

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 252
3000170**

BETWEEN JAMES GOLDSMITH
 Applicant

AND COUNTIES READY MIX
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: James Goldsmith Snr, Advocate for Applicant
 Shelley Kopu, Counsel for Respondent

Investigation Meeting: 17 August 2017 at Auckland

Submissions received: 17 August 2017 from Applicant
 14 and 17 August 2017 from Respondent

Determination: 25 August 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr James Goldsmith, claims that he was unjustifiably dismissed by the Respondent, Counties Ready Mix Limited (Counties Ready Mix). Specifically Mr Goldsmith claims that he did not breach Counties Ready Mix Health and Safety policy.

[2] Mr Goldsmith also claims that Counties Ready Mix authorised an employee to enter his house without authority.

[3] Counties Ready Mix denies that Mr Goldsmith was dismissed unjustifiably and claims that the dismissal was justifiable both substantively and procedurally.

Issues

[4] The issues for determination are whether or not:

- Mr Goldsmith was unjustifiably dismissed as a result of his breaching Counties Ready Mix Health and Safety policy
- Counties Ready Mix authorised an employee to enter Mr Goldsmith's house without Mr Goldsmith's authority.

Background Facts

[5] Counties Ready Mix is a ready mix concrete company transporting products by way of 26 tonne 8-wheeler trucks and has been in business since 2000. It currently employs 42 staff. The site is a high hazard site with approximately 130 heavy truck movements taking place daily.

[6] Mr Andrew Payne, Managing Director and part owner of Counties Ready Mix, said that one of the developments at the beginning of 2016 was the introduction of the Counties Ready Mix Health and Safety system, PeopleSafe. The introduction of the PeopleSafe scheme and the overhaul of the Health and Safety processes was prompted by the Health and Safety at Work Act 2015.

[7] Counties Ready Mix took seriously its primary duty of care to look after the health and safety of the employees and other people at risk from the work it performed including customers, visitors and the general public. Counties Ready Mix was also aware of the employees' duty to keep themselves safe and not cause harm to others and took steps to ensure that the employees were also made aware of this duty.

[8] Mr Goldsmith was employed by Counties Ready Mix over three different periods, 16 June 2008 to 13 July 2008, 1 December 2008 to 5 April 2009 and 5 October 2009 to 10 September 2016 when his employment ended.

[9] Mr Goldsmith was a Truck Driver and his duties required him to drive one of the large 8-wheeler trucks used in the business. He worked autonomously, loading concrete, driving the concrete to clients and then discharging the concrete onsite before returning to the yard for the next load.

[10] Mr Goldsmith was issued with an individual employment agreement (the Employment Agreement) on 27 April 2016 which he had signed immediately above the statement which read:

I, James Goldsmith accept this employment agreement relating to my employment with Counties Ready Mix; I have been advised of my right to seek independent advice on the terms of this agreement.

[11] The terms of the Employment Agreement included the following:

Employee's obligations

The employee shall:

- ...
- *Comply with all policies and procedures (including any Codes of Conduct) implemented by Counties Ready Mix from time to time*
- *Take all practical steps to perform the job in a way that is safe and healthy for themselves and their fellow employees.*

Health and Safety

General health and safety obligations

Both Counties Ready Mix and the Employee shall comply with their obligations under the Health and Safety at Work Act 2015. This includes Counties Ready Mix taking all practical steps to provide the Employee with a healthy and safe working environment.

The Employee shall comply with all directions and instructions from Counties Ready Mix regarding Health and Safety and shall also take all reasonable steps to ensure that in the performance of their employment they do not undermine their own Health and Safety or the Health and Safety of any other person. ...

Random Drug Testing

... Accordingly Counties Ready Mix reserves the right to require the Employee to submit to random testing for non-prescribed drugs and alcohol.

.... In deciding whether to conduct a test, Counties ready Mix shall first discuss with the Employee and note any feedback. Failure to attend the registered medical practitioner appointed by Counties ready Mix for such testing shall be treated as serious misconduct. ...

Alcohol

If an Employee turns up to work and they are believed to be under the influence of alcohol or look as though they have recently consumed alcohol, it will be at the supervisor's discretion that the Employee be stood down from work on full pay. This is not a disciplinary measure, however disciplinary action may occur depending on the outcome of the investigation (if one is initiated).

