Determination Number: AA 394/05
File Number: AEA 300/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Richard Hireme (Applicant)
AND	Acrow Ltd (Respondent)
REPRESENTATIVES	Brian Rimmer, Advocate for Applicant Paul Tremewan, Counsel for Respondent
MEMBER OF AUTHORITY	Ken Anderson
INVESTIGATION MEETING	26 July 2005
SUBMISSIONS RECEIVED	4 August 2005 15 August 2005
DATE OF DETERMINATION	4 October 2005

DETERMINATION OF THE AUTHORITY

The Matter to be Determined

[1] Mr Hireme was employed as a Scaffolder. On 27 January 2005, he was dismissed from his employment on the grounds of serious misconduct. Mr Hireme claims that the dismissal was unjustified and seeks that the Authority finds that he has a personal grievance and award him various remedies, including reinstatement.

Background Facts and Evidence

[2] On Tuesday 25 January 2005, Mr Hireme and two other employees of Acrow Limited ("Acrow"), were erecting scaffolding at a site in Tauranga. Mr Hireme was the Leading Hand and responsible for the other employees.

[3] Late that afternoon, Mr John Lile, the Branch Manager, received a phone call from the contractor that had engaged Acrow to erect scaffolding. The contractor expressed his concern that Mr Hireme and his colleagues had left the work site at approximately 1:00pm and had not returned.

[4] On the morning of Wednesday 26 January, Mr Lile met with the three men and ascertained that when the men had left the work site the day before, they had gone to a local hotel and had returned later in the afternoon to pick up their gear. Mr Hireme had gone directly home from the work site and the other two men went back to the Acrow yard before going home.

[5] Following obtaining advice from the company Human Resources Manager, Ms Annie Adams, the three men were suspended on pay pending disciplinary proceedings.

[6] On Thursday 27 January, Mr Lile and Ms Adams met with Mr Hireme and his Union representative and an explanation was sought as to his absence from the work site on 25 January. Mr Hireme explained that he and the other two workers had left the work site at 2:00pm on the day in question and gone to have a beer at a local hotel. The reasons given for going to the hotel were that it was hot and it was Mr Hireme's birthday.

[7] The evidence of Ms Adams is that little further explanation was given and that there had been no authorisation given to depart from the work place.

[8] The meeting was adjourned to enable Mr Lile and Ms Adams to consider Mr Hireme's explanation and to consider the other matters that their investigation had revealed. The evidence of Ms Adams is that upon reconvening the meeting, it was conveyed to Mr Hireme that the matters that had been taken into consideration were:

- He was a Leading Hand and had been for a number of years. The Company believed that he was in a position of trust and responsibility and that had been severely diminished by the incident.

- It is not acceptable for employees to leave work without authorisation because it is their birthday or because it is hot.

- There was a health and safety issue involved in that the three men returned to the work site after drinking alcohol.

- The customer that Acrow was providing services to on the work site was extremely unhappy and had complained about the absence of the scaffolders. The incident had cost Acrow financially in lost time but also the Company's public image had been tainted.

[9] Mr Hireme was advised that his employment was to be terminated immediately but in consideration of his length of service with Acrow, he would be paid one week's notice. The other two employees were also dismissed.

The Issue of Disparity

[10] The evidence of Mr Hireme is that about a week after he was dismissed, he became aware of the circumstances pertaining to another Acrow employee based in Auckland, a Mr Dan Riley. The evidence is that in December 2003, Mr Riley was also a Leading Hand and he also left his work place during the lunch break and went drinking at a hotel bar. Apparently, he was discovered at the hotel at about 3:00pm that day and then instructed to return to the work site, despite having consumed an unknown quantity of alcohol.

[11] The outcome of the consequent disciplinary process, during which Mr Riley was informed that his offence was of a serious nature and was subject to instant dismissal, was that while Acrow found that the explanation that Mr Riley gave for his behaviour was unsatisfactory, he was not dismissed. Rather, he received a final warning that remained on his record for a period of three months and Acrow expected "to see a significant improvement" in his adherence to Company policy.

[12] Mr Hireme compares the magnitude of his disciplinary outcome with that of Mr Riley and says that he was treated in a disparate manner and hence the actions of Acrow were unfair and unreasonable.

[13] In response to that allegation from Mr Hireme, Acrow says that the overall circumstances applying to Mr Riley and Mr Hireme were different in a number of ways. Firstly, Mr Hireme had been a leading hand for a longer period of time than Mr Riley and therefore would have had a greater understanding of his responsibilities and the associated expectations of the Company. Acrow says that Mr Riley had only been a Leading Hand for a short period of time and still in the process of learning about his responsibilities.

[14] Secondly, Acrow says Mr Hireme was the only Leading Hand on his site and that the only other line of authority was back at the Acrow office. In comparison, Mr Riley was working on a reasonably large job and while he had responsibility for 6 other employees, the Company had assigned a more senior Leading Hand to work with him, and the senior person had the final say on the day to day undertakings on the site.

[15] Thirdly, Acrow says that Mr Riley went to a hotel next to the work site he was on during his lunch break and was discovered there by the Contract Supervisor. Acrow says that Mr Hireme had left the site and had no intention of going back to work hence the Company concluded that Mr Hireme had walked off the job rather than simply leaving the work place without authorisation, which apparently, is how Mr Riley's action was viewed.

[16] Acrow also says that there were other factors that distinguished the outcome for Mr Hireme compared with Mr Riley. They are that Mr Riley had several Contract Supervisors speak favourably on his behalf and sought leniency for him and he was regarded as an excellent employee who performed well and had a good attitude. In comparison, Mr Hireme's supervisors stated that he worked slowly and had a poor attitude for most of the time.

[17] Then, Acrow says that Mr Riley was remorseful and made apologies to Company personnel for his actions. On the other hand, while Mr Hireme was open and honest about what happened, he never at any time displayed any remorse and his attitude verged upon being arrogant.

[18] Finally, Mr Philip Manning, the new National Operations Manager for Acrow, says that in a competitive business environment, the current management personnel has adopted a more professional approach and the decision that was made, not to dismiss Mr Riley, would be quite different now.
The evidence of Ms Adams is that: "The manager employed at the Dan Riley disciplinary [sic] took the approach (whether correct or not) of viewing the merits of the individual as well as the actual conduct. Therefore it is my belief that a decision was made for Dan Riley that was possibly not correct because it was not completely objective as Dan Riley's character was used to formulate a large part of the basis of the disciplinary outcome."

The Provisions of the Employment Agreement

[19] Schedule Two to the applicable employment agreement provides for certain rules regarding conduct and safety in the work place. The *House Rule*s have two parts. Part One provides that instant dismissal may occur for actions by an employee that are considered to be serious misconduct.
One of the misdemeanours is:

> "ix Refusing to obey lawful and reasonable instruction, or walking off the job."

[20] Acrow viewed the actions of Mr Hireme on 25 January 2005 to be a breach of this rule and hence grounds for instant dismissal. The evidence (and submission) for Acrow is that "refusing

to obey a lawful and reasonable instruction" – "or walking of the job" are two separate offences and the second is not contingent on the first being present.

[21] Part Two of the *House Rules* provides for warnings to be given for less serious misconduct. Included in the misdemeanours is:

> "iii Unauthorised absence.
> xi Leaving assigned place of work without permission.
> xii Failing to be at the assigned place of work during working hours without permission of management other than for tea and meal breaks or personal needs."

[22] The Authority prompted some discussion as to the possible application of the above provisions to the circumstances applying to Mr Hireme. The position of Acrow is that it is the offence of "walking off the job" in Part One of the *House Rules* that applies, hence the actions of Mr Hireme constituted serious misconduct warranting instant dismissal.

Analysis and Conclusions

[23] If it were not for the issues of disparity and the respective provisions of the rules of conduct being present, given the actions of Mr Hireme pertaining to his absence from the work site on 25 January 2005, dismissal was an option that was reasonably available to the employer. However, in regard to the matter of disparity, there is some legal authority that the Authority is bound to take into consideration in determining if the actions of the employer were fair and reasonable overall.

[24] In ***Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd*** *[1985] ACJ 952* at 954, it was said:

> "We accept that if there is a prima facie case of disparity or enough to cause inquiry to be made by the Arbitration Court into the issue of disparity, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming."

[25] The above quotation was considered by the Court of Appeal in ***Samu v Air New Zealand*** *[1995] 1 ERNZ 636* at 639 when considering an appeal of an Employment Court judgment:[1]

> "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 forever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.
> The issue for the Judge was whether on the facts before him the decision to dismiss was one which a reasonable and fair employer would have taken in the circumstances."

