

NOTE: This determination contains an order at paragraph [6] prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 232
3158484

BETWEEN JASON JOYCE
 Applicant

AND TRAFFIX (2020) LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Sarah Harding, advocate for the Respondent

Investigation Meeting: 16 February 2023

Determination: 8 May 2023

DETERMINATION OF THE AUTHORITY

- A. Traffic (2020) Limited acted justifiably in deciding to dismiss Jason Joyce for serious misconduct.**
- B. Costs are reserved. A timetable is set if an Authority determination of costs is needed.**

Employment relationship problem

[1] Traffic (2020) Limited (Traffic) dismissed Jason Joyce on 1 November 2021 for serious misconduct. He had worked as a traffic controller since 31 March 2021.

[2] Traffic managing director Michael Eremin decided to dismiss him after he concluded Mr Joyce deliberately consumed alcohol while at work on the night of 21

October 2021 and was “intoxicated on site and drove home while under the influence of alcohol”.

[3] In reaching that conclusion Mr Eremin said he had relied on information from three people who had seen and talked with Mr Joyce during his work shift. Two supervisors, Jord-Ann Betterton and Jianhi David, reported Mr Joyce appeared drunk when they saw him when they visited his work site and again shortly afterwards when he returned to the work depot. The other person was Traffix’s office manager, Emma Betterton. She came into the work depot after the two supervisors rang her to report their concerns about Mr Joyce. She later told Mr Eremin that Mr Joyce appeared “intoxicated” when she spoke to him and she had urged him not to drive home.

[4] Mr Joyce raised a personal grievance about his dismissal. He applied to the Authority for a finding that Traffix’s actions were unjustified and the company should be ordered to pay him lost wages and distress compensation.

[5] He said he had not been drinking his working hours. Rather, Mr Joyce said it was his supervisor, referred to in this determination as Mr B, who was drunk and had thrown Mr Joyce to the ground. Mr Joyce said he hit his head on the ground, leaving him bloodied and bruised. He said Traffix had not fairly investigated the incident and had treated him less favourably than Mr B. Mr B received a written warning for inadequate supervision of Mr Joyce at the worksite.

Order prohibiting publication of names of two employees

[6] The names of two employees referred to in the pleadings and evidence are prohibited from publication in relation to this matter.¹ The two employees are the supervisor, referred to above as Mr B, and one other employee, to be referred to only as Mr A, who were present at the work site at the time that the two supervisors visited and later returned to the work depot with Mr Joyce and Mr B. Those two employees did not provide evidence for the Authority’s investigation and did not have the opportunity to respond to any allegations about their own conduct that night so it was not appropriate that their names be on the public record through this determination.

¹ Employment Relations Act 2000, Schedule 2 clause 10(1).

The Authority's investigation

[7] Mr Joyce, Summer Robertson, Mr Eremin, Ms David, Ms Emma Betterton and Ms Jord-ann Betterton lodged written witness statements for the Authority's investigation. The latter two women are sisters.

[8] All six witnesses, under affirmation, answered questions from me and the parties' representatives at the investigation meeting. The representatives also gave oral closing submissions.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[10] The following issues were investigated:

- (i) Did Traffix do what a fair and reasonable employer could have done in deciding to dismiss Mr Joyce on 1 November 2021 and how it reached that decision, including considering whether:
 - (a) a finding of serious misconduct was reasonably reached;
 - (b) he was treated differently from another worker, Mr B; and
 - (c) the outcome of Traffix's inquiry into its concerns about Mr Joyce's conduct was pre-determined?
- (ii) If Traffix acted unjustifiably, what remedies should be awarded to Mr Joyce, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Joyce that contributed to the situation giving rise to his grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

The events and disciplinary process

[11] At 2.05pm on Wednesday, 21 October 2021 Mr Joyce sent the following text message to an unknown number of other Traffix employees:

So we were thinking. Scene [sic] we are working on View Road tonight. We thought you people may want to join us for a feed. You bring food, drinks and we will supply music and intertainment [sic]. So bring your beers, weed. Bawa hahaha after 9.00pm tonight View Road.

[12] He signed the message off with his first name and the first names of Mr A and Mr B.

[13] Traffix was providing traffic management in View Road for a utility company carrying out maintenance work during the night.

