IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 542
5348816

	BETWEEN	TERRY VAN DER HOEVEN Applicant
	AND	ALLOY YACHTS INTERNATIONAL LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Max Whitehead for Applicant Mark Kamphorst for Respondent
Investigation Meeting:	30 and 31 August 2011
Further submissions:	22 September 2011 from both parties
Determination:	20 December 2011

DETERMINATION OF THE AUTHORITY

A. Terry van der Hoeven's personal grievance application is declined for the reasons given in this determination.

B. Costs are reserved.

Employment relationship problem

[1] Alloy Yachts International Limited (AYIL) dismissed Terry van der Hoeven on 24 June 2011 for disruptive behaviour and failing to follow instructions. Its action was the conclusion of a disciplinary process begun in March 2011 but which was suspended for eight weeks in an arrangement AYIL representatives understood to allow Mr van der Hoeven to seek treatment concerning either alcohol abuse or dependency. Mr van der Hoeven however contends AYIL unjustifiably disadvantaged him by suspending him on 14 March 2011 and then unjustifiably

dismissed him after he sought to return to work in May and June. His doctor considered he was physically well and his psychotherapist recommended a return to work. AYIL considered however that Mr van der Hoeven had not kept to his arrangement with it and had not really addressed the issues or changed the behaviour that had led to the disciplinary process.

The investigation

[2] In preparing this determination the Authority has reviewed the extensive written and oral evidence given during the investigation by:

(i) Vivienne Feyen, the step-sister of Mr van der Hoeven and a barrister, who accompanied him at meetings with his managers on 7 and 11 March; and
(ii) Karen van der Hoeven, Mr van der Hoeven's wife; and
(iii) Mr van der Hoeven; and
(iv) Fred Roberts, president of the Alloy Yachts Employees Federation, who accompanied Mr van der Hoeven to a meeting with his managers on 22 June; and
(v) Barbara Reardon, a registered psychotherapist who met with Mr van der Hoeven from late April and corresponded with AYIL managers in May and June about the prospects for his return to work; and
(vi) Graeme Eddy, AYIL's human resources manager; and
(vii) Russell Salmon, AYIL engineering manager; and
(viii) Andrew Stone, AYIL engineering design manager.

[3] The parties provided relevant background documents. Their representatives, in addition to questioning the witnesses, delivered closing submissions.

[4] As permitted by s174 of the Employment Relations Act 2000 (the Act), this determination does not record all evidence and submissions received but states findings of fact and law and expresses conclusions on matters requiring determination. The Authority's findings are made on the civil standard of the balance of probabilities, assessing the evidence to determine what is more likely than not to have happened.

[5] Ms Reardon attended and gave evidence under a witness summons. Her evidence was, in part, based on discussions she and Mr van der Hoeven had in their psychotherapeutic sessions that would normally have been confidential. However Mr van der Hoeven had given Ms Reardon permission to disclose those discussions to his employers as part of endeavours in May and June to get agreement for his return to work. In her evidence to the Authority Ms Reardon was not required to disclose anything which Mr van der Hoeven had not given her permission to tell his employer and nothing more than what she had actually said about him in those conversations with AYIL managers.

[6] The evidence from various witnesses did traverse employment, family and health issues concerning Mr van der Hoeven. However the Authority can only determine employment matters, although the health and family issues do comprise, in this case, some of the circumstances that a fair and reasonable employer may need to have considered. AYIL's actions in respect of Mr van der Hoeven were required by s103A of the Act to be what a fair and reasonable employer could have done in all the circumstances at the time. Those actions included:

(i) the decision to begin a disciplinary investigation; and

(ii) the discussion with Ms Feyen at the 7 March disciplinary meeting about whether Mr van der Hoeven needed time away from work for treatment; and

(iii) signing an agreement for leave with Mr van der Hoeven on 11 March; and

(iv) dealing with Mr van der Hoeven and Ms Reardon about whether he was ready and should return to work in May and June; and

(v) proceeding with the disciplinary process in June; and

(vi) deciding to dismiss him after the 22 June disciplinary meeting; and

(vii) how it treated him following that decision.

What led to the disciplinary investigation?

