him if he wanted them to obtain a statement from Mr Griffiths. However, Mr Bavister said they did not need to do that.

[61] Mr Bavister said he had explained that he and some other workers on site had drunk some beer after they believed work had been finished for the day. He specifically disputed the allegation that he was intoxicated. However, when he had made that comment,

Mr Statham said that the allegation wasn't so much that he was intoxicated, but that he was under the influence of alcohol and explained because the site was dry, any consumption of alcohol meant he was under the influence. Mr Bavister had not agreed with that statement.

[62] Despite what the letter dated 15 May 2017 had stated, no performance concerns were put to Mr Bavister during the meeting for him to answer. The meeting had been adjourned briefly and during the adjournment Mr Griffiths had arrived.

[63] Ms McKay said that during the adjournment she and Mr Statham had considered the possibility of providing support to Mr Bavister to prevent further reoccurrence, however in light of the fact that Mr Bavister had removed Mr Ray Lorenzen from the SET Apartments site for drinking it would be difficult to not act consistently, and he was not an alcoholic which made offering support not a feasible option.

[64] When the meeting was resumed Mr Bavister said Mr Statham announced that OCL had made a preliminary decision to terminate his employment.

[65] Mr Statham said he had communicated the preliminary decision to Mr Bavister and that OCL were providing him with the opportunity to provide feedback and comments on the decision once he had had time to consider it. The decision was confirmed in a letter dated 19 May 2017 which stated that the preliminary decision was based on the following findings”

- The company policy states that “Alcohol will not be permitted on Ockham sites at any time’
- By your own admission you were drinking on site
- By your own admission you had purchased the alcohol and brought it in onto site
- Based on your complaints about alcohol consumption on site, we introduced a Zero tolerance alcohol policy several months ago, and you were instrumental in implementing and managing this policy.

[66] The minutes of the meeting had been provided to Mr Bavister later that day, 18 May 2017, who said that he had found no issues with them.

[67] The letter confirmed that a meeting had been agreed to take place on 23 May 2017 to hear Mr Bavister's response to the preliminary decision. The letter also advised that he could make submissions by phone, email or in writing prior to 23 May 2017.

[68] This meeting had been postponed by Mr Bavister who stated in an email that he was feeling unwell.

[69] A further date for the feedback meeting had been set by letter dated 23 May for 29 May 2017. The letter advised that Mr Bavister's continued suspension would be unpaid. Mr McKay said this had been because she and Mr Statham believed that Mr Bavister was delaying the process, however they had not requested a medical certificate be provided.

[70] Just immediately prior to the meeting commencing on 29 May 2017 an email was received which had been sent by a friend on behalf of Mr Bavister. The email advised that Mr Bavister was still not able to attend the meeting due to ill health, advised that he had two witness statements relevant to the incident, and that he intended to raise a personal grievance in due course.

[71] OCL had requested the witness statements to which Mr Bavister had referred by 5 p.m. the following day, but they had not been received.

[72] Mr Griffiths said at the investigation meeting that he had intended to provide a witness statement, however he had been very busy at the time, and it "*had not come to fruition*".

[73] As OCL had heard nothing from Mr Bavister by 31 May 2017, Mr Statham had written to him by letter dated 31 May 2017 confirming that his employment was summarily terminated for serious misconduct.

Determination

Was Mr Bavister unjustifiably disadvantaged by reason of suspension by OCL?

[74] Mr Bavister is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[75] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[76] Mr Bavister must therefore establish that there was some unjustifiable action by OCL which affected his terms and conditions of employment to his disadvantage.

[77] The law on suspension has been long established in several leading judgments. In *Sefo v Sealord Shellfish Ltd* the then Chief Judge Colgan commented:

... Absent, as here, an express contractual power of suspension, justification for doing so in any particular case will depend upon the circumstances of the parties and the employment and the fairness and reasonableness of the action at the time and in those circumstances. That is because suspension of an employee pending investigation and determination of allegations of serious misconduct in employment may, and indeed frequently does, affect the employee's employment or one or more conditions of that employment to the employee's disadvantage.¹

[78] In *Singh v Sherilee Holdings Limited* the Court commented:

In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.²

[79] There was no contractual provision for suspension in the Employment Agreement issued to Mr Bavister. However, as observed in *Munro v NS Security Ltd formerly known as Hibiscus Coast Security Ltd, (Munro)* despite there being no contractual right to suspend, suspension may still be justified in certain circumstances, namely in circumstances in which the employee's continued presence may result in some other significant issue.³

[80] There is a legislative requirement that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act:

S4(1A)The duty of good faith in subsection (c)-

- 1) requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- 2) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-

¹ *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178 at [33]

² *Singh v Sherilee Holdings Limited* AC 53/05 22 September 2005 at [91]

³ *Munro v NS Security Ltd formerly known as Hibiscus Coast Security Ltd* [2012] NZEmpC 38 at [19]

- i. access to information, relevant to the continuation of the employees' employment; about the decision; and
- ii. an opportunity to comment on the information to their employer before the decision is made.

