# New Zealand Employment Relations Authority Decisions



## O'Conner v Ports of Auckland Limited [2011] NZERA 105; [2011] NZERA Auckland 93 (10 March 2011)

# New Zealand Employment Relations Authority



## O'Conner v Ports of Auckland Limited [2011] NZERA 105 (10 March 2011); [2011] NZERA Auckland 93

Last Updated: 3 June 2011

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

[2011] NZERA Auckland 93 5295547

BETWEEN MICHAEL O'CONNER

Applicant

AND PORTS OF AUCKLAND

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

K J Anderson

M Mitchell, Counsel for Applicant K Dunne, Counsel for Respondent

6 October 2010 at Auckland

20 October 2010 for the Respondent
4 November 2010 for the Applicant

Determination:

10 March 2011

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] The applicant, Mr O'Conner, claims that he was unjustifiably dismissed on 22nd January 2010. He asks the Authority to find that he has a personal grievance and award him various remedies, including reinstatement to his previous position. Conversely, the respondent, Ports of Auckland Limited (PoAL) says that the dismissal of Mr O'Conner was justified on the ground of serious misconduct.

**Background facts and evidence**

[2] Mr O'Conner was employed by PoAL from 10th February 2005 to 1st June 2008 as a casual employee, performing lashing duties on ships. He became a permanent employee, as an Operations Clerk, from 2nd June 2008. Mr O'Conner's terms and conditions of employment were as provided by the collective employment agreement (the CEA) between PoAL and the Maritime Union of New Zealand Local 13 (the Union).

[3] On the night of 17th January 2010, Mr O'Conner left his car, along with a friend's car, parked at a car park owned by PoAL, while he went up town with friends to go drinking. The car park is used by stevedores working for PoAL. It is accessed by use of a swipe card. The evidence of Mr O'Conner is that a friend was going to be the "sober driver" and drive Mr O'Conner's car home later. Therefore, Mr O'Conner gave his car keys to his friend. Attached to the car keys was Mr O'Conner's PoAL swipe card.

[4] The evidence of Mr O'Conner is that he left the club he was drinking at before his friend who had the car keys. Upon arrival back at the car park, he realised that he didn't have his swipe card to gain access. The security guard at the Tinley Street entrance to the wharf let Mr O'Conner and another friend into the car park. Mr O'Conner went to his car to wait for his friend with the keys to arrive. Mr O'Conner and his friend decided to leave the car park and go to a nearby Shell station for a drink. Mr O'Conner says that upon their return, because they did not want to bother the security guard again to let them in, they put a stick through the hole in the gate to access the button used to open the gate into the car park. The gate obliged and upon gaining access to the car park, Mr O'Conner went to his car. Because it was locked and his absent friend had his keys, Mr O'Conner broke one of the windows of his car so that he could gain access. Mr O'Conner's friend arrived about twenty minutes later with the keys and drove him home.

**The disciplinary process**

[5] The evidence of Mr Jon Ward, Manager - Operations and Planning for PoAL, is that on 18th January 2010, the Security Manager for the company informed him of "an issue" relating to Mr O'Conner in the car park the day before. Mr Ward formed the view that there could have been serious misconduct and hence a disciplinary process began. A meeting took place with Mr O'Conner and Mr Ward on 20th January 2010. Mr O'Conner was represented by Mr Dave Phillips, Walking Delegate for the Union. Notes of the meeting were taken by Ms Michelle Smith.

[6] The notes taken by Ms Smith and a further summary produced by Mr Phillips, along with the respective statements of evidence, reveal that there was a candid discussion and that it was acknowledged that Mr O'Conner had made an error of judgement, most probably due to the combination of youth and alcohol, in regard to his actions on the evening of 17th January 2010.

[7] The concerns for PoAL were that there had been a breach of security in regard to Mr O'Conner accessing the premises in an unauthorised manner and giving his security card to his friend; a person who was not an employee of PoAL. It also appears that health and safety concerns were expressed in regard to Mr O'Conner breaking the window of his car, the manner in which he did this, and leaving the broken glass where it fell; along with being intoxicated on PoAL premises. Finally, and now of particular relevance to his submissions before the Authority, the matter of Mr O'Conner being in receipt

of a current written warning, issued on 21st July 2009, was discussed.

