

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 457
5384131/5384136**

BETWEEN HENRY NEE NEE
 First Applicant
 ANDY NATHAN
 Second Applicant

AND C3 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Simon Mitchell, Counsel for Applicants
 Katherine Burson, Counsel for Respondent

Investigation Meeting: 30 October 2012 at Auckland

Submissions received: 31 October 2012 from Applicant and from Respondent

Determination: 14 December 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicants, Mr Henry Nee Nee and Mr Andy Nathan, claim that they have been unjustifiably dismissed from their employment with the Respondent, C3 Limited (C3), following an incident involving other C3 employees drinking on C3 premises during the evening of 2 February 2012.

[2] Mr Nee Nee and Mr Nathan further claim that there has been discrimination on the basis of their roles as union delegates and Health & Safety representatives, and that that there has been disparity of treatment.

[3] C3 claim that Mr Nee Nee and Mr Nathan were justifiably dismissed for breaching a liquor ban which was in place for the C3 premises on 2 February 2012 and for breaching the C3 Code of Conduct.

Issues

- [4] The issues for determination are whether:
- a. The decision by C3 to dismiss Mr Nee Nee and Mr Nathan was a fair and reasonable decision.
 - b. There was discrimination and/or disparity in the treatment of Mr Nee Nee and Mr Nathan such as to render the decision to dismiss Mr Nee Nee and Mr Nathan one which was not available to C3 as a fair and reasonable employer.

Background Facts

[5] Mr Nee Nee and Mr Nathan were employed as Stevedores. Mr Nee Nee had previously worked for Leonard & Dingley Limited, his employment being transferred to C3 when Leonard & Dingley Limited was sold to C3. Mr Nathan had been employed by C3 since 2006.

[6] Both Mr Nee Nee and Mr Nathan were delegates of the Maritime Union of New Zealand (MUNZ) and employee representatives on the C3 Health & Safety Committee.

Liquor Ban

[7] Mr Ronald Neil, Manager of the C3 Auckland operation, explained that on the night of 22 September 2011 there had been a serious assault on an employee following a drinking session involving alcohol on the C3 premises. The employee had been punched in the side of the head and had ended up at the bottom of a flight of stairs.

[8] As a result of this incident, Mr Neil said that he had wanted, in line with the C3 Code of Conduct, to ensure that employees were reminded that liquor was not to be brought on to, or consumed on, the C3 Premises. Accordingly Mr Neil said he had put up signs dated 23 September 2011 in the C3 Canteen and at the different offices around the wharf stating:

*Due to a Serious Assault on a C3 Employee on C3 Company
Premises ALL Alcohol is Now Banned From C3 Premises Forthwith.*

[9] Mr Neil said he had also sent a text message to all employees stating that a liquor ban was in place, and had drawn the liquor ban to the attention of the Health & Safety

representatives at a Health & Safety Committee meeting held on 27 September 2011 at which Mr Nee Nee and Mr Nathan were present.

[10] Mr Nee Nee and Mr Nathan confirmed that they were aware of the liquor ban as a result of the signs and the information at the Health & Safety Committee meeting on 27 September 2011; however they both stated that they had believed the liquor ban to be temporary in nature.

Incident on 2 February 2012

[11] Mr Neil said that following the announcements of the liquor ban being in place he had not been notified of any alcohol being consumed on C3 premises until 3 February 2012 when he had been informed by Ms Michelle Gurney, an Auckland employee, that she believed there had been a drinking session in the C3 locker room the previous evening. Mr Neil said Ms Gurney had informed him that she had been putting up labour lists on the previous evening and had seen Mr Tangi Williams with others drinking in the locker room.

[12] Mr Neil said he had checked the rubbish bins after speaking to Ms Gurney where he had discovered a number of empty beer boxes and bottles, and he had taken photographs of the contents of the rubbish bins which were submitted in evidence, which were of Heineken beer boxes. Mr Neil said he had been very busy at this time, and he had therefore contacted Mr Baz Pritchard, C3 General Manager – Employee Relations, for assistance on 10 February 2012.

[13] Mr Neil said he and Mr Pritchard had agreed that Mr Pritchard would carry out an investigation into the alleged breach of the liquor ban, and in the interim Mr Neil had spoken to Mr Tangi Williams after having first informed Mr Dave Philips, Walking Delegate of the Maritime Union of New Zealand (MUNZ), who had raised no objection to his talking to Mr Williams.

[14] Mr Neil said Mr Williams had been forthcoming when questioned about what had occurred on the evening of 2 February 2012, and had acknowledged that there had been a group of employees drinking alcohol in the locker room that evening after having been fishing on the wharf. Mr Neil said Mr Williams had informed him of the names of those present in the locker room, which had included Mr Nee Nee and Mr Nathan.

The initial investigation

[15] Mr Pritchard, who was based in Tauranga, said he had arrived in Auckland on 16 February 2012 to commence the investigation and as part of the investigation he had

interviewed Ms Gurney, Mr Tu Tangata, Mr Tuakeu Rio, and Mr Nathan on 16 February 2012, and had spoken to Mr Rua Porima-Henry by telephone.