[26] Further, in ***Cooke v Trans Rail Ltd*** *[1996] 1 ERNZ 610* at 621, the Employment Court held that:

> "Comparisons however, as the saying goes, are odious. One has to be careful with comparisons. In the present context, comparisons are governed by two legal principles. The first is that, assuming the grounds for dismissal exist, the prerogative whether to dismiss or not remains with the employer. The employer remains free to choose whether to dismiss or not. That right cannot be taken away from the employer. See *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA). The right is subject (see the dictum above from this case) to a requirement of

[1] ***Air NZ v Samu*** *[1994] 1 ERNZ 93.*

reasonableness and fairness. The second principle is that disparity of treatment is no more than a factor to be put in the balance with other factors when deciding whether a particular employee's dismissal was justifiable; ……"

[27] Finnigan J then went on to say:

"It is thus proper that I remind myself, and I have, that the two incidents are separate, each to be judged in its own circumstances. The process of judging whether Mr Cooke's dismissal was justifiable is a process of balancing all the relevant circumstances of that dismissal. Comparison with the earlier incident is only one of many relevant factors."

[28] Given that the respective misconduct of Mr Hireme and Mr Riley was almost identical, and following the words of the Court of Appeal in ***Samu***, the first question to be asked is: Is there an adequate explanation for the disparity?
Having weighed the explanation given by Acrow, apart from the change in the perspective of the management of the company during the year that elapsed between the misconduct of Mr Hireme and Mr Riley, I have to say that I have found the explanation given for the disparity of the penalty imposed on the two employees to be largely inadequate. And, while I can accept that in hindsight, Acrow would not have been so lenient towards Mr Riley, the fact remains that in both circumstances, the view of the decision makers was entirely subjective rather than objective, and the respective decisions made were based more upon the perceived personal qualities of the individual employees rather than the gravity of the misconduct.

[29] Therefore, it is my finding that there was significant disparity in the treatment accorded to Mr Hireme compared with that given to Mr Riley for what was largely identical misconduct.

[30] But, as was held in ***Cooke***, disparity of treatment is just one factor to be balanced with other factors when deciding whether the dismissal of an employee was justifiable. Another factor is the content of the company *House Rules.* While I accept that the rule of *ejusdem generis* cannot be strictly applied to the misconduct of: "Refusing to obey a lawful and reasonable instruction, or walking off the job", I believe that it seems more logical to conclude that; "walking off the job" is to be taken to be associated with "refusing to obey a lawful and reasonable instruction" in the sense that some element of common defiance is present, hence constituting serious misconduct attracting the penalty of dismissal set out in Part One of the rules.

[31] Part Two of the *House Rules* provides for the offences of "Unauthorised absence" and "Leaving the assigned place of work without permission" and "Failing to be at the assigned place of work during working hours without permission of management ….." It seems to me that the misconduct of Mr Hireme is covered by these rules. They constitute "Less Serious Misconduct" for which warnings are to be issued.

[32] There is of course the well recognised principle that the prerogative to dismiss or not remains with the employer and it is not for the Authority to usurp that prerogative, but it is subject to a requirement of fairness and reasonableness.

Determination

[33] I find that the dismissal of Mr Hireme was unfair and unreasonable for two reasons. Firstly, the misconduct of Mr Hireme, more probably than not, fell into the category of less serious misconduct of the Acrow *House Rules.* It follows that it was not open to Acrow to dismiss Mr Hireme under the rules of serious misconduct.

[34] Secondly, the treatment of Mr Hireme was unfair and unreasonable compared with that accorded to Mr Riley, as only a relatively short period of time had elapsed between the two incidents and the explanation given by Acrow for the disparity was not convincing.

[35] For the above reasons I find that the dismissal of Mr Hireme was unjustified and he has a personal grievance.

Remedies

[36] Having found that Mr Hireme has a personal grievance I am required to consider the remedies that may be available to him. Under the provisions of s 124 of the Employment Relations Act 2000 ("the Act"), the Authority:

> "[must in deciding both the nature and the extent of the remedies to be provided in respect of the personal grievance,-
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly."

[37] I accept the submission for Acrow that Mr Hireme was responsible for the actions that led to his dismissal, and the dismissal of the other two employees for whom he had responsibility. It is my considered finding that the actions of Mr Hireme contributed towards the situation that gave rise to the personal grievance to such a high degree that this case; "[is one of a category of cases that is unusual in that although the dismissal was so unfair that it cannot be other than unjustified, the employee's entitlement to remedies is so clearly vitiated by the proven facts in the Tribunal [Authority] that there should only be a finding or declaration of unjustified dismissal but without remedies."[2]

[38] Although the dismissal of Mr Hireme has been found to be unjustified, the degree of his culpability was so substantial that in addition to the discretion available to the Authority pursuant to s 124 of the Act, equity and good conscience dictate that no remedies should be awarded to Mr Hireme.

Costs

[39] Given the overall outcome of this matter, the order of the Authority is that costs will lie where they fall.

Ken Anderson
Member
Employment Relations Authority

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[2] ***Porter v Board of Trustees of Westlake Girls' High School*** *[1998] 1 ERNZ 377* at 393.