[81] In respect of the requirement to provide Mr Bavister with information about the continuation of his employment, the information relating to the proposed suspension was provided to Mr Bavister in the meeting held on 15 May 2017 at which he was asked for his response.

[82] The allegations contained in the letter dated 15 May 2017 were of serious misconduct. This does not amount to a justification for suspension automatically.⁴

[83] Mr Bavister's evidence as to his response to the allegations contained in the letter read to him by Mr Statham was that his mind became a 'complete blank'.

[84] Whilst Mr Bavister said he understood the proposal to suspend, that does not necessarily mean that that he accepted the need for the suspension or that he was in a position to give informed consent. Given the fact that he had been unaware of the allegations until the letter had been read to him, I accept that he may not have had time to process the proposal and give consent to it.

[85] As identified in *Munro* suspension could be justified, absent the contractual right to do so, on the basis that Mr Bavister's continued presence on the SET Apartments site would give rise to some other significant issue.

[86] Mr Bavister was the Site Manager and in a position of some seniority in OCL. His response on the suspension proposal to Mr Statham on 15 May 2017 indicated to Mr Statham that he was admitting the allegation that he had been drinking on 14 May 2017.

[87] Mr Bavister as Site Manager was in a position of authority in relation to the contractors on the site, particularly in regard to health and safety issues. The SET Apartments site was a high hazard site and as such health and safety was of paramount importance.

[88] Mr Bavister had reported issues enforcing his instruction to the contractors that no drinking was to take place on site, as a result of which Mr Statham issued the email dated 26 March 2017. It was Mr Bavister's evidence that he was concerned about the potential risk of the contractors being intoxicated on a hazardous site. I find this concern to have been justified.

⁴ *B & D Doors Limited v Hamilton CC* [2007] NZEmpC 163 at

[89] Mr Bavister had instructed Mr Jay Lorenzen shortly after this email was issued to remove Mr Ray Lorenzen from the site for his inability to follow the OCL policy on drinking. Mr Jay Lorenzen was removed and a trespass order issued preventing his return to the site.

[90] I find that in these circumstances the suspension of Mr Bavister was justified given the potential health and safety breach regarding the policy he had requested be strengthened by the issuance of the email dated 26 March 2017. Moreover I accept that OCL had lost trust and confidence in him to satisfactorily manage the imposition of OCL policy in such circumstances.

[91] The suspension of Mr Bavister had initially been on full pay. Following the delay attendant upon Mr Bavister's adjournment of the meeting scheduled to take place on 23 May 2017, he was notified in the letter dated 23 May 2017 that his suspension was to be unpaid.

[92] Mr Bavister had informed OCL that he was unable to attend the scheduled meeting due to his feeling unwell. OCL did not request him to provide a medical certificate

[93] I find that Mr Bavister was unjustifiably disadvantaged by being placed on unpaid suspension. I accept that Mr Bavister has since been paid for the period of unpaid suspension, however I find that it caused him added stress prior to his employment being terminated.

[94] I determine that Mr Bavister was unjustifiably disadvantaged by OCL in respect of the unpaid period of unpaid suspension.

Was Mr Bavister unjustifiably dismissed by OCL?

[95] Mr Bavister claims that he was unjustifiably dismissed by OCL. The test of justification in s 103A of the Act 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.

[96] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. OCL must establish that the dismissal was a decision

that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[97] Mr Bavister was the Site Manager on the Set Apartment site. As such he was the OCL representative and responsible for ensuring its policies were enforced. This included as a priority health and safety since the site was a high hazard site and health and safety was therefore a priority.

[98] OCL's evidence was that there had been an Alcohol and Drug policy prior to the commencement of Mr Bavister's employment, but at his request it had been revised.

