



for the night shift, for which he could have returned to Glenbrook in time if required to work.

[4] Supervisors had tried to contact Mr Minhinnick early that morning to come into work to cover for an absent worker but could not reach him on his home phone number or his mobile phone. NZSL says that because of Mr Minhinnick's absence it did not have enough staff to operate the particular steel production line on which he should have worked that shift.

[5] Mr Minhinnick says he realised his mistake regarding the roster when he rang his supervisor in the early afternoon of 26 January 2009 to check if he was required for work on the night shift that evening.

[6] NZSL initiated a disciplinary investigation which, after meetings held between 13 February and 5 March 2008, concluded with Mr Minhinnick's dismissal on 6 March 2008. In making that decision the responsible manager relied on a final written warning issued to Mr Minhinnick on 20 June 2007 for an absence on 23 May 2007 when he was also supposed to be available to provide cover if required.

[7] Before deciding to dismiss him NZSL considered whether Mr Minhinnick could be transferred to one of two jobs in other parts of the mill. The manager for one of those jobs refused to have Mr Minhinnick employed in his area given his employment record. The other possible job was ruled out by Mr Minhinnick as not suitable for him due to an existing back problem.

### **Issues and investigation**

[8] The issues for investigation were whether:

- (i) Mr Minhinnick's conduct, in not attending work to provide cover for the day shift on 26 January 2008, was serious misconduct; and
- (ii) his explanation for his absence was fairly considered; and
- (iii) NZSL was justified in relying on the June 2007 final written warning in making its decision; and
- (iv) alternatives to dismissal were fairly considered; and
- (v) he was treated more harshly than other employees for similar offences.

[9] On each issue NZSL's actions, and how it acted, must be considered against the standard of what a fair and reasonable employer would have done in all the circumstances at the time of deciding or making that action – that is the test of justification required under s103A of the Employment Relations Act 2000 (the Act).

[10] Written witness statements were provided by:

- (i) Mr Minhinnick;
- (ii) his union representative, Peter Elsley;
- (iii) NZSL rolling mills manufacturing manager Russell Voigt, who conducted the disciplinary investigation and decided on the dismissal; and
- (iv) NZSL human resources vice-president Tony Wright, who subsequently conducted a review of the dismissal decision at the request of Mr Elsley.

[11] Each witness attended the investigation meeting and – under oath or affirmation – answered questions from the Authority and the parties' representatives. Speaking to written synopses, the representatives also gave oral closing submissions on the application of the facts to relevant legal principles.

[12] While this determination, in accordance with s174 of the Act, does not set out all the evidence and submissions heard, I have closely reviewed all the written and oral evidence and submissions provided before preparing this determination on the facts, issues and conclusions. In doing so I note with regret that the preparation of this determination was delayed for a longer- than-desirable period by the demands of other Authority matters and acknowledge the patience of the parties and their representatives.

**Did Mr Minhinnick's actions or omissions amount to serious misconduct?**

[13] NZSL identified the incident for which Mr Minhinnick was later dismissed as being “*unsatisfactory performance – further failure to provide OT cover*”.

[14] Mr Minhinnick's closing submissions argued a failure to provide shift cover through inadvertence or genuine mistake could not properly be seen as amounting to serious misconduct. It was not a deliberate act and was acknowledged by Mr Voigt as

a “*mix-up*” or – as Mr Elsley put it on Mr Minhinnick’s behalf in a disciplinary interview on 13 February 2008 – “*an honest mistake*”.

[15] The Employment Court in *Angel v Fonterra Co-operative Group*<sup>1</sup> considered how the classification of serious misconduct relates to acts of carelessness or oversight by workers:

*[75] Serious misconduct is the most serious breach of the employment relationship and often results in the most serious outcome of dismissal because if the employment relationship is deeply impaired or destroyed it is untenable. The trust and confidence which is at the heart of the relationship is gone.*

...

*[77] Offences of dishonesty are almost always cast as serious misconduct. If an individual deliberately steals from an employer this will usually destroy the trust and confidence between them and the consequence is almost inevitably as serious as the misconduct.*

*[78] The classification of serious misconduct becomes more problematic where an employee acts out of ignorance, carelessness, or accident but causes serious or potentially serious consequences for the employer or the employer’s business. In evaluating whether an employer is justified in believing that such an act has caused the irreparable breakdown of the employment relationship, the Court has to objectively assess whether it was the consequences of the employee’s action which have led the employer to conclude that there was serious misconduct or whether it was the actions or omission of the employee that were so serious.*

*[79] In Makatoa v Restaurant Brands (NZ) Ltd*<sup>2</sup> *the Court stated:*

*The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical to the employer’s interests. It will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*

*[80] With respect, the last four words may have overstated the position. If the behaviour has got to the point of dereliction of duty then that must come close to or even amount to serious misconduct. The word dereliction includes an element of shame and impliedly a deliberate failure to fulfill the required duty.*

*[81] Where an employer investigates an employee’s failure to adhere to a policy or code of conduct, it has to assess whether the employee’s failure to comply was because of inadvertence, oversight, or*

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<sup>1</sup> [2006] ERNZ 1060 (EC, Shaw J).

<sup>2</sup> [1999] 2 ERNZ 311 at 319 (EC, Goddard CJ).

*negligence or whether it was done deliberately in the knowledge that it was wrong. If the employee did not have knowledge of the relevant policy or rule, a fair and reasonable employer should find out whether that was the fault of the employee for ignoring or failing to take proper care to be familiar with the policy, or whether there was genuine room for misunderstanding as to what the policy meant. This is not to say that it is necessary for an employer to be satisfied that an employee who breaches policy or a code of conduct has done so deliberately in the sense of having mens rea or criminal intent ... [ ] ... but it is bound to investigate fully to establish why it occurred.*

[16] The consequence of Mr Minhinnick not being available when required on 26 January 2008 was that a production line did not run that shift. The other workers who did show up for the shift did ‘housekeeping’ work rather than direct revenue-generating production work. While the actual cost of lost production to NZSL was not quantified, that consequence is not generally the definitive measure of whether a breach of the type found in this case was serious misconduct.

[17] As the Court in *Angel* indicates, the focus should be on the extent of the employee’s responsibility for his or her inadvertence, oversight or negligence in light of their knowledge of the relevant policy or code of conduct. The breach of that policy or code need not be intentional.

[18] In this particular case there is no doubt that Mr Minhinnick did “*have knowledge*”, in the phrase used in the *Angel* case, of the general requirements of the call out roster. It was part of a shift roster normally set for a 12 month period in advance and followed a reasonably predictable pattern of days off and call out requirements. There was no suggestion of any genuine misunderstanding of what it required and how it worked. Neither was there any need for NZSL to find out more about the fault of Mr Minhinnick in not abiding by its particular requirements on 26 January 2008 because he told the company representatives all they needed to know. He told them he had “*misread*” the roster because he was not wearing his glasses at the time that he checked it.

[19] He may also be taken to be well aware of the requirements of the NZSL code of conduct provisions in matters such as absenteeism, negligence and unsatisfactory performance.

[20] In January 2008 he was still working under the terms of a final written

warning issued to him on 20 June 2007 and in force for a 12 month period. That warning stated that in the event of disciplinary action for further “*misconduct of any nature (be that attendance related or otherwise)*”, his employment was “*likely to be terminated*”. While that warning is to be considered further under another heading below, its relevance here is that the warning was issued for the same breach of the company code – he was rostered for call out on 23 May 2007 but failed to attend work when called to provide shift cover.

[21] On that occasion he was not available as he was at the airport. He was due to go to Australia on holiday the next day but had mistakenly gone to the airport one day early and found out too late to make it back to work for the shift. From the resulting disciplinary investigation over that incident he must have been aware of the requirement to be available when rostered for call outs – and the potential disciplinary consequences for the failure to do so.

[22] In that context I find that it was open to NZSL to characterise Mr Minhinnick’s conduct on 26 January 2008 as repeated and serious misconduct. It was more than “*mere*” oversight. It occurred in circumstances where he had specific knowledge of, and the need to carefully observe, the particular requirements of the call out regime. The fault for failing to take proper care to do so was his and his alone, with no room for genuine misunderstanding of the requirements.

### **Was Mr Minhinnick’s explanation for his conduct fairly considered?**

[23] Mr Minhinnick submits his explanation of an honest mistake was not fairly considered but, instead, was overridden by management concerns over previous disciplinary issues. He points to a comment in meeting notes quoting Mr Voigt as saying “*the file is getting thicker and thicker with discipline interviews*”.

[24] Mr Voigt’s evidence confirmed he was aware of the detail of Mr Minhinnick’s disciplinary history at NZSL, including various formal warnings given between 2001 and 2006. However, having listened carefully to Mr Voigt giving that evidence, I accept that it was only the events of Mr Minhinnick’s non-availability on 23 May 2007 and 26 January 2008 that were decisive in NZSL’s resolution to dismiss him.

[25] Mr Voigt accepted the reason that Mr Minhinnick gave for being away at the golf tournament in Taumarunui. A fair and reasonable employer could have considered the credibility of the explanation and might have found it wanting, but NZSL did not do so. Instead Mr Voigt took the approach that such an error was not acceptable, specifically in the context of the existing final written warning for an omission of the same nature.

[26] Mr Minhinnick submitted that Mr Voigt had acknowledged in the course of the disciplinary meeting that “*these kind of mix-ups can happen*”. However that comment from Mr Voigt – recorded in the meeting notes – continued with the following observation: “*... but most people get the message when it happens and don’t do it again. I would have thought when you are already on a final written warning you would be particularly careful to ensure this did not happen.*”

[27] In short, this was not a case of a single instance of carelessness. There were repeated breaches of the same, known obligation. In the particular circumstances I accept these repeated breaches would deeply impair the trust and confidence of a fair and reasonable employer in the employment relationship with the worker.

[28] I find NZSL fairly considered those circumstances and did not unfairly consider irrelevant matters. In doing so I note that Mr Wright, at the request of Mr Elsley, conducted a detailed review of Mr Voigt’s decision in the month following Mr Minhinnick’s dismissal. This included meeting with the managers, union representatives and Mr Minhinnick. I accept Mr Wright was entitled to conclude that “*historical issues*” – with the exception of the June 2007 final written warning – had “*not been taken into consideration when determining the matter that led to the dismissal*”.

### **Was NZSL justified in relying on the previous final written warning?**

[29] Mr Minhinnick submits the final written warning given to him in June 2007 was invalid because it was issued under the mistaken belief that he was still under an earlier final written warning. The 12-month term of that earlier warning – dated 5 May 2006 – had expired before the 23 May incident which led to the June 2007 final written warning.

[30] I do not accept the June 2007 warning was invalid. Rather I find that warning could validly be considered in NZSL's February 2008 deliberations for two reasons.

[31] Firstly, the evidence is not conclusive that a disciplinary sanction at the level of a final written warning was decided in June 2007 because of a confirmed view of the responsible manager that Mr Minhinnick was already under such a warning for different performance-related matters. Rather the interview notes record that the manager asked Mr Minhinnick in a meeting on 18 June 2007 whether he was "*aware you are still on a final written warning*". Mr Minhinnick is recorded as saying he did not know that and asking when that warning ended. The note records that the manager would "*clarify written warning status*" and "*review further with next level [of] management*". There is nothing in the text of the subsequent final written warning letter dated 20 June 2007 that indicates (i) that the manager had not clarified the status of that warning (or had not found its term had expired) or (ii) that the subsequent June 2007 warning, in fact, did rely on the previous expired warning.

[32] Secondly, Mr Minhinnick was well outside the statutory 90 day period for challenging, by way of personal grievance, the validity of the June 2007 warning. NZSL was entitled to take and act on the apparent acceptance by Mr Minhinnick of that warning. In the 2007 disciplinary process he was represented and assisted throughout by experienced on-site union delegates who were familiar with the necessary review and grievance processes if there had been any real issue at the time. No such review or grievance applications were made.

### **Were alternatives to dismissal fairly considered?**

[33] Mr Minhinnick submits that having resolved that his non-attendance on 26 January 2008 was serious misconduct, NZSL failed to properly consider alternatives to his dismissal. He accepts NZSL did canvas the prospect of transferring him to two other jobs at the mill – with one rejected by him as unsuitable due to the risk of aggravating a back injury. However he submits the reasons given for not allowing him to transfer to the other job were not properly checked. He was told that he lacked the necessary skills for that job and that the manager of that area was not prepared to accept his transfer due to his disciplinary history.

[34] Neither reason amounts to a lack of fairness in the particular circumstances of the case. I accept Mr Voigt's evidence that he genuinely explored the prospect of transfer. He was familiar with Mr Minhinnick's work history. He was entitled to make an assessment of Mr Minhinnick's work skills and take account of a manager's reluctance to have someone who failed to meet standards in one department transferred into that manager's work area.

### **Was Mr Minhinnick treated more harshly than others for similar offences?**

[35] Mr Minhinnick submits he was more harshly treated than other employees for not being available for work when required under the call out roster. He suggests others would have got a written warning for a first offence and a final written warning for a second offence.

[36] He has not met the onus on him to provide compelling evidence to support his allegation of discrimination. While Mr Elsley was able to confirm that other workers had faced disciplinary action for breaching 'on call' obligations, there were insufficient details to establish that any other worker had been in a significantly similar position to Mr Minhinnick but had been treated more leniently than him.

[37] By contrast there was uncontested evidence that in both May 2006 and June 2007 NZSL managers tempered the level of disciplinary sanction against Mr Minhinnick following pleas by his union delegates. This took account of family pressures on him, including care of a daughter seriously injured in a car accident.

### **Determination**

[38] For the reasons given above I find NZSL's decision to dismiss Mr Minhinnick was what a fair and reasonable employer would have done in all the circumstances at the time of that decision. Mr Minhinnick's personal grievance application is declined.

### **Costs**

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs

between themselves. If they are not able to do so, NZSL may, by no later than 28 days after the date of this determination, lodge and serve a memorandum as to costs if it wishes the Authority to determine that matter. Mr Minhinnick would then have 14 days to lodge a reply. No application will be considered outside this timetable without prior leave.

Robin Arthur  
Member of the Employment Relations Authority