IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 161/08
5130855

	BETWEEN	NEVILLE JOHN GODFREY Applicant
	AND	CANON NEW ZEALAND LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Ian Hard for the Applicant Christine Meechan for the Respondent
Investigation Meeting:	20 November 2008 at Wellington
Determination:	8 December 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This case is about whether Neville Godfrey was justifiably dismissed from his employment as a customer care officer with Canon New Zealand Limited in July 2008. Mr Godfrey was dismissed by Mr Ben Archer, the Wellington customer care manager, after his conviction for driving with excess breath alcohol one Friday night after work, when returning home in his company vehicle. Despite Mr Godfrey's 22 years of hard work and able service to Canon, he was dismissed because this was his third conviction for driving with excess breath alcohol; Canon was not prepared to support his application for a limited licence again; and he could not work at Canon's service centre at Rimutaka prison.

[2] Mr Godfrey is concerned that his good service had not been taken into account, nor that his drink driving convictions took place over 15 years and his reading was at the lower end of the scale of being over the limit. He also claimed that

Mr Archer was either not the real decision-maker and/or that Mr Archer had predetermined the dismissal. In addition, he claimed that the delay in pursuing the matter after his conviction and statements made by Canon led him to believe his employment would be ongoing, and therefore unfairly lulled him into a false sense of security at the disciplinary meeting. Furthermore, he claimed that he was not given a fair opportunity to explain his conduct during the meeting.

Issues

[3] The issues for determination are related to procedure and substance, namely:

- Was Mr Godfrey unfairly lulled into a false sense of security before the disciplinary meeting so that he was prejudiced in his ability to give a full explanation;
- Did Mr Godfrey have an opportunity to explain his conduct at the disciplinary meeting;
- Did Mr Godfrey have access to the real decision-maker;
- Was the dismissal predetermined;
- Was there good cause for Mr Godfrey's dismissal; and
- If the dismissal is unjustified, what remedies are available to Mr Godfrey?

[4] The above issues can be conveniently divided into two categories: procedural and substantive fairness, bearing in mind, however, that the two can overlap significantly.

[5] The classic statement in relation to procedural fairness is found in *NZ (with exceptions) Food Processing etc IUOW v. Unilever New Zealand Limited* [1990] 1 NZILR 35 at 46, where it is stated:

> *The minimum requirement can be said to be:*
>
> *(1) Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*

> *(2) An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
>
> *(3) An unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*
>
> *Failure to observe any one of these requirements will generally render the disciplinary action unjustifiable. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standard of a fair-minded but not over-indulgent person.*

False Sense of Security?

[6] Mr Godfrey was an experienced service technician for Canon, with over 20 years experience. As part of his terms and conditions of employment he was provided with a company vehicle, which he was entitled to take to and from work. In November 2007 he was caught at a checkpoint on his way home driving with excess blood alcohol, after having a few drinks following work. He informed his then supervisor and claims that arrangements were made for him, in anticipation of loss of licence, to work at Canon's distribution and service centre, which is operated out of the Rimutaka Prison and is close to Mr Godfrey's home. Whatever arrangements may have been anticipated, Mr Godfrey broke his leg in March 2008 and has been unable to work since.

[7] On 9 April 2008 Mr Godfrey was duly convicted of driving with excess blood alcohol, with a reading of 111mg against the maximum allowable reading of 80mg. He was disqualified from driving for 12 months and 1 day, which, Mr Hard informed me, is a very light sentence for someone convicted of driving with excess blood alcohol for the third time.

[8] This was Mr Godfrey's third conviction for driving with excess breath alcohol while employed by Canon, albeit over a period of 15 years. Following the two previous convictions Mr Godfrey had been clearly told that he had committed serious misconduct in breach of his employment agreement and that Canon may not act with the same compassion in future should such incidents reoccur. After the first

conviction, Mr Godfrey wrote that he understood that his future with Canon was in jeopardy and that he could understand this. Furthermore, following a later criminal conviction unrelated to driving, he was again advised that if he took any action that potentially jeopardised the company's reputation, Canon would consider terminating his employment.

[9] Canon's management in Wellington was in a state of flux in March and April of 2008 and it was not until 5 May that Mr Ben Archer took up his position as customer care manager for the Wellington branch and became Mr Godfrey's boss. He met Mr Godfrey for the first time on 22 May and they discussed his broken leg and the drink driving conviction. The discussion covered his previous convictions, the potential for a limited licence and that Rimutaka Prison had stated that because of his convictions it would not allow him back at the service centre. Mr Godfrey disputed that and Mr Archer undertook to discuss the matter further with the Department of Corrections.