Termination for serious misconduct

Notwithstanding any other provision in this agreement, Counties Ready Mix may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:

...

- *Failure to follow Counties Ready Mix's Health and Safety policies or procedures.*
- *Breach of Counties Ready Mix's policies or procedures.*

[12] Mr Goldsmith was also issued with a job description which he signed immediately below the statement:

I James Goldsmith, accept and understand the details in this job description; I am aware of my primary responsibilities and the objectives required.

[13] Under a heading 'Other' it stated:

- *As an absolute condition of employment is zero tolerance to drugs and Employees are required to be alcohol-free whilst at work.*

[14] Counties Ready Mix Code of Conduct And Procedures policy stated:

GROUND'S FOR DISCIPLINARY ACTION

The following are examples of offences, acts or omissions which could lead to a warning that your employment is in jeopardy.

[15] Included in the list as examples of offences which would be considered as serious misconduct and meriting summary dismissal were:

- *Serious breach of hygiene, health and/or safety requirements, or interfering with safety or security*

equipment or otherwise acting in a manner that threatens safety, health, or hygiene in the workplace or in a manner that hinders the safe and proper performance of the duties of other employees.

- *Consumption or use of, or being affected by, ... alcohol at work, on Company premises, in Company vehicles or other machines, ...*
- *Being at work in such a state of intoxication (whether drugs or alcohol) as to prevent, impede, affect or put at risk the proper and/or safe performance of duties (whether of the employee himself or of any other employee).*
- *Act in breach of any term of the employee's employment contract, or of any rules or policies from time to time issued by the Company relating to the security of the Company's ... property or premises.*
- *Serious breach of Company policies or procedures.*

[16] Counties Ready Mix' Health and Safety Policy included the statement:

- *Each Worker is expected to play a vital and responsible role in maintaining a safe and healthy workplace through:*
 - *Observing all safe work procedures, rules and instructions.*

[17] At the Investigation Meeting, Mr Goldsmith confirmed that he was aware of the terms of:

- the Employment Agreement and his obligations as an employee;
- the Code of Conduct;
- his job description; and
- the Health and Safety policy.

Mr Goldsmith confirmed that he understood the reasons for the Company's rules in respect of alcohol and that he was aware of what was considered by Counties Ready Mix to be serious misconduct.

[18] Mr Goldsmith further confirmed at the Investigation Meeting that he was aware of the Health and Safety procedure 0.6.1 which stated:

.... Any employee reporting for work under the influence of either drugs or alcohol will not be allowed to commence work. Failure to comply with this rule will lead to disciplinary action and may lead to instant dismissal.

Health and Safety Awareness in Counties Ready Mix

[19] Mrs Joanne Payne, General Manager, said that an important part of her role was to ensure that Counties Ready Mix was adhering to its Health and Safety obligations. One of Counties Ready Mix core values was safety and this was openly displayed by means of a poster which stated as the top core value “*Look after ourselves and our mates*”.

[20] Mrs Payne explained that Counties Ready Mix values in respect of Health and Safety procedures were reiterated throughout the company site by way of posters (including in the drivers’ lunchroom) and were discussed during monthly toolbox meetings which all the drivers, including Mr Goldsmith, attended. Copies of the health and safety procedures were located in each of the key site locations: the lunchroom, main office and the precast yard.

[21] As part of Counties Ready Mix’ commitment to safety and the adoption of the PeopleSafe scheme on 31 March 2016, it had fitted out a dedicated staff training room. All employees attended the six monthly Health and Safety refresher courses to ensure that they were current and familiar with the company policy and procedures.

[22] The refresher courses included reading all relevant procedures and answering a series of questions for each procedure. The employee had to answer all questions correctly for each procedure to complete the refresher. Accordingly the system provided Counties Ready Mix with a record of their employees’ learning for each procedure and also confirmed comprehension by the employees of the procedures.