[14] Ms Jord-ann Betterton and Ms David were supervising work on a different site that night but learned of Mr Joyce's text message from other workers. At the end of their shift, at around 3.30am, they made an unannounced visit to the View Road site. They later told Ms Emma Betterton and Mr Eremin that, on arrival, they saw Mr Joyce urinating against the side of the work truck and he appeared drunk. There were some empty bottles and cans of various alcoholic beverages in the cab and on the deck of the truck. They rang Ms Emma Betterton who asked them to return to Traffix's work depot which was about ten minutes' drive away.

[15] Ms Jord-ann Betterton and Ms David also took some photographs showing empty cans and bottles on the truck and, inside the cab, a chilly bin belonging to Mr Joyce. The bin had some cans and a bottle in it.

[16] They returned to the depot where Ms Emma Betterton joined them. Around 4am Mr B, Mr A and Mr Joyce arrived at the depot in the work truck. Ms David and Ms Jord-Ann Betterton said they saw Mr B and Mr A struggling to get Mr Joyce out of the truck. They said this "ended up with a little pushing of one another on the road as Jason was so drunk".

[17] Mr Joyce went to his car. Ms Jord-Ann Betterton and Ms David spoke to him through the window of his car, asking him not to drive home.

[18] Meanwhile Ms Emma Betterton spoke to Mr B and Mr A. She later said that she had "looked them over" and believed they were sober. She noticed no smell of

alcohol or “glassy eyes”. She also approached Mr Joyce in his car and spent around 10 minutes talking to him. In an email she wrote the following week she said “it was apparent not only by the smell but the slurred speech and slouched appearance that he was highly intoxicated”. She said she asked him if he had been drinking and he replied with yes.

[19] She said she then “exchanged words for a bit” and asked “how could someone be so foolish to risk all our jobs like that”. She said Mr Joyce drove off but soon after came back “yelling obscenities to all three of us” before driving off again.

[20] At around 4.30am Ms Emma Betterton spoke by telephone to Mr Eremin to let him know what had happened. Around 5am Traffix’s work scheduler arrived at the depot. He spoke with Mr B. He later told Mr Eremin that Mr B showed no signs of intoxication, did not smell of alcohol and spoke calmly and clearly.

[21] Around 10am that morning Mr Eremin spoke with Mr Joyce by telephone. He told him there was to be a disciplinary process. He sent him a letter later that day setting out his concerns and advising Mr Joyce of his right to have a representative accompany him to a meeting about those concerns.

[22] Mr Eremin’s letter said Mr Joyce was “argumentative and sounded drunk” during their telephone conversation that morning. He also later said Mr Joyce had told him during that phone call that “he was not in the yard” earlier that morning. This led Mr Eremin to check the depot’s security cameras. He said he saw footage of Mr Joyce sitting in the driver’s seat of his car with Ms Emma Betterton leaning in to his window and Ms David and Ms Jord-Ann Betterton walking past.

[23] The meeting with Mr Joyce to discuss Traffix’s concerns was held on 29 October 2021. An employment advocate accompanied him. Mr Joyce accepted he had sent the text to other workers on 21 October about coming to the site with beers and “weed”. He said this was only meant as “a joke”. He denied he drank any alcohol during that night. Instead he said it was Mr B who was drunk.

[24] Mr Joyce also said he was seriously assaulted by Mr B that night. Mr Eremin took this to be a reference to “a light tussle” when Mr B pulled Mr Joyce out of the truck when they returned to the depot around 4am. However a letter sent by his advocate after his dismissal said Mr Joyce was assaulted earlier in the morning. He

claimed that around 2am on 22 October Mr B asked Mr Joyce to drive him to get more alcohol and to visit a service station. Mr Joyce said that at the station he had remonstrated with Mr B about drinking and Mr B had dragged him out of the high seat of the truck. Mr Joyce said he fell and hit his head on the concrete surface at the service station. Mr Joyce said his head was bleeding and he was then taken back to the yard by Mr A.

[25] On 1 November 2021 Mr Eremin arranged a further meeting with Mr Joyce. It was held by audio-visual link rather than in person. At that time the Auckland region was still under Alert Level 3 Covid-19 response restrictions. At the Authority investigation meeting Mr Joyce denied any such meeting had been held on 1 November 2021. Traffix, however, provided a copy of an email with the subject heading “Jason Joyce – Outcome Meeting”. The email was dated 1 November. It included a Zoom meeting hyperlink and was sent to Mr Joyce’s email address. A reply email from Mr Joyce also sent that day read: “Thanks, I’ll be there”.