[16] Mr Pritchard said he had spoken to Mr Nathan in the presence of Mr Philips, and Mr Nathan had told him that Mr Williams, Mr Rio, Mr Prima-Henry and Mr Tangata had been in the locker room at approximately 3.00 to 3.30 p.m., but that Mr Nee Nee had not been present. Mr Pritchard said Mr Nathan had told him that those present were “*well on the way*” and “*happy*”, and he had told them to go outside, i.e off the C3 premises, to have a drink as he was aware of the company policy concerning the liquor ban.

[17] Mr Pritchard said that Mr Nathan had told him that he “*may have had a beer with them – on the way downstairs and outside*” but said he had not consumed alcohol on the C3 premises and he had left before the others.

[18] Mr Pritchard said that upon his return to Auckland on 22 February 2012 he had spoken to Mr Tangata again because although he had told him that he had been asleep during the incident on 2 February 2012, Mr Rio had at the earlier interview said that he believed Mr Tangata had in fact had a drink. However Mr Pritchard said Mr Tangata had confirmed his earlier statement that he had been sleeping at the relevant time.

[19] Mr Pritchard said he spoken to Mr Porima-Henry a second time by telephone in order to clear up a conflicting statement by Mr Nathan who had told him that Mr Nee Nee had not been present during the drinking session on 2 February 2012, whereas Mr Porima-Henry had stated that both Mr Nee Nee and Mr Nathan had been drinking with the other employees on C3 premises and had continued drinking downstairs. Mr Pritchard said that Mr Porima-Henry had also told him that Mr Nee Nee had bought the beer.

[20] Mr Pritchard explained that he had also spoken to Mr Josh Iosua who had confirmed that Mr Williams, Mr Porima-Henry, Mr Rio, Mr Nee Nee and Mr Nathan had been present in the locker room drinking beer.

[21] On 28 February 2012 Mr Pritchard said he had spoken to Mr Rio again in the presence of Mr Tommy Faifua, a MUNZ representative. Mr Pritchard said he had told Mr Rio that he had been concerned that he (Mr Rio) had not been completely forthcoming on the previous occasion when they had spoken, whereupon Mr Rio had told him that on 2 February 2012 he and Mr Tangata had gone upstairs and had found Mr Nee Nee drinking a beer. Mr Pritchard said that Mr Rio had informed him that Mr Nee Nee had told the men who had been wharf fishing to go upstairs and have a beer with him.

[22] Mr Pritchard added that Mr Rio had also told him that at approximately 3.00 p.m. Mr Nathan had arrived and sat down to have a beer with them, and that after finishing the box of beer, the men had gone to purchase some more beer before moving downstairs.

[23] Mr Pritchard said on 29 February 2012 he had again spoken to Mr Williams who had confirmed his earlier account about the participants in the incident on 2 February 2012. Mr Pritchard said Mr Williams had stated that Mr Nee Nee and Mr Nathan had been present and drinking beer with the other men, and had said that Mr Nee Nee had had a box of 24 Heineken beers which had been finished upstairs.

[24] On 13 March 2012 Mr Pritchard said he had met with Mr Nee Nee who was accompanied by Mr Phillips. Mr Pritchard said Mr Nee Nee had explained that he had seen some beers in the fridge and assumed they were for a 'shout' so he had let the men know they were there. At the Investigation Meeting Mr Nee Nee agreed that at the meeting on 13 March 2012 he had denied drinking beer, and had told Mr Pritchard that he had been drinking ginger beer.

[25] Mr Pritchard said Mr Nee Nee had also told him that he had not noticed the other men drinking beer and denied that he had bought any beer himself. Mr Pritchard said Mr Nee Nee had shown him a green unlabelled bottle, which he had said was a ginger beer bottle.

Further investigation steps

[26] Mr Pritchard explained that he had taken further steps in the investigation, specifically he had:

- a. asked Mr Bob Harvey, a foreman supervisor at the Auckland site to contact Mr Blair Patterson from Toyofuji Shipping to ask him about the 'shout' to which Mr Nee Nee had referred. As a result he had been made aware that Mr Patterson had confirmed that he bought eight dozen beers but no ginger beer. Further that the beer had been delivered to the car foreman's hut and distributed to the men from there. Mr Patterson had also confirmed that the beer he had provided had been Lion Red, Tui and Speights only, there had been no Heineken or Steinlager.
- b. spoken to Mr Harvey who had confirmed that the beer had been distributed, with none being moved to company premises.

- c. spoken to Mr Harvey who had denied seeing any beer or ginger beer in the fridge when he had replaced the milk in the fridge on 2 February 2012 or at 7 a.m. the following morning.
- d. spoken to Mr Peter Connelly who had emptied the rubbish bins and he could not recall seeing any bottles other than beer bottles, and that these had been the first he had seen since the liquor ban had been put into place.
- e. visited Countdown supermarket adjacent near to the Wharf and had found one bottle of ginger beer, which had been of a different shape to that of the bottle Mr Nee Nee had shown him at the investigation meeting on 13 March 2012; and
- f. been contacted by Mr Harvey who informed him that he had spoken to Mr Porima-Henry on 22 March 2012 who had told him that: “*we were all on the piss*”.