[23] Mr Goldsmith had completed a Health and Safety refresher course between June and July 2016 and was reminded of Health and Safety procedures. The series of questions in relation to the procedures included questions on alcohol, asking specifically whether an employee attending to work under the influence of alcohol could attend to work duties and whether a failure to comply with the rule could result in instant dismissal. Mr Goldsmith had answered the following questions correctly:

- (a) *Any employee returning for work under the influence of either drugs or alcohol will not be allowed to commence work. True or false?*
- (b) *If you can walk in a straight line it's okay. True or False?*
- (c) *Failure to comply with this rule will lead to disciplinary action and may lead to instant dismissal. True or False?*

Events on 2 September 2016

[24] Mr Goldsmith was scheduled to be working at a start time of 3.45 a.m. on 2 September 2016. He had been notified of his start time via a text message which read: "32 Goldie 345" sent at 3.56 pm on 1 September 2016. The number 32 was the number of the truck assigned to Mr Goldsmith, 'Goldie' was his nickname and 345 was the start time. Counties Ready Mix used a text messaging service to send the text messages to all the drivers and the one to Mr Goldsmith was confirmed as having been received.

[25] Mr Goldsmith said that following the end of his workday on 1 September 2016, some of the other work employees had gone around to his home to socialise and drink beer. His sister had arrived later in the evening and informed him of a family bereavement, following which he and his sister visited a tavern then later drove to see their family members in Otara. Mr Goldsmith said whilst in Otara he had had a few drinks but these had been in moderation.

[26] Ms Andrea Shaw, Batching Supervisor, said her duties involve operating the company's despatch and batching systems to manage the manufacture and logistics of ready mixed concrete to customers as per their requirements. She shares an office with Mr Rob Tait, Production Team Leader.

[27] As part of her role she takes note of the drivers as they arrive to work and collect their vehicle keys, keeping a schedule of the drivers' start times on her desk and checking to see whether they arrived on time or not. This was important because if a driver did not arrive on time, it could affect Counties Ready Mix' ability to service the customers' requirements.

[28] Mr Payne said one of the changes made following the introduction of the PeopleSafe health and safety system at the beginning of 2016 was to keep the drivers' truck keys (including truck driver, hoist and loader drivers) on a keyboard in the Key Lobby in the Batching Office. This enabled employees to be met when they started their shifts and that gave Counties Ready Mix an opportunity to assess their state. Prior to this change, keys were placed in the lunchroom well away from the Batching Office staff.

[29] Ms Shaw said that on Friday 2 December 2016 she arrived at the Counties Ready Mix yard at around 2.45a.m. because it was going to be a busy day. Mr Goldsmith had been rostered to start work at 3.45am. but had not arrived at his scheduled start time and she had not received a message from him to say he was not going to be at work or that he would be late.

[30] Mr Goldsmith lived close to Counties Ready Mix' site, approximately 100 metres distance, and between approximately 4 a.m. and 5 a.m. Ms Shaw asked some of the drivers who were returning from customer sites to drive past and give him a 'toot' to wake him up just in case he had slept in. Ms Shaw said that at no time had she instructed any employee to do anything other than to sound their horns, and she had not told any driver to enter Mr Goldsmith's house.

[31] Mr Roland DeLacy, a fellow driver and a personal friend of Mr Goldsmith, said he had been asked to sound his horn as he drove past Mr Goldsmith's house, however he had taken it upon himself to knock on Mr Goldsmith's house door, and finding it open, he had gone inside the house and tried to awaken Mr Goldsmith, but had been unable to do so.

[32] Mr DeLacy confirmed at the Investigation Meeting that he had not been instructed by Ms Shaw to enter Mr Goldsmith's house, but had taken it upon himself to do so as Mr Goldsmith's friend.

[33] Mr Tait, who was Mr Goldsmith's direct supervisor, explained that because the drivers' start times changed from time to time, they could become confused and not arrive at work at the due commencement time, therefore it was not unusual to give them a quick call to check that they were aware of the time, hurry them along and make sure they were intending to come to work.

[34] When Mr Tait arrived at the Counties Ready Mix yard on 2 September 2016 at approximately 5.15 a.m., Ms Shaw told him that Mr Goldsmith had still not arrived at his scheduled time of 3.45a.m. and no message had been received from him to say that he was not going to be at work or that he would be late. Therefore at approximately 5.15a.m., he had tried to telephone Mr Goldsmith to find out if there was a reason why he was not at work, if he intended to come into work, or if he was just running late. He estimated he had called Mr Goldsmith approximately five times on his mobile telephone but none of the calls had been answered.