[99] Following incidents with some of the contractors on site, Mr Bavister had requested support enforcing the OCL position on alcohol. In response Mr Statham had issued the email dated 26 March 2017 confirming that there was to be no alcohol to be consumed on any building site, including by an OCL employee. The only exception to this was when alcohol was provided as part of a planned event and authorised by himself.

[100] Despite requesting this enforcement of the stance he had adopted with the contractors at the SET Apartment site, Mr Bavister had purchased beers on 14 May 2017, supplied them to R.G. Steele Limited and consumed beer himself in breach of this direct embargo from Mr Statham.

[101] I accept that there was no evidence to support the allegation that Mr Bavister had been under the influence of alcohol, but by his own admission he had been witnessed by Mr Todd drinking beer on 14 May 2017 in breach of the Alcohol and Drug policy.

[102] I find that Mr Bavister would have been fully aware of the conditions contained in the policy and in the email dated 26 March 2017, especially as he was responsible for making new subcontractors and employees aware of them as part of the induction process.

[103] I find that OCL had substantive justification for dismissing Mr Bavister.

Procedural Justification

[104] In accordance with s 103A (3) of the Act, OCL was required to carry out a fair investigation and follow a fair procedure. The Authority must also consider whether:

- (a) ... *the employer sufficiently investigated the allegations against the employee ...*
- (b) ... *the employer raised the concerns that the employer had with the employee ...*

(c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...

(d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[105] During the disciplinary meeting with Mr Bavister on 18 May 2017 the allegation that he had been witnessed drinking on site by Mr Todd and his brother was put to Mr Bavister. He admitted that he: "*had the beer*" and then continued working.

[106] Any investigation carried at this point would not be necessary. In *Murphy and Routhan t/a Enzo's Pizza v Van Beek* the then Chief Judge commented on the effect admitted misconduct would have on the requirement for an investigation:

An employer who has carried out no inquiry as to the possible existence of innocent explanations for apparently irregular conduct cannot claim to have reasonably reached an honest belief that the employee was guilty of serious misconduct justifying dismissal. However, that requirement does not extend to admitted conduct. ...

The point about procedure is that it is required not for its own sake; its purpose is to give the employer a better chance to arrive at the truth than exists without a full and fair inquiry into the facts and circumstances. The procedure then cloaks the employer's decision with the legitimacy that stems from credibility. But if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow the procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy.⁵

[107] Mr Bavister confirmed at the Investigation Meeting that he had been given an opportunity to explain the events at the disciplinary meeting on 18 May 2017 and he had done so. He had raised no objection to what had been recorded in the minutes of the meeting prepared by Ms McKay and provided to him on 18 May 2017.

[108] Mr Bavister has claimed that OCL had predetermined the decision to terminate his employment. I have considered whether or not predetermination might have affected OCL's genuine consideration of Mr Bavister's explanation.

[109] The inclusion of the reference to unspecified performance concerns in the letter dated 15 May 2017 I believe to have justifiably raised Mr Bavister's anxiety in light of the allegations. However I find no evidence that these performance concerns affected the decision to dismiss in circumstances in which OCL had high health and safety requirements which Mr Bavister, who was in a position of responsibility for enforcing standards on the site,

⁵ *Murphy and Routhan t/a Enzo's Pizza v van Beek* [1998] 2 ERNZ 607 at [pg 620]

admitted breaching by consuming alcohol and continuing to work on the SET Apartments site.

[110] I find that Ms McKay advising Mr Bavister not to respond to the allegations on 15 May 2017 before he had a proper opportunity to consider them and seek advice was correct and does not indicate premeditation.

[111] Mr Bavister was provided with a full opportunity to explain his actions and an opportunity after the preliminary decision had been announced when he had been given the opportunity to consider it and respond, further argues against premeditation.

[112] Whilst the Alcohol and Drug policy states that: “*where appropriate, seek to provide support to the worker to ensure further breaches do not occur*” I accept that this option was considered by OCL and rejected as not being appropriate prior to a decision being reached, and this also argues against predetermination.

[113] I determine that Mr Bavister was not unjustifiably dismissed by OCL in all the circumstances at the time the dismissal or action occurred.

Remedies

[114] Mr Bavister suffered an unjustifiable disadvantage as a result of his unpaid period of suspension.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i) of the Act.

[115] I order that OCL pay Mr Bavister the sum of \$2,000.00, pursuant to s 123(1) (c) (i) of the Act.

Costs

[116] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination. No application for costs will be considered outside this time frame without prior leave.

[117] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority