IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 15
5280197

	BETWEEN	CHRIS RILEY and SHANE WOODS Applicants
	A N D	BLUEPRINT LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Greg Lloyd, Counsel for Applicants Robert Thompson, Advocate for Respondent
Investigation Meeting:	30 November 2010 at Christchurch
Date of Determination:	28 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Both applicants (the applicants) claim that they were unjustifiably dismissed by the respondent (Blueprint) while Blueprint resists those claims and argues that the applicants' dismissals were conducted in a procedurally fair manner and were substantively justified.

[2] Both the applicants were members of the New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc (the Union) and because they say that they were concerned about being discriminated against by Blueprint, they were in fact confidential union members, that is to say, their membership was unknown to Blueprint when the sequence of events leading to the applicants' dismissal commenced.

[3] By the beginning of calendar 2009, Blueprint had signalled an intention to commence a restructuring process which potentially affected the applicants. A

consultation meeting involving the applicants was scheduled and in anticipation of that meeting, Jo McLean, a Union organiser, wrote to Blueprint's general manager, Mr Lightbourne, indicating that the applicants were members of the Union and that she would be representing them during the consultation process. That letter is dated 23 January 2009 and it was received by Blueprint on 26 January 2009.

[4] Meanwhile, on Sunday, 25 January 2009, the applicants and one other employee who was not a member of the Union were completing their work requirements for the day and as they alleged was the custom, the applicants and the other employee involved were each drinking a bottle of beer.

[5] While this was happening, Mr Lightbourne, Blueprint's general manager, entered the workplace, observed the beer but made no comment in relation to it. Mr Lightbourne was attending at the workplace in order to hand deliver to the applicants letters relating to the upcoming restructuring consultation meeting.

[6] The following day, Monday, 26 January 2009, the applicants each received a further letter from Blueprint indicating that in addition to the restructuring proposals to be discussed at the forthcoming meeting, the employer also wanted an explanation of the allegedly serious misconduct involved in the drinking of beer during working hours.

[7] Amongst other things, the applicants contend that the disciplinary issue was only activated by Blueprint after Blueprint became aware that the applicants were union members and the applicants further contend that their dismissal by Blueprint for misconduct was effected simply to ensure that Blueprint did not have to meet its redundancy obligations, assuming that the applicants were the two printers selected for redundancy in terms of the proposed restructure arrangement.

[8] A meeting took place on 28 January 2009 which had the twin purposes of dealing with the disciplinary issue (the drinking of alcohol at the workplace) and consultation in respect of Blueprint's restructure. Present at the meeting were the applicants together with their Union organiser, Ms McLean, Mr Lightbourne and his advocate, Mr Thompson.

[9] Concerning the disciplinary matter, both applicants alleged that the drinking of beer at the end of a shift was common practice in the workplace. Mr Lightbourne requested the names of other employees so that he could consult with them about the

alleged common practice of drinking beer at the end of a shift. The applicants provided some names and Blueprint conducted further inquiries. The results of those further inquiries were provided to the Union and further submissions requested. By way of a general summary, Blueprint's further investigations did not support the applicants' contention that the drinking of beer at the end of a shift was commonplace. Further submissions, especially in respect of penalty, were sought and by letter dated 3 February 2009, Blueprint advised the applicants that they were dismissed for serious misconduct. A personal grievance was promptly raised on behalf of the applicants by letter dated 13 February 2009.

Issues

[10] The first issue the Authority needs to address is the question whether the evidence supports the applicants' contention that they were penalised as a consequence of being union members. Next, the Authority needs to consider whether Blueprint's conclusion that there was no common practice of drinking a bottle of beer at the end of a shift was a reasonable conclusion, and finally whether the decision to dismiss was the decision that a fair and reasonable employer would make.

Were the applicants penalised for their union membership?

[11] I am satisfied there was no evidence whatever that the applicants were penalised for their union membership. It will be remembered that the applicants were confidential members of the Union, that is to say the employer did not know that they were members until the matter was drawn to Blueprint's attention by a letter from the Union's organiser dated 23 January 2009. The receipt of that letter by Blueprint on 26 January 2009 coincided with Blueprint's letter to the applicants of the same date calling them to account for their behaviour in being seen to drink alcohol while working the previous night.

[12] The facts simply do not support the applicants' contention. First, the letters sent to the applicants on 26 January 2009 by Blueprint and calling the applicants to account for their behaviour was indeed dated the same day as the Union's letter about the applicants' union membership, was received by Blueprint. But Blueprint says that it had not considered the Union's letter when it wrote to the applicants about the disciplinary issue and that view is supported by the fact that had Blueprint considered the Union's letter, it would presumably have addressed the disciplinary letters to the

Union (as agent) rather than to the applicants themselves. In fact, the letters were addressed to the applicants personally and not to the Union which would suggest that Blueprint's claim that the letter from the Union was not considered before the letters were prepared to the applicants, is truthful.