[27] Mr Pritchard said after completing his investigation he had prepared an investigation report. Under the heading ‘Apparent Sequence of Events’ he had stated:

45. From the interviews conducted during this investigation, it appears that:

- a. On the 2nd of February 2012 at around 3.00 pm Henry Nee Nee invited a group of C3 and an ASCO employee to drink beer in the locker room of the company’s Auckland premises.*
- b. All men but one (Tu Tangata) took part in drinking a large quantity (approximately 66 bottles between 6 people) of alcohol over an 8 hour period.*
- c. The photos (attached) of the bins show 5 empty boxes, possibly six. The boxes in the photos appear to corroborate the stories of how many were purchased. One initially, then two by Andy Nathan and two by Rio (albeit that Rio said he took a box home with him).*
- d. Nathan, Nee Nee, Williams, Tangata, Porima-Henry, and Rio were all present between about 3.00pm and 8.00 pm (Vehicles were still there when Michelle left). Iosua*

*arrived around 6.30 and left at 11.00 pm.
With the others leaving at various times from
around 8.00 pm to 11.00 pm.*

- e. All men but one (Tangi Williams) say they were aware a liquor ban was in place.*
- f. Three of them Nee Nee, Nathan and Rio appear to have driven home after consuming alcohol for at four hours, Rio for up to 8 hours.*

Disciplinary Meetings

[28] The report had concluded with the statement that four employees, Mr Nathan Mr Nee Nee, Mr Rio and Mr Porima-Henry would be invited to attend disciplinary meetings to answer C3's concerns that they had apparently breached the liquor ban on 2 February 2012..

[29] In respect of Mr Nee Nee and Mr Nathan, Mr Pritchard explained that he had written to them attaching the C3 Code of Conduct, the photographs of the contents of the waste bins, the liquor ban notice and the Health and Safety meeting minutes of 27 September 2011. Mr Pritchard said he had sent the letters to Mr Neil by email and asked him to forward them. Mr Neil confirmed at the Investigation Meeting that he had done so.

(i) Disciplinary Meeting with Mr Nee Nee 26 March 2012

[30] The disciplinary meeting held between Mr Pritchard, Mr Neil and Mr Nee Nee took place on 26 March 2012, and Mr Nee Nee had been accompanied by Mr Phillips. Mr Pritchard said he had asked Mr Nee Nee if he was maintaining that he had been drinking ginger beer on the night of 2 February 2012, and he had confirmed that was the case.

[31] Mr Pritchard said that Mr Nee Nee had also told him that he believed the liquor ban had been in place temporarily pending an investigation into the assault which had lead to the ban. Mr Pritchard said that Mr Phillips had also made representations on Mr Nee Nee's behalf to the effect that (i) Mr Nee Nee had left early on the night of 2 February 2012, (ii) he had been 'open' about what had happened, (iii) he had not seen anyone drinking and, (iv) the Schweppes ginger beer bottle looked similar to the beer bottles left behind on the night.

[32] Mr Pritchard said he and Mr Neil had adjourned the meeting at this point to consider what Mr Nee Nee and Mr Phillips had said. Mr Pritchard said that following this adjournment the meeting had resumed and he had raised some concerns about what Mr Nee Nee had told him and Mr Neil, including the statement that he had believed the liquor ban to be temporary when the notice put up on site had been clear that the liquor ban had not been of a temporary nature.

[33] Mr Pritchard said he had pointed out to Mr Nee Nee that he was a senior employee, a Health and Safety Representative and a union delegate, and that C3 was concerned that he had instigated the drinking session by telling the men to come and drink the beer that was in the fridge.

[34] At this point there had been a further adjournment in the meeting to allow Mr Nee Nee and Mr Phillips to consider any further comments they might wish to make.

[35] Following the second break Mr Nee Nee had made reference to the fact that there were two fridges, that he was guilty “*by association*” only, and that he had “*turned a blind eye*”.

[36] Following a third break in order for Mr Nee Nee and Mr Phillips to clarify a point, Mr Pritchard said the issue of C3 being able to have trust and confidence in Mr Nee Nee had been discussed.

[37] Following a further break Mr Pritchard said he had informed Mr Nee Nee and Mr Phillips of his and Mr Neil’s preliminary findings, which were that they did not accept that Mr Nee Nee could have thought the liquor ban to be temporary; that they had concluded, on the balance of probabilities, that Mr Nee Nee had been drinking beer on site; and that they were concerned they could no longer have trust and confidence in him.

[38] Mr Pritchard said he had also advised Mr Nee Nee and Mr Nathan that C3 was proposing dismissal and that Mr Nee Nee and Mr Phillips should discuss this proposal with Mr Russell Mayn, Secretary/Treasurer of MUNZ

[39] Mr Pritchard said the meeting had then concluded with an agreement that Mr Nee Nee could have time off on pay whilst the matter was concluded.

(ii) Disciplinary Meeting with Mr Nathan 26 March 2012

[40] The disciplinary meeting with Mr Nathan who had also been accompanied at the meeting by Mr Phillips, took place later on the same morning of 26 March 2012.

[41] Mr Pritchard stated that Mr Nathan had disagreed with the statements made by some of the employees during the investigation, and had alleged that he had only been drinking ginger beer. Mr Pritchard said he had been surprised by this statement because this was the first time Mr Nathan had alleged this.

[42] Mr Pritchard said Mr Nathan had also explained that he had been trying to get the men who were drinking to go downstairs, and Mr Phillips had made the point that Mr Nathan had been acting responsibly by trying to get everyone outside.

[43] Mr Pritchard said the meeting had been adjourned to allow him and Mr Neil to consider the points made by Mr Nathan, after which the meeting had resumed and he and Mr Neil had acknowledged that Mr Nathan said that he had agreed with the liquor ban.

[44] Mr Pritchard said he had remarked upon the fact that the other employees who he had interviewed had referred to the fact that only beer had been drunk on the night of 2 February 2012, and that from what he had been told, the men had spent two or three hours in the locker room drinking beer.

[45] Mr Pritchard said he had pointed out to Mr Nathan that as a senior employee who was well aware of the company rules, and also as a Health and Safety Representative and a union delegate, he was expected to behave to a high standard. Mr Pritchard said that both he and Mr Neil had stated that Mr Nathan should have advised other employees of the liquor ban and left rather than becoming part of the drinking session.

[46] Mr Pritchard stated he had informed Mr Nathan and Mr Phillips of his and Mr Neil's preliminary findings which were that on the balance of probabilities:

- (i). Mr Nathan had been drinking beer upstairs in the locker room for several hours; and that they were concerned they could no longer have trust and confidence in him, and
- (ii). they believe Mr Nathan had been trying to minimise his actions by saying that he had been drinking ginger beer.

[47] Following a break in the meeting Mr Pritchard said Mr Nathan had acknowledged that it was: "*highly probable*" that he did have a "*beer upstairs in an attempt to get the boys downstairs*". Further that he had not handled the situation as well as he could have done and that he may have had a couple of beers, and that although he did buy a box of beer that had been consumed downstairs.

[48] Mr Pritchard observed that despite the amount of alcohol consumed, Mr Nathan had been the only one of the employees involved in the incident on 2 February 2012 who could not remember the date or the week of the incident.

[49] Mr Pritchard said Mr Nathan had told the meeting that C3 could have trust and confidence in him because he had tried to put the company's position to the other employees and he had just lost track of time.

[50] After a break to consider Mr Nathan's response, Mr Pritchard said he and Mr Neil had responded that they considered it highly probable that Mr Nathan had drunk beer on C3's premises and had not really insisted on getting the other employees to stop drinking or to leave C3's premises.

[51] Mr Pritchard said he had also advised Mr Nathan that C3 was proposing dismissal and that Mr Nathan and Mr Phillips discussed this proposal with Mr Mayn.

[52] Mr Pritchard said the meeting had concluded with an agreement that Mr Nathan could have time off work on full pay whilst the matter was concluded.

[53] Both Mr Nee Nee and Mr Nathan accepted that they had acted unwisely at the disciplinary meetings by denying their involvement in the incident on 2 February 2012, however they both said at the Investigation Meeting that they had been shocked that C3 was treating the matter so seriously.

[54] Mr Pritchard said letters had been sent on 27 March 2012 to Mr Nee Nee and Mr Nathan confirming what had been discussed at the disciplinary meeting, in particular, that C3 considered their actions to constitute serious misconduct and was proposing termination of their employment.

[55] The following day Mr Phillips delivered a letter addressed to Mr Pritchard from Mr Mayn in which he had written that while MUNZ appreciated that the actions of Mr Nee Nee and Mr Nathan may have breached company policy, it did not accept that dismissal was the appropriate outcome. Mr Mayn had requested that C3 postpone any decision until he had the opportunity to meet with them.

Mr Mayn's Involvement

[56] Mr Mayn said he had been concerned following an update from Mr Phillips, who had regularly discussed the situation with him, that the evidence suggested that Mr Nee Nee and Mr Nathan had been involved in drinking which they had denied.

[57] As a result, Mr Mayn said he had interviewed Mr Nee Nee and Mr Nathan and had challenged them about what had occurred on 2 February 2010. In response Mr Nee Nee and Mr Nathan had told him that they had been unwise and should have told C3 the full story. At the Investigation Meeting Mr Mayn said he had had ‘*stern words*’ with Mr Nee Nee and Mr Nathan during their interview.

[58] On 2 April 2012 Mr Pritchard and Mr Neil met with Mr Mayn and during their discussion Mr Pritchard said Mr Mayn had made a number of suggestions as to how the situation could be resolved without Mr Nee Nee’s and Mr Nathan’s employment being terminated. These suggestions included:

- a. a meeting with the workforce to reinforce the liquor ban;
- b. removal of Mr Nee Nee and Mr Nathan as Health and Safety Representatives;
- c. removal of Mr Nee Nee and Mr Nathan as union delegates (or at least one of them); and/or
- d. if required, giving them a couple of weeks of suspension without pay.

[59] Mr Mayn said he had understood Mr Pritchard to have indicated at the conclusion of the disciplinary meeting that the termination of their employment could be avoided if Mr Nee Nee and Mr Nathan admitted to having been involved in the drinking of beer on 2 February 2012. Mr Pritchard denied this and Mr Neil said he did not recall Mr Pritchard having made this statement at the meeting.