[35] Mr Goldsmith had answered when he called him again at approximately 6.10 a.m. Mr Tait said he had asked: *“Did you sleep in James?”* and Mr Goldsmith replied in a confused manner: *“Oh yes sorry”*. Whereupon he (Mr Tait) said: *“Well hurry up we’ve got other drivers away”* to which Mr Goldsmith replied: *“Be there soon”*.

[36] Mr Goldsmith said that when he had answered the telephone, he had heard Mr Tait order him to attend work, and as a result, he got dressed, put on the work clothes which were lying adjacent to his bed, picked up his lunchbox and also put his high viz vest on as this was mandatory to be worn on the worksite. He had decided to walk into work and inform Mr Tait that he was not able to attend work that day. He confirmed that he had not telephoned or texted Mr Tait to inform him that he was unfit to attend work that day as he had done on previous occasions because his mind had been on other things.

[37] Mr Payne said that Counties Ready Mix understood that occasionally the employees were not able to come to work and they were expected to inform Counties Ready Mix. He stated that it was unusual for disciplinary action to be taken as the result unless a pattern of such behaviour had developed.

[38] Mr Tait said that had Mr Goldsmith told him at any stage that he was not able to come to work for whatever reason, including that he was drunk; he would have simply accepted that without there being disciplinary action taken.

[39] Mr Tait said that he had removed the keys to the truck Mr Goldsmith was to drive from the Key Lobby because he had wanted to ask Mr Goldsmith the reason for his lateness when he arrived. Unless he did so, Mr Goldsmith might have arrived,

collected the keys from the hook in the Key Lobby and driven away in the truck without him (Mr Tait) being able to see and speak to him.

[40] At approximately 6.20 a.m. Ms Shaw said she saw Mr Goldsmith walking towards the production building in his usual work boots and high viz work clothing, and informed Mr Tait of his arrival, saying: *“He’s here, you had better see him”*.

[41] She said she had seen Mr Goldsmith enter the Key Lobby in the production building where the keys for the trucks, loaders and hoists were kept hanging on the wall. He had not entered the main office where she and Mr Tait worked but stayed in the Key Lobby for approximately for 10 seconds looking for his keys.

[42] Mr Tait was in the despatching side of the office adjacent to the Key Lobby and when he had heard Mr Goldsmith entering the Key Lobby he walked around and opened the door to talk to him.

[43] Mr Goldsmith said when he had entered the small area which contained the Key Lobby and the area where Ms Shaw sat and adjacent to which Mr Tait had his office, he had intended to speak to Mr Tait and tell him he was not able to drive.

[44] Mr Tait entered the Key Lobby area and asked him if he was looking for his keys. Mr Tait then moved as if to hand the keys towards him and asked if he was going to drive. Mr Goldsmith said he was not going to drive at which stage Mr Tait had asked him if he had had some alcoholic drinks and asked him to breathe upon him.

[45] Mr Tait said that when he had entered the Key Lobby area, he had seen Mr Goldsmith looking at the keyboard. However if Mr Goldsmith been intending to see him, he would have had to have entered through the door to his office area; instead he was looking at the keyboard in the Key Lobby.

[46] He had asked Mr Goldsmith if he was looking for his truck keys and when he responded positively, he had passed them towards him and Mr Goldsmith had put out his hand to receive them. At that point he became aware that Mr Goldsmith’s eyes were bloodshot and he appeared to be swaying, so he asked him to breathe upon him. When he had done so, he had said to Mr Goldsmith: *“You’re drunk aren’t you?”* to which Mr Goldsmith replied: *“Yes”*. His impression had been that Mr Goldsmith was intoxicated, so he asked him to go home.

[47] Ms Shaw confirmed that she had heard Mr Tait in discussion with Mr Goldsmith and asking him to breathe on him after which he had questioned Mr Goldsmith's sobriety, then told him he was not driving and to go home.

[48] After he had told Mr Goldsmith to go home, Mr Tait said he considered that the matter was very serious and decided to ring Mr Payne who had told him to ask Mr Goldsmith to wait until he arrived at the site which was approximately five minutes later.