[26] Following the meeting Mr Eremin sent Mr Joyce a letter confirming he was summarily dismissed for serious misconduct. The letter said Mr Eremin had told Mr Joyce during their meeting on 1 November that the allegations of serious misconduct for “being intoxicated at work and driving under the influence” were upheld. Mr Eremin wrote that he had then asked Mr Joyce to comment on Traffix’s proposal to dismiss him. Mr Joyce had responded by saying Mr B was to blame, not him.

A finding of serious misconduct could reasonably be made

[27] An employer investigating concerns of the type raised regarding Mr Joyce’s conduct must act fairly and reasonably in making its inquiries and reaching its conclusions. In reviewing the employer’s actions, the Authority investigates whether the employer’s actions were, on the balance of probabilities, what a fair and reasonable employer could have done in all the circumstances at the time. This includes looking at whether the employer had a reasonable basis for any conclusions reached, genuinely believed the information relied on was true and had made reasonable efforts to investigate the reliability of that information.

[28] If satisfied the information was reliable, Mr Eremin was entitled to conclude drinking alcohol at work was serious misconduct. A work rule set out in Mr Joyce’s written employment agreement said an ““employee may not be under the influence of

... alcohol while at the place of work or while carrying out their duties”. The agreement also identified “use of ... alcohol at work” as a grounds for dismissal for serious misconduct.

[29] In this case Mr Eremin had first-hand accounts from two supervisors and Traffix’s office manager of their observations of Mr Joyce’s conduct and demeanour during the early hours of 22 October. They each described smelling alcohol on his breath, slurred speech and “glassy” eyes. They agreed Mr B had pushed Mr Joyce out of the truck at the depot but reported no visible bleeding as Mr Joyce claimed had resulted from being pushed out of the truck at a service station.

[30] Mr Eremin had no corroborated information supporting Mr Joyce’s allegation that Mr B was really the one who was intoxicated. The two supervisors, the office manager and the scheduler each spoke to Mr B in the early hours of 22 October and reported no signs he had been drinking.

[31] Mr Eremin was also able to assess the reliability of some of what Mr Joyce said by checking the depot CCTV footage. What it showed contradicted Mr Joyce’s denial that Ms Emma Betterton had spoken to him at the depot that morning.

[32] While, as discussed below, Mr Eremin could have done more to investigate the matter, this did not negate the reasonable basis on which he reached his conclusion that Mr Joyce had committed serious misconduct by both planning to be, and actually being, intoxicated at work.

There was no unfair difference of treatment between Mr Joyce and Mr B

[33] Under an Authority direction Traffix disclosed its documentation for the disciplinary process it conducted with Mr B about the events of the same night. In that process Mr B was required to explain why, as a supervisor, he appeared to have allowed Mr Joyce to drink on site and what had happened when he and Mr Joyce had returned to the yard. The allegation put to him was that he had pulled Mr Joyce out of the truck “resulting in a scuffle”. Mr B was told Traffix believed he had failed to adequately perform his duties as a supervisor and to maintain safe work practices.

[34] Notes of a disciplinary meeting held with him on 25 October 2021 record Mr B saying he had not been drinking himself but he should not have allowed Mr Joyce to drink. He said he accepted that was “on him” as supervisor. He denied hitting Mr

Joyce but accepted he had “pulled him out of the truck”. He said he did so because Mr Joyce was drunk and “being an idiot”. He also said the scheduler had “checked me and smelt my breath” when he returned to the depot that night so knew that he was not drunk.

[35] Mr B was also recorded as saying he realised his actions were “poor” and he should have been in control of what was happening on the site.

[36] There were significant differences in the evidence about what happened and the responses of the two men. Mr Eremin did not have any information, apart from Mr Joyce’s allegation, saying Mr B was under the influence of alcohol himself. Mr B also accepted his conduct was unsatisfactory and he was contrite. By contrast Mr Eremin had information he could reasonably rely on that Mr Joyce was intoxicated but Mr Joyce denied doing anything wrong.