[7] Mr van der Hoeven worked for 24 years for AYIL, initially on a contract basis but in the last eight years as a direct employee. His terms of employment were covered by a collective agreement between AYIL and the workplace union. As the company had grown and the technology used for its design work had developed, Mr van der Hoeven had taken a particular interest in that area. In recent months he had

become increasingly concerned about whether the system and software used was adequate or properly set up and was openly critical of management decisions which he regarded as resulting in deficiencies. He was recognised as someone who was passionate about his work and who would vigorously dispute management decisions on design approaches or solutions if he considered those decisions would not produce the best outcome. By the second half of 2010 however, Mr Stone and Mr Salmon had become concerned about what they saw as an increase in the frequency of angry outbursts from Mr van der Hoeven. In September 2010 the three men had an informal meeting in which, according to Mr Stone's evidence, Mr van der Hoeven was told his managers did not want to stifle his creative input but he needed to 'toe the line' and follow instructions in order for the company to function effectively.

[8] Mr Stone had worked with Mr van der Hoeven since 1997 and been his immediate supervisor for the last five years. Their desks in the office were next to one another. By December 2010 Mr Stone remained concerned about Mr van der Hoeven's reluctance to accept direction and the effect on other staff of how he behaved and carried out his work. Mr Stone knew Mr van der Hoeven had experienced family difficulties with his wife and a teenage son during the year and Mr van der Hoeven had said he was attending anger management counselling.

[9] Mr Stone decided to contact Mrs van der Hoeven and check whether there were still issues at home that might need to be taken account of at work. He knew Mrs van der Hoeven from work social functions they had both attended over the years. When telephoned Mrs van der Hoeven agreed to talk with Mr Stone on the condition of confidentiality and in their evidence to the Authority neither disclosed the content of that conversation other than Mrs van der Hoeven saying she had told Mr Stone she would try to get Mr van der Hoeven to see his doctor. The following week Mr van der Hoeven told Mr Stone that he had seen a doctor, was prescribed anti-depressant medication and his wife was concerned about his drinking.

[10] Through January and February 2011 Mr Stone and Mr Salmon continued to be concerned about Mr van der Hoeven's conduct, including whether he had followed directions on how to carry out or complete particular design requirements (which were referred to in evidence as the 'wire v rope' discussions and the use of 'p-pins' in

a window design) and reports that he was disrupting the work of others while supposedly doing overtime on Saturday mornings. This included one incident where Mr Salmon said he found Mr van der Hoeven in the drawing office on a Saturday morning "loudly complaining to all about management's ignorance". Mr Salmon directed Mr Stone to tell Mr van der Hoeven not to work on Saturday mornings unless he was supervised.

[11] When Mr Stone went to give Mr van der Hoeven this instruction at around 3.45pm on a Friday afternoon he found him in the on-site bar, called the "Boat Builders Arms". Despite the instruction, which he accepts he got and understood, Mr van der Hoeven attended work on the Saturday. Mr Salmon subsequently altered Mr van der Hoeven's time sheet so he was paid one less hour for the Friday (because he was in the bar before his official finishing time) and got no pay for the Saturday. Mr van der Hoeven had claimed five hours pay for that day.

[12] Mr Stone sent Mr van der Hoeven an email advising him not to work Saturdays until further notice but Mr van der Hoeven still came to work on the following Saturday.

A disciplinary process begins

[13] Meanwhile Mr van der Hoeven had been told of a disciplinary investigation on allegations of disruptive behaviour and failing to follow instructions. He was advised to bring a representative to a meeting set for 2 March "as your job may potentially be in jeopardy". The meeting date was delayed so Mr van der Hoeven could attend with the representative of his choice.

[14] On 7 March Mr van der Hoeven met with Mr Stone, Mr Salmon and Mr Eddy. He was accompanied by Ms Feyen. His father and wife had arranged for Ms Feyen to go with him. During the course of the meeting he left the room at Ms Feyen's suggestion on the pretext of getting water for everyone. While he was out of the room, Ms Feyen raised the prospect of Mr van der Hoeven taking medical leave to attend a "structured programme". While there is some dispute in the evidence I find that all the participants understood this proposal to relate to a programme of treatment

for alcohol abuse or dependency and behaviour associated with it.

[15] In her oral evidence regarding that discussion Ms Feyen said: "I had the impression that the three gentlemen were responsive and positive about helping Terry, once that was all done and Terry demonstrated the treatment, Terry would go back to Alloy Yachts. I thought that was fair." I accept her evidence as accurately reflecting the understanding reached. When Mr van der Hoeven returned to the room, Ms Feyen summarised the discussion and the meeting adjourned.

[16] The following day Mr Eddy sent an email to Ms Feyen saying AYIL felt the "time out" should start as soon as possible and asked whether an agreement that Mr van der Hoeven go on leave, sick or annual, from 14 March was a possibility. He then sent her a draft memorandum and I accept his evidence that he amended this to include the word "suspending" at Ms Feyen's suggestion.

[17] Ms Feyen and Mr van der Hoeven then met briefly with Mr Eddy and Mr Stone on 11 March. Mr van der Hoeven signed a copy of the memorandum to indicate his agreement to the terms on which he would take sick leave. Before doing so he asked what could happen if he refused to do so and Mr Eddy told him that he could then face dismissal. Ms Feyen encouraged Mr van der Hoeven to sign the memo and he did so. It stated:

> *Following on from Monday's disciplinary hearing the Company is suspending you from your duties from Monday 14 March for 2 months in order for you to undertake medical treatment.*
>
> *You have 21.5 days sick leave and 18 days annual leave available to cover the time off.*
>
> *There will be a review within the 2-month period based on the medical evidence available with regard to a date for your return to work.*

[18] This was not, I find, an unjustified suspension but an attempted remedial measure agreed during a disciplinary investigation. It was not inconsistent with a provision of the collective employment agreement that allowed for suspension on pay during investigations "if deemed appropriate". There was however – and contrary to

Mr van der Hoeven's evidence – no agreement that the disciplinary investigation was abandoned as a result of the leave agreement. Rather, it was understood by all parties at the time, I find, that the leave was intended to provide an opportunity for him to address personal issues and change behaviour that would otherwise result in a disciplinary sanction. Progress in that regard was to be reviewed within two months. The company had not waived any right to proceed with its investigation and take disciplinary action if necessary.

Role of Ms Feyen

[19] In his witness statement Mr van der Hoeven impliedly criticised the bona fides of his leave arrangement by stating there had been "unknown collusion" between Ms Feyen and Mr Eddy. He took this view because Ms Feyen and Mr Eddy had met some years before (although they had no ongoing contact) and because he said he did not know of the email correspondence between the two about the wording of the leave memorandum he later signed.

[20] Mr van der Hoeven also questioned whether Ms Feyen had attended the disciplinary meetings as his representative or as a representative of his family.

[21] Neither accusation, I find, has any negative consequence for the justifiability of AYIL's actions in its dealings with Ms Feyen as Mr van der Hoeven's representative.

[22] Mr van der Hoeven's wife and father had arranged for Ms Feyen to attend the disciplinary meeting, but that meeting would have gone ahead sooner if Mr van der Hoeven had not arranged for a delay so his representative could attend – and it was, I find, Ms Feyen to whom he was referring. He also met with her in the work car park to discuss the meeting before it began and, on his evidence, knew when he was asked to leave the room to get water that Ms Feyen would use that opportunity to discuss the prospect of him taking leave in relation to alcohol issues.

[23] Ms Feyen returned with him to his home after the 7 March meeting where – as confirmed by the evidence of Mr and Mrs van der Hoeven and Ms Feyen – the three

of them sat outside on the deck and discussed the arrangements she had made with the AYIL representatives in the meeting. At the 11 March meeting where Mr van der Hoeven signed the leave memorandum, Ms Feyen also openly gave him advice that he should sign it. As a question of law, I find, Mr van der Hoeven, by his actions, had held out Ms Feyen to AYIL as his representative and his managers were entitled to deal with her on that basis and assume she had informed him of those dealings.

Agreement

[24] The memorandum Mr van der Hoeven signed clearly referred to his leave being to undertake treatment but he argued no preconditions for his return were agreed and his leave should have ended once his sick and annual leave entitlements were exhausted.

[25] That argument fails because it is inconsistent with the plain wording of the memorandum and because, I find, the evidence of all the other witnesses involved in those discussions confirmed his return was to be conditional on him having undergone "treatment" that successfully addressed the issues that led to problems with his behaviour or conduct at work. It is implied by the wording of the memorandum referring to a "review … based on the medical evidence".

[26] Ms Feyen in her evidence referred to this as Mr van der Hoeven being able to "demonstrate the treatment". Mr Eddy, Mr Stone and Mr Salmon confirmed that from the conversation on 7 March they had understood Mr van der Hoeven would enter a treatment programme. In a telephone conversation with Mr Eddy on 8 March Mrs van der Hoeven referred to a particular alcohol treatment programme

Attempts to return to work

[27] Mr van der Hoeven subsequently attended an assessment for that programme but did not enter it for treatment. He decided it was not suitable for him. Instead he saw a psychologist and when he decided that did not suit his needs, he met with a man whom he described in his evidence as a "mentor". However he then decided the mentor was "out of his depth" and ceased meeting with him.

[28] On 14 April Mrs van der Hoeven telephoned Mr Eddy and told him that Mr van der Hoeven had not entered a residential rehab programme. Mr Eddy asked her to tell Mr van der Hoeven that, before he could return to his job, he needed to provide a "professional opinion that he was fit to work". When Mr van der Hoeven rang Mr Eddy on 26 April, Mr Eddy gave him the same message directly. Mr van der Hoeven began sessions with Ms Reardon two days later, seeing her five or six times in the following fortnight.

[29] At Mr van der Hoeven's request Ms Reardon spoke with Mr Eddy, Mr Salmon and Mr Stone in May about the prospects for his return to work. Ms Reardon supported the idea as something that would help him work on the issues she was discussing with him in psychotherapy but the AYIL representatives were not satisfied Ms Reardon's report showed Mr van der Hoeven had made sufficient progress to be able to return to work and to not repeat the behaviour and conduct which had led to the disciplinary meeting.

[30] AYIL offered Mr van der Hoeven a further month's leave but was not prepared to pay him for that time once his leave entitlement was used up. Mr Eddy met with Mr van der Hoeven to make this offer and to explain why AYIL did not consider he was ready to return. Mr van der Hoeven responded with a letter on 3 June in which he offered some undertakings about his behaviour that "may antagonise or upset my colleagues or management" and asked to be paid for further leave.

[31] Mr Eddy then sent a letter on 8 June stating AYIL had "no medical clearance, only your psychotherapist's opinion that returning to work would assist with your rehabilitation". Mr Eddy refused further paid leave, confirmed AYIL intended Mr van der Hoeven return to work and asked to meet with him on 24 June. He asked for written opinions from Ms Reardon and Mr van der Hoeven's GP as to his fitness to return to work.

[32] On 13 June the GP provided a letter stating Mr van der Hoeven was "physically quite fit", was taking an anti-alcohol medication (antabuse) and the GP felt "it would be good for him to start work again".

[33] On 16 June Ms Reardon provided a letter stating she believed "it would be helpful for Terry to return to work sooner rather than later, and detrimental for him to be obliged to remain off work for any longer". She also stated her professional opinion was that Mr van der Hoeven was "psychologically fit and able to return to work immediately".

Recommencing disciplinary process

[34] After considering the correspondence from Ms Reardon and the GP, Mr Eddy, Mr Stone and Mr Salmon informed Mr van der Hoeven that they wished to reconvene the disciplinary investigation suspended on 11 March. They told him the health information left them with no confidence of any fundamental change to Mr van der Hoeven's state of mind. In addition to issues notified to him in the 7 March disciplinary meeting, they told him that they also wanted to address "the unresolved issue of you drinking on site while clocked in in the days leading up to the disciplinary hearing". He was reminded his job could be in jeopardy and advised to bring a representative to the meeting.

[35] Mr Roberts accompanied Mr van der Hoeven to this disciplinary meeting, held on 22 June. Based on an opinion provided by employment consultant Max Whitehead, Mr Roberts contended Mr van der Hoeven's suspension was unlawful and that AYIL was legally obliged to provide him with work and pay.

[36] In the meeting Mr van der Hoeven gave undertakings that his conduct would be different if he returned to work but Mr Salmon expressed doubt there was any evidence that he would be any different. After considering Mr van der Hoeven's submissions, Mr Salmon decided to dismiss him.

[37] Mr Eddy set out the reasons for the dismissal in a three-page memorandum dated two days later. He referred to Mr van der Hoeven not attending to jobs and priorities as instructed, being a disruptive factor in his team, disparaging management, not taking the planned course of action when he was given leave to undertake treatment, and giving qualified assurances about his behaviour if he returned to work.

It concluded:

> *In our view you are not ready to return to work. You are taking medication to stay off the drink and need to attend ongoing counselling sessions. This combined with the lack of remorse, which in itself stems from lack of understanding, is indicative of insufficient change and we have no confidence that you can improve your behaviour sufficiently in the foreseeable future.*

[38] Although the dismissal was stated to be for serious misconduct, Mr van der Hoeven was paid four weeks notice and told he may be provided with contract work from time to time in the future.

Dismissal decision

[39] The 22 June disciplinary meeting briefly retraversed the details of the infringements raised with Mr van der Hoeven in the 7 March disciplinary meeting. Mr van der Hoeven contends the itemised allegations were not properly or fully discussed at the earlier meeting.

[40] I am satisfied from the evidence of Ms Feyen and the three AYIL managers that around 30 minutes was spent in the 7 March meeting discussing the details of those allegations before the conversation moved to the prospect of leave for treatment.

[41] I am also satisfied from that evidence Mr van der Hoeven had a fair opportunity to comment on the allegations and instances of conduct that were of concern to AYIL, that his comments were then fairly considered by Mr Salmon, and that a fair and reasonable employer could have concluded in all the circumstances at the time that the conduct itemised was serious misconduct.

[42] These included instances where Mr van der Hoeven had defied instructions regarding ‘wire v rope’ and ‘p-pins’ and more recent incidents where he defied instructions not to work overtime on Saturdays.

[43] AYIL had reasonable grounds for its assessment that he was distracting other staff from their work and it was entitled not to allow him to work on those days. It

was a lawful and reasonable instruction in the circumstances and there is no doubt that Mr van der Hoeven's defiance was deliberate. On first receiving the instruction, while drinking in the work bar on the Friday afternoon, Mr van der Hoeven declared his intention to ignore it. When the instruction was repeated by email in the following week, Mr van der Hoeven again ignored it. Tellingly, the second occasion was after he had been advised of the first disciplinary meeting.

[44] AYIL was not, I find, precluded from proceeding with disciplinary action on those instances of misconduct just because it had, in the meantime, allowed for an attempt to reach an alternative solution to Mr van der Hoeven's behaviour or conduct issues. In doing so it had stayed its hand but not waived its right to continue if those measures did not reach the required goals.

[45] I also accept it was open to a fair and reasonable employer to conclude Mr van der Hoeven's failure to undertake the expected treatment actions, instead setting about other measures of his own choosing, was a further instance of his attitude and behaviour that had led to the need for a disciplinary investigation in the first place.

[46] The AYIL managers did not accept the assessment of Mr van der Hoeven's GP and Ms Reardon regarding his fitness for work. In doing so they preferred their subjective assessments of his capacity and likely behaviour. However, considered closely, I accept this was a conclusion open to a fair and reasonable employer in the circumstances.

[47] The GP's assessment was simply a statement of Mr van der Hoeven's physical fitness – which had not been in question – and then expressed the GP's feeling about the utility of work.

[48] Ms Reardon's assessment of Mr van der Hoeven's psychological state was based on a relatively short period of dealing with him and did not suggest he had resolved the issues of concern that had led to AYIL allowing him the leave for treatment. In that respect, AYIL's managers were not acting unfairly or unreasonably, I find, in relying on their own many years of experience with Mr van der Hoeven to conclude that he was not fit to return to the work required of him. While a return to

work might have been of therapeutic value to him – which was Ms Reardon's view – they had no assurance or confidence it would meet the standards of conduct and compliance that they were entitled to require.

[49] For the reasons given I find the conclusions reached and the dismissal decision made by AYIL met the applicable test of justification and was within the range of outcomes open to it in all the circumstances at the time. AYIL had satisfied the requirement to fairly consider alternatives to dismissal by its earlier decision to allow Mr van der Hoeven leave to seek treatment.

Treatment following decision to dismiss

[50] The payment of notice did not negate AYIL's finding of serious misconduct or its ability to dismiss for that reason. Rather the payment of notice was an action within its discretion to soften the blow of dismissal given Mr van der Hoeven's long service. Similarly AYIL's indication that he might get contract work in the future confirmed its appreciation of his skills without negating its assessment that he could not be relied on to follow its instructions as an employee.

[51] Mr van der Hoeven submitted he should not have had to use sick and annual leave to take time away from work to address the issues for which he was given leave. However the collective agreement did allow a disciplinary outcome of suspension without pay which AYIL could have imposed. The 11 March memorandum showed he had agreed to the use of sick and annual leave entitlements for the period of leave granted.

[52] Following the investigation meeting Mr van der Hoeven made further submissions suggesting his holiday and sick pay entitlements were calculated on a basis that was not in accordance with his statutory entitlements. No detail was provided although his representative did lodge a copy of six years of wage records and invite the Authority to analyse those documents to identify information that would support the contention. I agree with AYIL's reply submission that he would need to provide specific calculations to support and verify such a broad allegation.

Determination

[53] For the reasons given above Mr van der Hoeven's personal grievance application is declined and the remedies he sought cannot be awarded.

Costs

[54] Costs are reserved. The parties are encouraged to resolve any question of costs themselves. If they are not able to do so and a determination of costs by the Authority is required, AYIL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr van der Hoeven would then have 14 days from the date of service to lodge a memorandum in reply. No application for costs will be considered outside this timetable unless prior leave is sought and granted.

Robin Arthur
Member of the Employment Relations Authority