[49] Mr Payne arrived outside the main office at approximately 6.40 a.m. and met Mr Goldsmith and Mr Tait. He said Mr Goldsmith reeked of alcohol, was swaying a little, struggling to stand straight and his eyes were red. He had asked Mr Goldsmith if he was drunk and he said he was drunk.

[50] He asked Mr Goldsmith why he had tried to start work when he was intoxicated and Mr Goldsmith replied he had had a death in his family and had been drinking since 5.45 p.m. the previous night. He said he had some drinks at home, then some at a local pub before meeting with family in Otara for more drinks, arriving home at approximately 3 a.m.

[51] Mr Payne said he calculated that if Mr Goldsmith had been drinking consistently since 5.45p.m. on 1 September 2017 and had only arrived home at 3a.m. from Otara that meant that he had been drinking steadily for approximately eight hours with only one hour's sleep before his shift was to start on 2 September 2017. He had asked Mr Goldsmith why he had not made contact with Mr Tait or with himself about his situation during the previous evening but did not receive a response.

[52] Mr Payne said he had asked Mr Goldsmith again if he was drunk and to which Mr Goldsmith had again agreed. Mr Goldsmith had asked if he was in trouble and Mr Payne said he told him that he was, but that it would be discussed further the next day. He then told Mr Goldsmith to go home.

[53] Following the meeting with Mr Goldsmith, Mr Payne said he then discussed the matter with Mr Tait and Mrs Payne and also questioned Ms Shaw. They had reviewed the video footage from which they saw that Mr Goldsmith had arrived for work wearing his normal work attire (high viz jacket and work boots). He said Mr Goldsmith had his lunchbox with him which he placed next to his truck. He then walked to the Batching Office where the truck keys were kept. They could see

Mr Goldsmith looking for his keys in the Key Lobby and Mr Tait intervening and Mr Goldsmith walking down the stairs towards the main office to meet with Mr Tait and himself.

[54] Mr Payne said that Mr Tait explained that Mr Goldsmith had moved to take the keys from him, had not mentioned that he was drunk until questioned, and at that time he (Mr Tait) had taken the keys back. He had discussed the matter with Ms Shaw who confirmed Mr Tait's description of events.

[55] Mr Payne said he was extremely concerned that Mr Goldsmith had been drunk but had still walked into the Batching Office to retrieve his keys and therefore appeared to be intending to work. This concerned him as Mr Goldsmith appeared to be in the Counties Ready Mix site while intoxicated which was a high hazard area with heavy machinery, and truck and loader constant movement. As a result he regarded the issue as very serious.

Disciplinary Meeting

[56] Mr Payne said he had sought the assistance of Counties Ready Mix advisers and drafted a letter inviting Mr Goldsmith to attend a disciplinary meeting. The letter dated Monday 5 September 2016 had been handed to Mr Goldsmith that same day and invited him to a disciplinary meeting to be held on Wednesday 7 September 2016.

[57] Mr Goldsmith had been at work on the intervening days between 2 and 7 September 2016. Mr Payne said he had instructed Counties Ready Mix employees to check Mr Goldsmith was fit, alert, and did not appear to be under the influence of alcohol. He had not considered suspending Mr Goldsmith during that period as he considered suspension could be viewed as a decision as to guilt.

[58] The letter outlined the background to Counties Ready Mix concerns, namely the events on the morning of 2 September 2016, and stated:

If the above is found to be correct we are extremely concerned that:

- 1. Your actions have seriously compromised the health and safety of yourself and others by driving to work intoxicated.*
- 2. You have breached our health and safety policy.*

3. *Your intention was to carry out your normal duties, which may have put others at risk, including yourself.*

[59] It referred Mr Goldsmith to specific clauses in the Employment Agreement including those relating to alcohol and termination for serious misconduct. The letter concluded by advising Mr Goldsmith he would have an opportunity to respond to the concerns as outlined and to provide further information and/or an explanation. The letter stated:

If we find that the above concerns are substantiated we may decide to take formal disciplinary action up to and including termination of your employment.

[60] The letter also included the advice that since it was a formal meeting Mr Goldsmith could bring a support person or representative with him.