[37] In light of those differences, there was no unjustified disparity in the outcomes that Traffix imposed as disciplinary consequences on both men. Mr B failed to meet expectations his employer could reasonably have of a supervisor but, in light of his contrition, a fair employer could also have opted to be lenient about what action it took about his admitted wrong-doing. Mr Joyce’s response was contrary to the information Traffix had about his conduct. With no acceptance by him of any wrong-doing, a decision to dismiss Mr Joyce was within the range of responses reasonably open to a fair employer in the particular circumstances.

Traffix fairly investigated its concerns, without pre-determination

[38] Mr Joyce had a number of criticisms about how much Mr Eremin did to look into the company’s concerns about what happened during the night of 21 October and the early hours of 22 October 2021. He said more could have been done to investigate his allegation that he was injured by Mr B’s actions at a service station, not Traffix’s depot. He said Ms Robertson and another worker who visited the site should also have been interviewed.

[39] Mr Joyce said Mr Eremin should have approached the service station where he said he was pushed out of the truck and asked for its CCTV footage in order to check his account of events. However Mr Eremin had a logical basis for not pursuing that degree of inquiry. There was no evidence that Mr Joyce, as he claimed, was visibly

bleeding as a result of Mr B having assaulted him elsewhere. There was also good reason for Mr Eremin to doubt Mr Joyce's recall of events because of his denial, contrary to the depot's CCTV footage, that Ms Emma Betterton and the two supervisors had spoken to him on his return to the depot in the early hours of that morning.

[40] Further, Mr Joyce's allegation that Mr B had assaulted him did not answer the substance of the disciplinary inquiry. Even if Mr B had pushed him, resulting in a fall, it did not explain why Mr Joyce had suggested Traffix employees could gather at his work site earlier that night to drink or why Mr Joyce was, on what the two supervisors and Ms Emma Betterton reported, intoxicated at work.

[41] Mr Eremin did not interview two workers who Mr Joyce and his advocate suggested could have provided useful information about his demeanour and whether Mr B, not Mr Joyce, was drinking. Ms Robertson was one of those suggested interviewees. At the Authority investigation meeting she confirmed she was in a personal relationship with Mr Joyce but said that, at the time of the 21 and 22 October 2021 events, they were "just friends". At that time she was a Traffix employee but was not rostered to work that night. She said she was passing by Mr Joyce's worksite on her way to a friend's house. She said she had stopped there "for a little bit" but had left by 8pm. She said, if asked at the time, she would have said she saw Mr B drinking an alcoholic drink when she was there. She would not, however, have been able to provide any information about the state of affairs, or people, by the time Ms Jord-ann Betterton and Ms David visited the site at 3.30am. She would also not have been able to provide any information about whether Mr Joyce, as he said, had gone to a service station with Mr B at 2am.

[42] Similarly, another worker who was not on duty, but was said to have visited the site as a result of getting Mr Joyce's text message, was not present by the time the two supervisors visited and observed matters as they were by around 3.30am.

[43] So, while those omissions may have been defects in the process followed, they were minor and did not result in Mr Joyce being treated unfairly.²

[44] Considered overall, Traffix had met the obligations of following a fair process. Mr Joyce was advised of the company's concerns. He attended a meeting to give his

² Employment Relations Act 2000, s103A(5).

account of events with the assistance of an employment advocate. He was provided with relevant information about what Ms Emma Betterton, Ms Jord-Ann Betterton and Ms David said about what they saw and heard and an opportunity to comment on it. Mr Eremin's evidence established Mr Joyce's explanations were genuinely considered. It was within the range of reasonable responses that a fair employer could have made for Mr Eremin to reject Mr Joyce's emphasis on Mr B's conduct and to conclude Mr Joyce had not adequately explained his own conduct.

[45] In all the circumstances at the time, Traffix had done what a fair and reasonable employer could have done to investigate its concerns and to then decide Mr Joyce had committed serious misconduct for which, in light of the inadequacy of his explanation, he should be dismissed.

[46] Accordingly Mr Joyce's application for a finding that he had a personal grievance is declined. In light of that conclusion the issues of remedies and contribution did not need to be determined.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Traffix may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Joyce would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[48] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Robin Arthur
Member of the Employment Relations Authority

³ See www.era.govt.nz/determinations/awarding-costs-remedies.