[60] Mr Pritchard told the Authority that Mr Mayn had informed him and Mr Neil that C3 could issue a warning to Mr Nee Nee and Mr Nathan, but not a final written warning.

[61] Following the meeting with Mr Mayn, Mr Pritchard said he and Mr Neil had been a little confused about what Mr Mayn had told them, in particular why Mr Mayn had told them that he had given Mr Nee Nee and Mr Nathan a “*good dressing down*” when Mr Nathan had only admitted to a minimal involvement in the incident on 2 February 2012, and Mr Nee Nee had not admitted to anything other than being present and allegedly drinking ginger beer.

[62] In light of this Mr Pritchard said he had called Mr Mayn and explained the reason for his confusion. Mr Pritchard said that he recalled Mr Mayn saying: “*They’ve fessed up haven’t*

they” (indicating that they had admitted their involvement), and he had explained to Mr Mayn that they had not done so.

[63] Mr Pritchard denied that he had told Mr Mayn that if Mr Nee Nee and Mr Nathan confessed to their degree of involvement in the beer drinking incident on 2 February 2012, they would not be dismissed.

Meetings with Mr Nee Nee and Mr Nathan 5 April 2012

[64] On 5 April 2012 Mr Neil said he had met again with Mr Nee Nee and Mr Phillips. Mr Pritchard had been unable to attend that meeting, however Mr Neil said he and Mr Pritchard had decided it was better to proceed with the meeting rather than to cause more delay.

[65] Mr Neil said that Mr Nathan had produced a typewritten statement at the meeting, which he had read out. The statement had included the following:

1. *I have been advised by the Maritime Union of New Zealand that the Company is considering my explanation following an allegation that I have been drinking in the workplace after my shift finished.*
2. *I have thought very hard about what has happened, including my initial denial that I had been drinking on the night.*
3. *I should have immediately admitted that I did so, when I had the first opportunity at the disciplinary meeting.*
4. *I regret that I did not do that*
5. *I would like to apologise to the Company, not only for the events of the night, but also for not stating the full story when I first had the opportunity.*
7. *I did not play a big role on the night. I did not buy the alcohol. I did not take it to work. I accept that I removed the beer from the fridge and left it in the locker room but the intention was for the beer to be consumed off the premises. I regret that I did not take a leadership role and know it was a very stupid thing to do.*

[66] Mr Neil said that Mr Nee Nee had also made comments about recognising that he had a leadership role and should be an example to other employees as a Health and Safety Representative and he had offered to step down from that role.

[67] Mr Neil said he had stated that he was concerned about whether or not he could have trust and confidence in Mr Nee Nee in the future for the reasons previously discussed, and

invited Mr Nee Nee for any further comments prior to a decision being made, to which Mr Nee Nee had responded that he would need to rebuild the trust and confidence over time.

[68] Mr Neil said the meeting had concluded with his advising Mr Nee Nee that he and Mr Pritchard would consider the situation before confirming the final outcome,.

[69] Mr Neil said the meeting with Mr Nathan had been attended by Mr Phillips, and Mr Pritchard, who had been in Tauranga, had attended the meeting by speaker phone. Mr Neil said that Mr Nathan had also read from a typewritten statement. The typewritten statement contained many of the same clauses as in that read out by Mr Nee Nee, and at clause 7 stated:

I did not play a big role on the night. I did not buy the alcohol. I did not take it to work. I accepted a bottle when it was offered to me. I regret that and know it was a very stupid thing to do.

[70] In addition to the written statement, Mr Pritchard said that Mr Nathan had offered to stand down from the Health and Safety representative role. Mr Neil said he had again raised the issue of his being able to have trust and confidence in Mr Nathan, to which Mr Nathan had responded that he was prepared to start again and rebuild Mr Neil's confidence in him.

[71] Mr Neil said the meeting had concluded with Mr Nathan being advised that he and Mr Pritchard would consider the situation before confirming the final outcome.

Outcome

[72] Mr Pritchard and Mr Neil said they had considered the further information including the written statements made by Mr Nee Nee and Mr Nathan before reaching the view that their preliminary decision that there had been serious misconduct was correct, and that it was appropriate to summarily dismiss both Mr Nee Nee and Mr Nathan.

[73] Mr Pritchard said both he and Mr Neil had reached this view in circumstances in which they considered both Mr Nee Nee and Mr Nathan had breached their trust, both by knowingly breaching the liquor ban, trying to mislead them about what had happened on the night of 2 February 2012, and by minimising their part in what had occurred.

[74] Mr Pritchard explained that in relation to Mr Nee Nee, he and Mr Neil had reached the conclusion that he had breached the liquor ban and also the C3 Code of Conduct which listed as serious misconduct: *Bringing and/or consuming intoxicating liquor on company premises without the express consent of management.* In reaching this conclusion, Mr Pritchard said he and Mr Neil had taken into consideration the following:

- a. After initially denying his involvement, Mr Nee Nee had finally, on 5 April 2012, admitted that he had consumed beer in the locker room on C3 premises;
- b. Mr Nee Nee had accepted he should have told other employees who were present to leave the premises, thereby indicating that he understood the liquor ban was in place, however he had failed to do so;
- c. Mr Nee Nee was a Health and Safety Representative and a union delegate and therefore knew the required standards of behavior, however he had failed to demonstrate the behaviour C3 would have expected of him;
- d. Mr Nee Nee had instigated the drinking session by advising the other employees that there was beer in the fridge in the locker room and the investigation had revealed that he had been sitting with a box of beer when the employees came into the locker room. Therefore he (Mr Pritchard) and Mr Neil had considered that Mr Nee Nee was supplying the beer and allowing it to be consumed on the premises.

[75] In relation to Mr Nathan, Mr Pritchard said he and Mr Neil had considered:

- (1) Mr Nathan had acknowledged that he had consumed beer on company premises, and other employees had observed him drinking beer.
- (2) Mr Nathan was a Health and Safety representative and a union delegate and therefore knew the required standards of behaviour, however he had failed to demonstrate the behaviour C3 would have expected of him;
- (3) Despite the quantity of alcohol consumed by all who had been present on 2 February 2012, he appeared to be the only one who failed to remember the events of the day's events, which had made his account less plausible and other employees' accounts more believable, given that these had been consistent;
- (4) Mr Nathan had been inconsistent in the accounts he had given during the investigation and disciplinary process, especially in regard to the claim during the disciplinary process that he had been drinking only ginger beer,

- a. Mr Nathan had admitted that he had been intoxicated

[76] Mr Pritchard said he and Mr Neil had considered the alternative actions to dismissal which Mr Mayn had discussed with them, but did not think these were appropriate viable options on the basis:

- a. In relation to the suggestion that the liquor ban be enforced, that the liquor ban had been discussed at the Health and Safety meeting that both Mr Nee Nee and Mr Nathan had attended, and in addition the liquor ban had been widely publicised;
- b. Removing Mr Nee Nee and Mr Nathan as Health and Safety Representatives would not address C3's wider concerns about their behaviour; in particular that they had not been honest in their responses to questions during the investigation and disciplinary process;
- c. Removing Mr Nee Nee and Mr Nathan as union delegates was a union matter and not a C3 sanction, and again it would not address C3's wider concerns about their behaviour;
- d. A suspension without pay or as a warning, given that neither Mr Nee Nee and Mr Nathan had admitted drinking until a late stage of the process, or acknowledged any responsibility for the incident on 2 February 2012, would not address C3's wider concerns about their behaviour

[77] On 10 April 2012 Mr Pritchard said that he and Mr Neil, having considered the issues, had decided that Mr Nee Nee and Mr Nathan's actions constituted serious misconduct and because they considered that they could no longer have trust and confidence in them, dismissal was the appropriate outcome.

[78] The termination letters dated 10 April 2010 to Mr Nee Nee and Mr Nathan set out in detail the reasons for the decision to dismiss them from their employment with C3. Mr Nee Nee and Mr Nathan were also advised in the letters that they had a right of appeal

[79] On 13 April 2012 Mr Nee Nee and Mr Nathan had appealed the dismissal decision by way of a letter to Mr Dean Campbell, C3 Chief Executive.

[80] Mr Campbell had responded on 10 May 2012, stating that he had considered the issues raised, however he did not accept that Mr Neil and Mr Pritchard's decision to terminate Mr Nee Nee and Mr Nathan's employment had been inappropriate.

Determination

Was the decision by C3 to dismiss Mr Nee Nee and Mr Nathan a fair and reasonable decision?

The Law

[81] The decision to dismiss Mr Nee Nee and Mr Nathan on the basis of serious misconduct must be a justifiable decision in accordance with the test as set out in s 103A of the Employment Relations Act 2000 ("the Act") which states:

S103A Test of Justification

- i. 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).*
- ii. 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.*

[82] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. C3 must show that it carried out a full and fair investigation into the issue of whether Mr Nee Nee's and Mr Nathan's actions constituted serious misconduct, taking into consideration the factors in s.103A(3), statutory good faith requirements and natural justice. C3 must also establish that dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[83] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

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

¹ [2011] NZEmpC 160

² *Angus at para [*

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.

Substantive Justification

[84] The C3 Code of Conduct defined bringing alcohol on to company premises as serious misconduct, the penalty for an infringement of which could be “*instant dismissal*” depending on the gravity of the offence.

[85] Following a serious assault on an employee after a drinking session on company premises Mr Neil had implemented a liquor ban. Employees were made aware of the liquor ban by means of the notice posted on C3 notice boards and by means of a text message. The notice stated that the liquor ban had been imposed: “*Due to a Serious Assault on a C3 Employee*”.

[86] Mr Nee Nee claimed that he had believed the liquor ban to be temporary in nature, but this is not indicated on the notice, and Mr Nee Nee gave no valid justification for his belief other than stating that he believed it had not been enforced.

[87] Mr Nathan had been present at the C3 premises the night the serious assault had taken place and also said at the Investigation Meeting that he also had believed the liquor ban had been temporary as it had not been enforced.

[88] There was no evidence presented to the Authority by Mr Nee Nee or Mr Nathan that the liquor ban had not been enforced by C3. However Mr Neil stated that he had not been made aware of any breaches of the liquor ban until 3 February 2012 when he had been alerted to the breach which had taken place on 2 February 2012 by Ms Gurney.