[10] The agreed minutes record that a disciplinary meeting to be run by Mr Archer was set in place for 26 May. This is inconsistent with Mr Godfrey's claim that a disciplinary meeting was to be run by an Auckland-based manager on a different date and therefore, on the balance of probabilities, I do not accept that evidence.

[11] For various reasons, principally the responsibility of Canon, the disciplinary meeting did not take place until 10 July. This delay was unacceptable. Prior to the meeting, Mr Godfrey was given a letter (dated 7 July) about the meeting where it was made absolutely clear, in the following terms, that Mr Godfrey's job was at risk:

> *Neville, I want you to be in no doubt that your job with Canon is on the line here and that you need to take the situation seriously.*

[12] When Mr Archer rang Mr Godfrey to confirm the meeting, he also told him that the staff's PDAs were being upgraded and that he should bring his PDA in to the meeting for upgrading accordingly.

[13] Mr Hard submitted that Mr Godfrey was lulled into a false sense of security because of the large gap in time between the three drink driving offences, the lack of follow up by the Auckland-based manager to pursue a disciplinary hearing, the overall delay in bringing on disciplinary proceedings and the requirement for him to bring in the PDA for replacement.

[14] I do not accept Mr Godfrey could have been lulled into any false sense of security in these circumstances, despite the delays and the PDA issue. First, I do not accept that an Auckland manager was to undertake the disciplinary investigation. It was always the responsibility of Mr Archer. Second, Mr Godfrey knew what he had done constituted serious misconduct and that on the previous occasions when he had done it while he was let off he was also told that that would not necessarily be the case again. Third, Mr Godfrey was still in Canon's employ at the time of the disciplinary meeting and therefore it would have been inappropriate for it to tell Mr Godfrey that there was no need to bring in his PDA, as that could have indicated a predetermined outcome of dismissal. Finally, the letter of 7 July is absolutely clear in its terms and no reasonable person could therefore go to the meeting thinking other than that their job was in real jeopardy.

Fair opportunity to explain?

[15] Mr Godfrey complains that at the disciplinary meeting on 10 July he was not given an opportunity to explain his position. This is inconsistent with the record of the meeting produced by Mr Godfrey himself, which states:

> *Minutes of the previous meeting on 22 May were handed to me and we went through them. Again I brought up the problem with servicing CIE* [at the prison] *and briefly told him what had happened re the …*[most recent] *conviction. He then showed me an email from Peter Luey of CIE stating that I was not allowed to be on the CIE grounds for servicing or maintenance work as it was against CIE policy for contractors.*

[16] The issue with CIE related back to the previous meeting, subsequent to which Mr Archer had ascertained in writing that the Corrections Department was not prepared, given his convictions, to allow Mr Godfrey to operate on its site.

[17] It is clear therefore that not only had Mr Godfrey the opportunity to explain his conviction for driving with excess breath alcohol in his company car at the meeting of 22 May, but he had a further opportunity to explain it on 10 July. In fact, in direct evidence, Mr Godfrey accepted that he and Mr Archer went through the 22 May minutes, which covered his explanation for why he had been drinking and driving. He only commented further about his ability to work at Rimutaka Prison, but accepted that he was able to comment on all the other matters had he chosen to do so. I therefore do not accept that Mr Godfrey did not have a full and fair opportunity to explain his situation.

Access to the Real Decision Maker?

[18] Mr Godfrey considers that the decision to dismiss him was made by head office in Auckland, not Mr Archer. Mr Archer denies making any such statement to Mr Godfrey, other than that he had referred the matter to head office to consider. It is possible that Mr Archer had left the ultimate decision to head office, but on the balance of probabilities, I accept his assurances that he did not. His evidence was that he had to liaise with human resources at head office and that the chief executive of Canon had to authorise or approve a dismissal, but that the ultimate decision was his. On the balance of probabilities I accept his assurances, given that overall I found his evidence straightforward and credible. Although parts of the minutes were written in the third person, namely that Canon had decided to do certain things, rather than Mr Archer, I accept his evidence that the ultimate decision was his.

[19] There is a fundamental tenet of procedural fairness that the right to be heard in disciplinary proceedings is a right to be heard by the decision-maker. If Mr Archer had not been the decision-maker, then the dismissal of Mr Godfrey could not be justified in law. However, it is acceptable for the decision-maker to rely heavily on advice and assistance from others, as long as those others do not bear the responsibility for the final decision (see for example *Smith v. The Christchurch Press Company Ltd* [1999] 2 ERNZ 685).