[61] The meeting which had been postponed at Mr Goldsmith's request was held on 8 September 2016. The meeting was attended by Mr and Mrs Payne, Mr Goldsmith and his support person, Mr Kelvin Winstanley, a fellow colleague and truck driver. At the meeting, Mr Goldsmith and Mr Winstanley had been shown the camera footage and stills from the CCTV recording and were allowed time to consider them. Mr Payne said he had read out the letter of the 5 September 2016 and asked Mr Goldsmith if he had any response.

[62] Mr Goldsmith confirmed at the Investigation Meeting that he had the opportunity to provide an explanation at the meeting.

[63] Mr Payne said that Mr Goldsmith's response had been that he:

- (a) did not drive to work that day;
- (b) accepted that he did not telephone or text Mr Tait to tell him he could not attend work;
- (c) had come to work to tell Mr Tait that he could not work that day;
- (d) accepted that he was very drunk when attending to work;
- (e) did not dispute Counties Ready Mix version of events and admitted that he was very drunk.

[64] Mr Goldsmith said he was sure he had not told Mr and Ms Payne he had been very drunk, but stating during the Investigation Meeting that he had been intoxicated and that his eyes had been red, but the redness was caused by the distress over the relative's decease.

[65] Following Mr Goldsmith's response, Mr and Mrs Payne adjourned to consider his responses and their decision. They had accepted Mr Goldsmith's explanation that he did not drive to work and so that allegation was taken no further.

[66] They considered Mr Goldsmith's response that he had come into work only to tell his supervisor and/or manager that he could not work. They considered that this explanation conflicted with the facts, namely that he had arrived at work in his work clothes, brought in his lunchbox and left it by the truck he was due to drive, searched for his keys, and then moved to retrieve his keys from Mr Tait.

[67] Further, that he had never at any time prior to the meeting that day told Mr Tait or Mr Payne that he had only come to work on 2 September 2016 to tell Counties Ready Mix that he did not intend to work.

[68] If he had intended not to work, then their expectation was that he would have told Mr Tait that when Mr Tait spoke to him on the telephone or alternatively told Mr Tait and Mr Payne this when they had met with him on the morning of 2 September 2016. However, he had done neither of these things. He had also only gone home after both Mr Tait and then Mr Payne had told him to do so.

[69] They had considered Mr Goldsmith's actions did not match up with his explanation and did not accept that he had come to work to tell Counties Ready Mix that he could not work.

[70] Mr and Ms Payne reached the conclusion that Mr Goldsmith had intended to work and as a consequence that he had intended to drive the truck. They had believed that if Mr Tait had not intervened, Mr Goldsmith would have driven the truck while he was by his own admission drunk.

[71] They also considered Mr Goldsmith's view that Mr Tait handing over the keys to him was entrapment but they did not accept that Mr Tait had attempted to entrap Mr Goldsmith. Their view was that Mr Goldsmith's driving a 26 tonne truck whilst by his own admission drunk would have put the health and safety of himself and

others at serious risk and that the allegation that he had breached Counties Ready Mix Health and Safety policy was substantiated.

[72] Mr and Mrs Payne considered that Mr Goldsmith had not actually got into the truck and whether that should have made a difference to their decision. However they found that there was no doubt that Mr Goldsmith would have got into the truck and driven if Mr Tait had not intervened. Therefore it was not Mr Goldsmith's own decision that had prevented him from driving under the influence of alcohol but rather Mr Tait's intervention and then his and Mr Payne's instructions for him to go home that did so.

[73] Mr and Ms Payne reached the preliminary decision that Mr Goldsmith had come to work intending to work and intended to drive the truck while under the influence of alcohol. This amounted to a breach of the Employment Agreement, the Counties Ready Mix Health and Safety policy and they regarded it as serious misconduct. Based on their finding that there was no question that Mr Goldsmith had not intended to drive the truck, they considered that they had lost all confidence in him, that he could not be trusted to take care of himself and the public going forward, or to adhere to Counties Ready Mix Health and Safety policy.

Outcome Decision

[74] In deciding upon the appropriate outcome, Mr Payne said that he and Mrs Payne considered whether or not Mr Goldsmith could be demoted to another role where he did not need to work autonomously or where he no longer drove a truck, but there was no suitable position available. They considered that what had occurred was too serious to enable a continuing employment relationship with Mr Goldsmith and that allowing his employment to continue would mean that his behaviour would set a precedent for other employees. As a consequence, they had reached a preliminary decision to terminate Mr Goldsmith's employment.