[89] Moreover Mr Pritchard in his investigation report noted that Mr Connolly had seen beer bottles when emptying the rubbish bins on 3 February 2012 and that this was the only occasion he had seen any beer bottles in the rubbish bins since the introduction of the liquor ban.

[90] Mr Nee Nee and Mr Nathan had also been made aware of the liquor ban and the reason for it at the Health and Safety Committee meeting held on 27 September 2011 and Mr Nathan stated at the Investigation Meeting that he had backed the liquor ban 100 percent.

[91] During the course of the C3 investigation and disciplinary process, Mr Nee Nee and Mr Nathan had both confirmed that they had been aware that the liquor ban was in place, and

both confirmed during the Investigation Meeting that they were familiar with the C3 Code of Conduct.

[92] Mr Nee Nee and Mr Nathan admitted at the disciplinary meetings held on 5 April 2012 that they had been drinking beer on the night of 2 February 2012, in breach of the liquor ban.

[93] I find that in circumstances in which

- (i) a liquor ban had been implemented by C3 after a serious assault on an employee following the drinking of alcohol on company premises;
- (ii) Mr Nee Nee and Mr Nathan had been fully aware that the liquor ban was in place;
- (iii) The C3 investigation had revealed that the incident on 2 February 2012 had involved the drinking of beer in the locker room for approximately three hours before the participants moved outside; and
- (iv) Mr Nee Nee and Mr Nathan had admitted that despite having knowledge of the liquor ban, they had drunk beer on C3 premises

C3 had substantive justification for reaching the conclusion that Mr Nee Nee and Mr Nathan's actions constituted serious misconduct and dismissing Mr Nee Nee and Mr Nathan..

Procedural Justification

[94] The decision to dismiss must be procedurally justifiable. Section 103A of the Act states:

a. In applying the test in subsection (2), the Authority or the court must consider –

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

(a) Investigation

[95] Mr Pritchard carried out the investigation into the incident on 2 February 2012 by interviewing those employees named by Mr Williams as having been involved in the drinking incident, including Mr Nee Nee and Mr Nathan. Following comments made by Mr Nathan during the initial investigation interview with him that he had not consumed any beer on the C3 premises, Mr Pritchard had re-interviewed Mr Tangata, Mr Rio and Mr Porima-Henry

[96] Following the comments made by Mr Nee Nee during the initial investigation meeting, Mr Pritchard had taken the further investigatory steps of questioning Mr Harvey about the 'shout' to which Mr Nee Nee had referred, and had visited a Countdown supermarket to look for the ginger beer to which Mr Nathan referred himself as having consumed.

[97] I find that Mr Pritchard carried out a comprehensive investigation prior to holding the disciplinary meetings with Mr Nee Nee and Mr Nathan.

[98] Following completion of the investigation process, Mr Pritchard and Mr Neil had held disciplinary meetings with Mr Nee Nee and Mr Nathan, who had been accompanied at these meeting by Mr Phillips, an experienced MUNZ officer.

[99] I observe that at each of the disciplinary meetings, Mr Nee Nee and Mr Nathan were given the opportunity to respond to the allegations, with several adjournments taking place during the course of the meetings, and that Mr Neil and Mr Pritchard had given consideration to the responses provided.

[100] Following the disciplinary meetings on 26 March 2012 and the preliminary C3 view that it considered the actions of Mr Nathan and Mr Pritchard to be serious misconduct for which dismissal was the appropriate outcome, C3 agreed to postpone, at Mr Mayn's request, making a final decision.

[101] Following discussions with Mr Mayn, Mr Pritchard and Mr Neil held a further meeting with Mr Nee Nee and Mr Nathan on 5 April 2012 at which they were each given the opportunity to read their statements and make further submissions on the proposed outcomes.

[102] The evidence presented by Mr Pritchard and Mr Neil is that they gave these statements and submissions due consideration before reaching a final decision as to the appropriate outcome.

[103] Whilst the investigation was fairly protracted I accept that this had been a busy time operationally for C3 and that there were other investigations and disciplinary meetings taking place. I do not find the delay was unduly significant.

[104] In considering whether dismissal was the appropriate outcome, I note that Mr Nee Nee and Mr Nathan, unlike other employees who had been involved in the incident on 2 February 2012, had tried to mislead C3 about what had occurred on the night of 2 February 2012, and had not admitted their culpability until the disciplinary meetings on 5 April 2012.

[105] I observe that Mr Nee Nee and Mr Nathan were aware of the liquor ban as a result not only of the notice posted by Mr Neil, but also due to the notification at the Health and Safety Committee meeting on 27 September 2011. Mr Nee Nee and Mr Nathan were aware of the reason for the liquor ban, and Mr Nathan commented that he had supported it 100 percent.

[106] Mr Nee Nee and Mr Nathan were senior permanent employees. As such Mr Neil said they were expected to provide some guidance to new employees and contractors. Mr Nee Nee and Mr Nathan admitted that they were aware of the C3 Code of Conduct provisions in accordance with which bringing or consuming intoxicating liquor on site was a serious misconduct offence for which summary dismissal was a possible outcome.