[8] The meeting concluded on the apparent understanding the Mr Ward would give consideration to all matters and the parties would meet again for him to give his decision as to the sanction that would apply to Mr O'Conner. The evidence of Mr Ward is that:

I considered the conduct that Mr O'Conner had admitted. I formed the view that it was serious misconduct as Mr O'Conner had:

(a) given his security card to a person who was not an employee of Ports of Auckland;
(b) accessed a secure area in an unauthorised manner by poking a stick through a security gate;
(c) been on Ports of Auckland's property while intoxicated; and
(d) jumped on a car and smashed the window, engaged in unsafe behaviour that could have resulted in serious injury.

Mr Ward says that he considered what would be an appropriate sanction and in making his decision he took into account Mr O'Conner's work history and performance, the fact that he was on a written warning and mitigating factors that were put forward by Mr O'Conner and Mr Phillips; including that Mr O'Conner was young and intoxicated at the time the misconduct occurred. Mr Ward attests that:

However, I formed the view that the incident had led to a serious breach of trust and confidence and summary dismissal was the only appropriate outcome.

[9] A further meeting took place on 22nd January 2010. Mr Ward informed Mr O'Conner of the decision to dismiss. Mr Phillips actively sought to have Mr Ward reconsider the decision citing a number of mitigating factors. However, the dismissal

was confirmed via a letter dated 5th February 2010. The germane content is:

As discussed with you the reason for your dismissal arose from the incidents arising in the morning of 17th January 2010 reported to us by PoAL Security. These incidents raised serious concerns with the Company about potential serious misconduct through:

- Giving you [sic] access and security cards to a person not an employee of

PoAL

- Unauthorised access to PoAL property
    - Engaging in an activity an unsafe behaviour that could result in a serious injury on PoAL property
- Being on PoAL property intoxicated

A disciplinary investigation was conducted which involved meetings on Wednesday 20 January and Friday 22 January 2010. I confirm that you were given prior notice as to the purpose and nature of these meetings and the opportunity to seek independent advice or representation which you did so.

In the investigation you admitted that you were intoxicated, that you did access PoAL premise [sic] without authorisation and you gave your access and security cards to an unauthorised person. We also had the opportunity to view CCTV footage of incidents which confirmed our concerns.

Our conclusion after the investigation was that serious misconduct did in fact occur. In reaching this decision I have taken into account your work history, and performance, the fact you were on a current final written warning and any other mitigating circumstances presented to us by yourself and your representative. This incident has lead to a serious breach of trust and confidence in our employment relationship and after consideration the decision is that your employment with PoAL is terminated effective immediately.

**Analysis and Conclusions**

[10] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied to a dismissal and in determining whether a dismissal was justifiable (or not), the Authority is required to consider on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the

circumstances at the time the dismissal occurred.

**Was the warning issued on 21st July 2009 still current?**

[11] A submission for Mr O'Conner is that the first issue for the Authority to consider is; whether PoAL was correct to rely on the earlier warning issued on 21st July 2009 by treating it as remaining current at the time of the dismissal. This warning was issued to Mr O'Conner following an incident on 3rd July 2009, after which the company found that he had been driving dangerously on PoAL property. On 31st July 2009, Mr O'Conner signed a receipt for this warning and there is no issue about its validity in general. Under clause 4.2.6 of the CEA: *Warnings will stand for six months.*

[12] The argument for Mr O'Conner is advanced on two fronts. Firstly, due to the warning being issued on 21st July 2009 and as Mr O'Conner was dismissed on 22nd January 2010, the warning had expired. This argument has not been substantially expanded upon in the submissions for Mr O'Conner, but in any event I do not accept that there can be any material reliance on that argument. It seems to me that the real issue relates to the second argument advanced for Mr O'Conner. This argument is that the misconduct that brought about the warning dated 21st July 2009, happened on 3rd July 2009, hence it is the 3rd of July that the six month time frame under clause 4.2.6 should commence from. Therefore, following this reasoning, the warning should have expired on 2nd January 2010. The submission for Mr O'Conner is that any other result means that the employer extends the life of the warning beyond the six months allowed.

[13] While this is a novel argument I think that it is fatally flawed. This is because if a warning was to become valid from the time of an incident occurring, then it seems to me that the due process of a proper investigation and an opportunity for the employee to respond to allegations and have the response considered, before a decision is made, becomes somewhat perfunctory in that the decision of the employer would become retrospective and hence open to an allegation of bias. Apart from that, as the respondent has submitted, the 90 days requirement for raising a disadvantage grievance in regard to a warning, begins with the effective date of the warning, (or becoming aware of it), not the date of the incident that created the warning. Section 114(1) of the Employment Relations Act 2000 provides that:

Every employee who wishes to raise a grievance must, subject to subsections (3) and (4), raise a personal grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period. (Emphasis added.)