[20] Clearly Mr Archer was entitled to get advice from human resources while conducting the disciplinary process. At issue is whether the approval or authorisation required by the chief executive meant that the chief executive was the ultimate decision-maker. I conclude not for two reasons. First, Mr Archer gave evidence, which I accept, that he was the decision-maker. Second, the Collins English Dictionary defines the word *approval* as formal agreement and sanction and the word *authorise* as to permit someone to do something with official sanction. Clearly, therefore, Mr Archer sought and obtained prior approval to dismiss Mr Godfrey, but that did not mean that he was any less responsible for it.

[21] I therefore conclude that Mr Godfrey was heard by the decision-maker in relation to his dismissal.

Predetermination?

[22] Mr Hard submitted that if Mr Archer was the decision-maker then his decision to dismiss was predetermined because he had pre-authorised approval to dismiss Mr Godfrey and if such approval was required from head office then head office should have been contacted after Mr Godfrey gave his explanation on 19 July.

[23] I do not accept that Mr Archer had predetermined the dismissal. Even although he had been given prior approval to dismiss Mr Godfrey, I accept his evidence that he was open to a convincing explanation from Mr Godfrey. His request for Mr Godfrey to bring in his PDA for updating is evidence of a lack of predetermination.

[24] Given that Mr Archer was the final decision-maker and he had heard no new matters from Mr Godfrey, I conclude that although not an ideal way to proceed, the lack of any break to determine whether Mr Godfrey should be dismissed was not so unfair as to make an otherwise justified dismissal unjustified.

Substantive cause for dismissal

[25] Mr Hard argued that Mr Godfrey's conviction was at the lower end of the scale and that the Court's penalty was very light, showing that it did not treat his behaviour as being at the serious end of the scale for this offence. He also submitted that Mr Godfrey had never been subjected to any formal warning and even if he had such warning would have expired many years ago. Mr Hard also submitted that, when recovered from his broken leg, Mr Godfrey could return to work immediately if Canon was prepared to support his application for a limited licence, and that the dismissal was not necessary given Mr Godfrey's 20+ years of good performance.

[26] There is no doubting that, apart from his brushes with the law, Mr Godfrey was a very experienced, thorough, reliable and hard working service technician for Canon. It is also true that he had never been subject to a formal warning and that he had not been convicted of a serious driving offence in over 10 years. The fact remains, however, that driving his company car with an excess breath alcohol level constituted serious misconduct under Mr Godfrey's employment agreement, and he was very well aware of that.

[27] Mr Archer believed that he could not take the chance that Mr Godfrey might offend again because there could be serious consequences such as injury to other people. In these circumstances, Mr Archer quite reasonably saw that Canon's reputation might be affected. Furthermore, Mr Archer was rightly not impressed with Mr Godfrey's explanation that he had mistakenly drunk full strength beer when he thought he was drinking light beer. This was because, upon perusing Mr Godfrey's personal file, he found that he had used this excuse on an earlier occasion when convicted of driving with excess breath alcohol.

[28] While any warnings would well and truly have expired, the fact remains that there was serious misconduct and no warnings are therefore required.

[29] Given the existence of two previous occasions of drink driving, it is not surprising that Mr Archer was no longer prepared to take a risk that the offending might occur again. It is not for the Authority, in these circumstances, to substitute its view for that of the employer. It is however clear that, in the absence of an exculpatory explanation, employers are entitled to dismiss workers who abuse their trust, when provided with a company car, by driving it with excess breath alcohol, and even more so if it comes to a third occasion.

[30] Mr Godfrey's behaviour constituted a very serious and clear breach of his obligations to Canon. No doubt he was genuine when he volunteered that this would never happen again. Unfortunately, he had made such promises before and not kept to them. It appears that despite his best intentions, the drink driving message had not been fully taken on board by Mr Godfrey. No employer could have trust and confidence in Mr Godfrey in these circumstances. Canon simply could not take the risk that he would again not keep to his promise, with potentially disastrous consequences.

[31] In these circumstances, a fair and reasonable employer would conclude that summary dismissal was the appropriate sanction. Given that any procedural defects (the delay in bringing on the disciplinary meeting and the failure to take time to reflect on Mr Godfrey's explanation) were only minor, it therefore follows that what Canon did and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[32] Mr Godfrey's application is dismissed.

Costs

[33] Costs are reserved.

G J Wood
Member of the Employment Relations Authority