[107] Additionally Mr Nee Nee and Mr Nathan were senior employees, union delegates and Health and Safety Representatives, positions carrying a degree of leadership responsibility. In these circumstances I consider it was reasonable for C3 to have an expectation that they would not only obey the liquor ban themselves but encourage other employees to do so, especially given the rationale behind it.

[108] In the circumstances in which Mr Nee Nee and Mr Nathan had consumed alcohol on C3 premises in defiance of the liquor ban, and had not only not deterred other employees

from so doing but had actively participated in the provision of beer, I find that C3 had grounds for holding that they had lost trust and confidence in Mr Nee Nee and Mr Nathan.

[109] In this context I observe that in their typewritten statements presented at the disciplinary meetings held on 5 April 2012, Mr Nee Nee and Mr Nathan had continued to minimise their involvement in the drinking session, thereby further undermining Mr Neil and Mr Pritchard's trust and confidence in them.

[110] Although Mr Nee Nee and Mr Nathan had offered apologies for their conduct, no further evidence had been presented to reasonably alter C3's preliminary decision to dismiss. In these circumstances Judge Shaw in *Arthur D Riley v Wood*³ held that the employer could proceed with the decision to dismiss.

[111] I determine that Mr Nee Nee and Mr Nathan were justifiably dismissed. by C3.

Was there discrimination and/or disparity in the treatment of Mr Nee Nee and Mr Nathan such as to render the decision to dismiss them one which was not available to C3 as a fair and reasonable employer?

Discrimination

[112] Mr Nee Nee and Mr Nathan have claimed that they were discriminated against by C3 on the grounds that they were union delegates and/or Health and Safety Representatives.

[113] Pursuant to s 104 of the Act, an employee is discriminated against by the employer if he/she has been dismissed as a result of their: '*involvement in the activities of a union*'.

[114] I do not find that Mr Nee Nee and Mr Nathan were discriminated against because they had been involved in union activities, they had been dismissed because they had knowingly breached C3 policy as set out in the Code of Conduct and a liquor ban which had resulted in C3 losing trust and confidence in them as employees.

[115] In regard to Mr Nee Nee and Mr Nathan's standing as Health and Safety Representatives, I find that this was a relevant factor to be taken into consideration by C3 during the investigative and disciplinary process.

[116] Mr Nee Nee and Mr Nathan had been made aware of the liquor ban by means not only of the notices posted by Mr Neil, but through their attendance at the Health and Safety

³ [2008] ERNZ 462, at para [66]

Committee meeting on 27 September 2011. Mr Nee Nee and Mr Nathan had been made aware of the reason for the liquor ban, namely the serious assault on an employee following a drinking session on a previous occasion.

[117] In the responsible positions Mr Nee Nee and Mr Nathan occupied as Health and Safety Representatives, I consider that C3 was justified in expecting them to set an example for the other employees in upholding the liquor ban.

[118] I determine that Mr Nee Nee and Mr Nathan were not discriminated against by C3 on the basis of either their status as union delegates or as Health and Safety Representatives.

Disparity of treatment

[119] Mr Nee Nee and Mr Nathan have claimed disparity of treatment on the basis that other employees who had been involved in the consumption of alcohol on 2 February 2012 had not been dismissed.

[120] The Court of Appeal decision in *Chief Executive of the Dept of Inland Revenue v Buchanan*⁴ addressed the issue of disparity of treatment. The judgment outlines three separate issues to be considered in relation to the question of disparity of treatment:

- i. *Is there disparity of treatment?*
- ii. *If so, is there an adequate explanation for the disparity?*
- iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*⁵

[121] The first issue is the establishment of disparity of treatment. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

⁴ [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

⁵ *Ibid* at para [45]

[122] In *Samu v Air New Zealand*⁶ the Court of Appeal stated:

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[123] There were a number of persons involved in the incident on 2 February 2012, two besides Mr Nee Nee and Mr Nathan were C3 employees. These two employees had disciplinary action taken against them but had not been dismissed.

[124] Mr Nee Nee and Mr Nathan, unlike the two other employees, were Health and Safety Representatives. The reason for the introduction of the liquor ban had been ‘a serious assault on a C3 employee’ following a drinking session on C3 premises, this constituted a health and safety issue.

[125] In their capacity as Health and Safety Representatives Mr Nee Nee and Mr Nathan had occupied positions of trust and responsibility for health and safety matters and C3 should have been able to rely on them to uphold a liquor ban put in place for health and safety reasons.

[126] Moreover during the investigatory and disciplinary process Mr Nee Nee and Mr Nathan, unlike the other two employees, had lied about their involvement in the incident on 2 February 2012.

[127] Taking these factors into consideration, I determine that there is an adequate reason for the disparity of treatment between Mr Nee Nee and Mr Nathan and the two other employees, and consequently that the decision to dismiss Mr Nee Nee and Mr Nathan was available to C3 as a fair and reasonable employer.

[128] I determine that C3 justifiably dismissed Mr Nee Nee and Mr Nathan.

⁶ [1995] 1 ERNZ 636 (CA)

Costs

[129] 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.

Eleanor Robinson
Member of the Employment Relations Authority