Therefore, had Mr O'Conner chosen to raise a personal grievance relating to the warning, obviously *the date on which the action* (the warning) *occurred* would have been 21st July 2009, the date it was issued to him. Indeed, as Mr Adrian Tocker, the Human Resources Manager for PoAL, said in his oral evidence: "the clock startsticking" from that date and the warning simply expires by the passing of time - that is - six months later. Indeed, Mr O'Conner, to his credit, acknowledged this in his oral evidence to the Authority.

[14] In summary, I find that the effective date of the warning in question was 21st July 2009 and it expired six months later on 20th January 2010. Therefore, the conclusive reality of the situation is that from 21st July 2009 until 20th January 2010, Mr O'Conner was on notice that: *any further instances of misconduct, serious misconduct or poor performance may lead to your dismissal.*[1] Therefore, when Mr O'Conner engaged in the misconduct for which he was dismissed, the warning had not expired and I conclude that his employer was entitled to take it into account when deciding on an appropriate sanction.

[15] But in any event, even if I am wrong on that point (but I think not), and the warning had expired, then the following finding of Judge Travis in *Butcher v OCS Ltd* [2008] ERNZ 367, must have application in all the circumstances applying to Mr O'Conner:

An expired warning can be taken into account by an employer when deciding whether to dismiss an employee, and by a

Tribunal in deciding whether the employer has acted reasonably or unreasonably. Previous misconduct referred to in the expired warning may be relevant in determining the reasonableness of the employer's response to the new misconduct.

While the circumstances in *Butcher* related to a repeat of the same conduct, I conclude that Mr O'Conner was on recent notice that any further instances of misconduct may lead to his dismissal. Therefore, even if the previous warning had expired, it would have been reasonable for PoAL to take it into account. But I emphasis that it remains my primary view that the warning in question remained current at the time of Mr O'Conner's final transgression.

**Was the employer entitled to find there had been serious misconduct?**

[16] The submissions for Mr O'Conner challenge the four reasons given by PoAL for the dismissal:
(a) Giving his security card to a person who was not an employee of PoAL

(b) Accessing a secure area in an unauthorised manner by poking a stick through a security gate and activating an entrance.
(c) Engaging in an unsafe behaviour that could result in a serious injury on PoAL property, by jumping on the car and breaking one of its windows. Also the broken glass was left lying where it fell.
(d) Being on PoAL property intoxicated.

The Authority is asked by Mr O'Conner to: "make its own assessment of the Applicant and determine whether or not there has been misconduct."

[17] But it is not the role of the Authority to assess Mr O'Conner's behaviour, even under the broader inquiry allowed by s 103A of the Act, as compared with earlier regimes. Rather the inquiry is about whether it was fair and reasonable in the circumstances for PoAL to decide that the actions of Mr O'Conner constituted serious misconduct. Given the weight of the evidence, I find that Mr O'Conner's employer was entitled to treat his actions on the night of 17th January 2010 as serious misconduct.

**Was the dismissal of Mr O'Conner the action of a fair and reasonable employer in all the circumstances?**

[18] A submission for Mr O'Conner is that his employer failed to take into account mitigating circumstances. These being, it is argued: o the total circumstances of the incident;

o the fact that Mr O'Conner was out drinking and merely using his employer's car park; and that
o it was a silly drunken incident that led to the dismissal. But the evidence is that Mr Ward did take into account the possible mitigating factors, as capably and candidly advocated on Mr O'Conner's behalf by Mr Phillips. Unfortunately for Mr O'Conner, the possible mitigating factors were not sufficient to overcome the weight of the seriousness of his misconduct and the additional fact that, he had a current written warning that made it patently clear that, any further instances of misconduct, serious misconduct or poor performance may lead to his dismissal.

**Determination**

[19] I have to say that I found Mr O'Conner to be an open and engaging young man with some future potential I suspect. But regrettably, the evidence is that he is inclined to partake in some foolish acts and his behaviour on the night of 17th January 2010 was such that, taking everything into account, I reach the conclusion that the decision to dismiss Mr O'Conner was the action of a fair and reasonable employer in all the circumstances. I find that Mr O'Conner does not have a personal grievance and his claims are dismissed.

**Costs:** Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the outcome and that the investigation meeting was completed within half a day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

**K J Anderson**

**Member of the Employment Relations Authority**

---

[1] Written warning dated 21st July 2009.

---

**NZLII:** Copyright Policy | Disclaimers | Privacy Policy | Feedback
URL: *http://www.nzlii.org/nz/cases/NZERA/2011/105.html*