[13] What that all suggests is that Blueprint simply sought to progress a disciplinary issue without being aware first that the employees who were involved were members of a union. As if that is not enough, it is also important to note that there were three employees involved in the *drinking on the job* allegation; the third employee was not a member of the Union and is not in any way involved in this proceeding. That employee was dealt with by Blueprint on exactly the same basis as the applicants were and was treated similarly.

[14] Finally, I comment on the applicants' allegation that Blueprint's motivation for their dismissal was to save them from making either or both applicant redundant and thus becoming liable for redundancy compensation. Aside entirely from the fact that the evidence suggests that Blueprint considered the issue from a disciplinary aspect entirely and made its judgment on that basis alone, it is also worth pointing out that the applicants' employment agreements do not provide for any redundancy compensation so their argument, such as it is, has little force or effect.

Was the drinking of alcohol at work common practice?

[15] The essence of this employment relationship problem is the applicants' conviction that what they did, notwithstanding Blueprint's policy, was a commonplace. In order to explore this issue appropriately, the starting point must be the employer's policy. It is common ground that up until a clear enunciation of the employer's policy (which I will come to shortly), there was indeed a common practice of drinking alcohol in the workplace at the end of a shift. Blueprint's investigation of the issue once it was raised by the applicants disclosed a number of Blueprint employees who confirmed there was alcohol consumed in the workplace but before the employer enunciated its policy on the matter prohibiting alcohol consumption.

[16] By circular memorandum dated 25 October 2008, Blueprint notified all staff that:

> *From today onwards it is company policy that there will be no consumption of alcohol during work hours. Any consumption of*

> *alcohol will be limited to after hours and specifically only upstairs in the staff lunchroom. Deviation from this policy will be viewed as unacceptable behaviour, although we are supportive of a friendly working environment and allow moderate consumption of alcohol, it is strictly limited to after hours and within the defined location.*

[17] That circular memorandum emerged in the context of Blueprint determining that it would generate a policy and procedures manual for the enterprise but the management determined to enunciate a *stand alone* policy in respect of the consumption of alcohol on work premises and that policy was conveyed by the 25 October 2008 circular memorandum.

[18] As I have already noted, the effect of the new policy was to change the culture in the workplace. The evidence before the Authority is plain that prior to the October 2008 memorandum, alcohol was consumed in the workplace during working hours. That emerged as a consequence of the investigation undertaken by Blueprint while considering disciplinary sanctions against the applicants. However, the evidence is equally plain that after the memorandum was circulated, there was no widespread culture of alcohol consumption in the workplace.

[19] When the employer came to investigate the circumstances around the events of 25 January 2009, Blueprint formed the view (on reasonable grounds) that the events of 25 January 2009 involving the applicants were an isolated incident.

[20] Blueprint was drawn to that conclusion by the failure to find any evidence of other employees consuming alcohol in the workplace despite being urged to conclude otherwise by the applicants. While the applicants were anxious for Blueprint to speak widely to staff allegedly in the belief that other staff would support their view that alcohol consumption was still widespread, Blueprint's investigation in fact produced the opposite conclusion, namely that there was no other evidence of alcohol consumption in the workplace save for the singular events of 25 January 2009.

[21] The investigation of those events was assisted by the evidence of Mr Glendenning. Mr Glendenning was the third member of the shift that the two applicants worked on that Sunday night. His disciplinary meeting took place before the disciplinary meeting for the applicants (Mr Glendenning was not a member of the Union) and Mr Glendenning freely acknowledged that the three employees were drinking alcohol at the end of the Sunday night shift, that he knew it was wrong, and

that it was done on Sunday nights exclusively because management was not present in the building on those occasions.

[22] I am satisfied then that Blueprint's conclusion that the Sunday evening drinking participated in by the applicants and one other employee was not a commonplace in the work premises save for the anecdotal evidence that the applicants and the other employee involved regularly drank on Sunday evenings. On 25 January 2009, Mr Lightbourne, the general manager of Blueprint, had seen the three employees with alcohol at their work stations before they concluded their work responsibilities.

[23] At the disciplinary meeting which followed Mr Lightbourne's observation of the applicants with alcohol on the premises, the applicants initially denied they were drinking alcohol but after some prompting admitted that they were drinking alcohol (which was apparent to Mr Lightbourne anyway from his own observation). The applicants defended their action by relying on the contention that it was commonplace that the employer's policy be ignored. As I have already made clear, the employer's investigation disclosed it was not commonplace at all and that the only employees who seemed to be regularly in breach of Blueprint's policy were the applicants and their co-worker, Mr Glendenning.

[24] Counsel for the applicants protests that Blueprint's notes of the disciplinary meeting do not disclose that the applicants initially denied drinking alcohol. This is right (the notes are deficient in a number of respects, including this one) but Mr Sanders who took the notes gave *viva voce* evidence of what the applicants said, and I accept that evidence as truthful.

Was the decision to dismiss one that a fair and reasonable employer would make?