[75] The meeting resumed approximately 20 minutes later and Mr Goldsmith had been informed of the preliminary decision and asked for his comments.

[76] The meeting was again adjourned while Mr Goldsmith and Mr Winstanley considered the preliminary decision. Following a second resumption 20 minutes later, Mr Payne said Mr Goldsmith had stated that he completely understood why they had reached the termination decision but was disappointed. Mr Winstanley had asked if

there was any way in which Mr Goldsmith could keep his job and he and Mrs Payne had adjourned again and considered this request.

[77] They discussed options including breathalysing Mr Goldsmith before each shift, the risk of further occurrences, and their loss of trust and confidence in Mr Goldsmith. They decided it was not practical to breathalyse Mr Goldsmith before every shift, and given that he worked autonomously they felt they needed to be able to trust him. They had decided after full consideration that the breach of Health and Safety and the stipulations in the Employment Agreement were too great and there was ample evidence that Mr Goldsmith had intended to work whilst under the influence of alcohol that day.

[78] When the meeting resumed approximately 20 minutes later, Mr and Mrs Payne advised Mr Goldsmith of the final decision to terminate. Although Mr Goldsmith's actions could have resulted in summary dismissal, they had made the decision to terminate his employment on notice in consideration of the fact that he was due to go on holiday the following day and they knew he would need to seek alternative employment on his return. Therefore they paid him two weeks' notice in lieu as per the contractual clause and decided not to enforce the restraint of trade clauses contained in the Employment Agreement.

Determination

Was Mr Goldsmith was unjustifiably dismissed as a result of his breaching Counties Ready Mix Health and Safety policy?

[79] Mr Goldsmith claims that he was unjustifiably dismissed by Counties Ready Mix. The test of justification in s 103A Employment Relations Act 2000 (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.

[80] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. Counties Ready Mix 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.

Procedural Justification

[81] In accordance with s 103A (3) of the Act, Counties Ready Mix was required to carry out a fair investigation and follow a fair procedure.

[82] *Ministry of Maori Development v Travers-Jones*¹ the then Chief Judge Goddard stated in regards to a fair procedure:²

What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.

[83] I find that Counties Ready Mix had carried out an investigation in which the video footage and photographic stills had been viewed and carefully considered and interviews had been held with Ms Shaw and Mr Tait. Mr Goldsmith was advised of the allegations against him, and given the opportunity to provide an explanation at a meeting at which he had been accompanied by a support person. I find this followed the procedural requirements expected of the fair and reasonable employer.

[84] The explanation provided by Mr Goldsmith had been carefully considered by Mr and Mrs Payne before they had arrived at a preliminary decision, which had then

¹ [2003] 1 ERNZ 174

² Ibid at para [30]

been reconsidered following Mr Winstanley's submission on Mr Goldsmith's behalf before a final decision had been confirmed.

Predetermination

[85] I have considered whether or not there had been predetermination on the part of Counties Ready Mix.

[86] Firstly I have considered whether or not sending Mr Goldsmith home on the morning of 2 September 2016 prior to an investigation or his having had the opportunity to provide an explanation meant that Counties Ready Mix had predetermined the matter.

[87] When Mr Goldsmith arrived at work on the morning of 2 September 2017 Mr Tait had the view that he had been drinking alcohol, and Mr Goldsmith told him (and Mr Payne when he arrived at work) that he was drunk. I note that the Employment Agreement states that if an employee arrives at work and is believed to be, or: *“look as though they have recently consumed alcohol, it will be at the Supervisor's discretion that the Employee be stood down from work ...”*

[88] I find no predetermination in Mr Tait exercising his discretion to send Mr Goldsmith home in those circumstances.

[89] Secondly I have considered whether or not allowing Mr Goldsmith to work on the days between 2 and 7 September 2016 constituted predetermination.

[90] I note that Mr Payne had considered that issue and decided that suspending Mr Goldsmith without reason to believe he was under the influence of alcohol on the days between 2 and 7 September 2016, and prior to a meeting giving him an opportunity to offer an explanation would in fact be predetermining the issues.