[25] I am satisfied the decision to dismiss was the decision that a fair and reasonable employer would make after that fair and reasonable employer had conducted a proper investigation: s.103A Employment Relations Act 2000 applied.

[26] First, the employer enunciated a clear policy which represented a fundamental change in the workplace and the evidence suggests that with the exception of the applicants and one other employee, that change initiated by the employer was readily accepted by the employees. As I have already noted, there is ample evidence of

alcohol consumption in the workplace during work hours prior to the enunciation of the employer's 25 October 2008 policy and with the exception of the incident giving rise to the present proceedings, no other evidence of alcohol consumption in the workplace since the policy change.

[27] I do not accept the applicants' submission that Blueprint has failed to adequately implement their policy and to ensure compliance with it. Blueprint's investigation makes clear the applicants (and Mr Glendenning) were the only staff not observing the new policy.

[28] Mr Lightbourne attended at the workplace unexpectedly on Sunday, 25 January 2009 and discovered the applicants and one other worker with alcohol in the course of being consumed or having been consumed while the applicants were still working and still going about their tasks. It is common ground that Mr Lightbourne did not confront the applicants at the time, but nothing turns on that. His evidence (which I accept) is that he was shocked and distressed and had never seen other workers drinking alcohol on the job after the policy change. He says that when he left the workplace he spoke to Blueprint's financial controller about the episode and she recommended (very sensibly) that Mr Lightbourne obtain professional advice. That obtaining of professional advice resulted in Blueprint's letter of 26 January 2009 summoning the applicants to a disciplinary meeting.

[29] There is some dispute about the time that Mr Lightbourne arrived and left the premises. His evidence (which I prefer) is that he arrived at the workplace before 5 o'clock and he was already leaving the workplace in his car when he spoke with the financial controller, Ms Hawes, by telephone. The Authority has been provided with the telephone records of that call which is timed at 7 minutes past 5 on 25 January 2009. Ms Hawes gave evidence that it was clear to her from the background noise when Mr Lightbourne rang her that he was in his car and that it was moving. That is consistent with Mr Lightbourne's evidence which, amongst other things, was that he had his children with him and that he was required to return them after an access visit to Ashburton by 6pm. It would not be possible to get to Ashburton from Blueprint's premises in less than one hour's driving time.

[30] The importance of this exchange is simply that the applicants maintain that Mr Lightbourne turned up later. This is important to their argument because the later he turned up and saw them drinking, the less culpable they perhaps feel because the

drinking episode is closer to the end of the shift. However, whatever the applicants may wish or think, I am satisfied that Mr Lightbourne was at the premises by 5pm and that he would have seen the evidence of the alcohol by around 5pm at the very latest, that is one hour before the shift for the applicants was to end and so in no sense could it be claimed that the alcohol was being consumed at the very end of the work shift.

[31] Having established that Blueprint's policy was clearly enunciated and accepted and implemented by the vast majority of its employees, and having further identified through his own eyes that three employees were in breach of that policy, and having secured the resignation of Mr Glendenning who properly and honourably acknowledged his wrongdoing, Mr Lightbourne, after satisfying himself by appropriate inquiry that alcohol consumption in the workplace was not commonplace, determined to dismiss the applicants for serious misconduct, relying on the 25 October 2008 policy and the definition of serious misconduct in the individual employment agreement of each of the employees, which includes *consumption of alcohol or drugs likely to cause impairment at work*.

[32] At the disciplinary meeting on 28 January 2009, Mr Lightbourne made clear his genuine concern about the operation of machinery under the influence of alcohol and the importance that Blueprint placed on its obligations under the Health and Safety in Employment Act. Evidence from more than one of Blueprint's witnesses was to the effect that there was no difference in terms of health and safety consequence between actually operating the printing machines under the influence of alcohol and cleaning up the machines at the end of a shift. Indeed, it was suggested that the cleaning up process could be more dangerous than the operating phase because, by definition, cleaning of the machines involved getting hands and arms inside the machinery in order to effect the necessary cleaning.

[33] Counsel for the applicants protests that it was not clear to staff that breach of the *no alcohol* policy could be serious misconduct leading to the ultimate sanction of dismissal. It is also contended that in the absence of any evidence of impairment, reliance could not be placed on the provision in the individual employment agreement. But Blueprint's position is that it implemented an alcohol ban in the workplace for health and safety reasons and that the new policy made clear that alcohol consumption in the workplace would not be accepted. The events of 25 January 2009 were apparently the first occasion that Blueprint had had to consider

enforcement action; there were no earlier precedents. In a new work culture where alcohol was prohibited from the working day it is, I think, available to a fair and reasonable employer to conclude that any alcohol consumption will be *likely to cause impairment at work* and thus to determine the employment relationship in consequence.

Determination

[34] I am satisfied on the balance of probabilities that a fair and reasonable employer in Blueprint's position, having conducted a proper investigation, would be justified in dismissing the applicants. It follows that the applicants' claims fail in their entirety.

Costs

[35] Costs are reserved.

James Crichton
Member of the Employment Relations Authority