[91] I find no predetermination on the part of Counties Ready Mix.

[92] I find that Counties Ready Mix followed a fair procedure.

Substantive justification

[93] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*³. The Employment Court stated:⁴

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[94] In *Ministry of Maori Development v Travers-Jones*⁵ the Employment Court observed:

A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.

[95] Counties Ready Mix is a high hazard working environment. In addition to the risks to employees working on site, there are the risks contingent upon heavy large trucks being on public roads. As a result Counties Ready Mix has comprehensive policies regarding health and safety which are communicated to employees via provision of employment agreements, policies and procedures, and regularly enforced via posters in the main work locations, at the monthly toolbox meetings and in 6 monthly refresher courses.

³ [2011] NZEmpC 160

⁴ *Angus at para [23]*

⁵ [2003] 1 ERNZ 174

[96] Mr Goldsmith confirmed at the Investigation Meeting that he was aware of, and had accepted the terms in the Employment Agreement. He knew and understood the requirements of Counties Ready Mix policies and its stance on health and safety, in particular as it related to alcohol, as reinforced and confirmed during his attendance at the health and safety refresher course a few months prior to the termination of his employment.

[97] I find that it was reasonable for Counties Ready Mix to believe on reasonable grounds that Mr Goldsmith had breached the Employment Agreement and its Health and Safety policy and procedures by his actions on 2 September 2016 in light of:

- The video footage which appeared to confirm Mr Goldsmith's arrival at the Counties Ready Mix premises on 2 September 2016 in his work clothes and with his lunch box which he placed by the truck he was expected to drive that day;
- Ms Shaw and Mr Tait's evidence that Mr Goldsmith's action on arrival at the Production Office was to examine the board in the Key Lobby for the truck keys, and
- Mr Goldsmith's admission that he was drunk made on separate occasions: once on 2 September 2016 to Mr Tait and twice subsequently to Mr Tait and Mr Payne on 2 September 2016, and again during the meeting held on 8 September 2016 to Mr and Mrs Payne when he was no longer intoxicated.

[98] Mr Payne's evidence was that Counties Ready Mix had not considered having Mr Goldsmith attend a medical practitioner for a drug and alcohol test as not only was this not a random testing situation, but not indicated as applying in the situation in which Mr Goldsmith not only smelt strongly of alcohol and appeared to be unsteady on his feet, but had also repeatedly told Mr Tait and then him that he was drunk on 2 September 2016. Therefore he considered the situation not to fall to be considered under the Random Drug Testing procedures as outlined in the Employment Agreement.

[99] I consider this to be a conclusion a fair and reasonable employer could reach based on Mr Goldsmith's repeated confirmation that he was drunk on 2 September 2016, and repeated during the meeting held on 8 September 2016 at which he had a support person present.

[100] During the investigation Meeting Mr Goldsmith disputed that he was 'drunk', but said he been 'intoxicated'. I consider this to be a semantic distinction with no practical differentiation, noting that '*intoxicate*' is defined as: "*(alcoholic drink or drug) cause (someone) to lose control of their faculties or behaviour*"⁶

[101] I find that Counties Ready Mix had substantial justification for concluding that Mr Goldsmith had breached its Health and Safety policy with the potential to place himself and others at risk, and terminating Mr Goldsmith's employment.

[102] I determine that Mr Goldsmith was justifiably dismissed by Counties Ready Mix.

Did Counties Ready Mix instruct its employees to access Mr Goldsmith's house without his authority?

[103] Ms Shaw stated that she had issued instructions for some of the other Counties Ready Mix drivers to sound their truck horns as they drove past Mr Goldsmith's house in order to rouse him if he had overslept. She denied that she had issued any instruction to any of the drivers to enter Mr Goldsmith's house.

[104] Mr DeLacy's evidence was that he had, on his own initiative and on the basis of his personal relationship with Mr Goldsmith, entered Mr Goldsmith's house.

[105] I determine that Counties Ready Mix did not issue its employees with an instruction to enter Mr Goldsmith's house and that Mr DeLacy's decision to do so was a personal decision with its basis in their personal friendship.

⁶ Oxford Living Dictionaries online

Costs

[106] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[107] 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