

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Jason Palmer
AND Bluescope New Zealand Steel Ltd
REPRESENTATIVES Helen White, Counsel for Applicant
Philip Skelton, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING Thursday 24 August

Applicant's submissions 4
September, 11 September
Respondent's submissions 6
September, 11 September

DATE OF DETERMINATION 26 September 2006

DETERMINATION OF THE AUTHORITY

The applicant, Mr Jason Palmer, was employed by the respondent, Bluescope NZ Steel Ltd, as a Group One Crane Operator working in the company's slab making plant.

In early September 2005 Mr Palmer approached Mr Keith Grala, the then Steel Plant Manager, and told him that he had an alcohol problem for which he needed to get help. Until Mr Palmer made this admission Mr Grala had not been aware that Mr Palmer had a problem. Clearly, his performance had been satisfactory. Although he had a warning for absenteeism he had never presented for work in a manner which aroused suspicion that he was impaired in any way nor had there been any indications that he was an unsafe worker. The company had no formal policy in place regarding alcohol or drug addiction so Mr Grala had to consider Mr Palmer's request on an individual basis.

Mr Grala referred him to the company doctor, Dr Burley, and then had a meeting with the two of them. Mr Palmer decided that he needed to go into an alcohol detoxification programme for which he would need unpaid leave. Three months was sought in order to enable Mr Palmer to undertake a residential rehabilitation programme.

Mr Grala sought permission for Mr Palmer to be granted the leave from Ms Simmons, a Human Resources Consultant, and Mr Barry McLeod, the Human Resources Manager. Mr Grala was

instrumental in Mr Palmer's being granted three months leave. This was subject to his entering into what was called a Rehabilitation Agreement.

Rehabilitation Agreement

Ms Simmons and Mr Grala had discussed this with Dr Burley whose view was that a patient was less likely to relapse if receiving ongoing counselling at the end of the residential programme and if the right incentives and support programmes were put in place to enable the person to abstain. However, the agreement that was drawn up went beyond this. It provided that Mr Palmer would:

- complete a detoxification programme;
- attend a medical rehabilitation course;
- obtain a clearance from the company doctor prior to resuming work on 10 January;
- agree to random breath tests;
- provide proof of regular contact with a support group;
- report weekly to his supervisor;
- meet with the company doctor if directed to do so.

The terms of the agreement were to remain in place for two years. Significantly, the terms of the agreement also provided that "Any breach of this Rehabilitation Agreement will result in your termination from New Zealand Steel" and "If you are found with an alcohol level over 0.02 you will be dismissed". These provisions were punitive and not rehabilitative. In essence, it was as if Mr Palmer had relinquished his entitlement to a normal disciplinary process and gone straight to the final warning stage without having committed any offence.

Ms Simmons and Mr Grala met with Mr Palmer to discuss the agreement. Mr Palmer was asked whether he wanted to see a union representative or have one present at the meeting. Mr Palmer declined. Mr Grala said he explained clearly that a breath test reading of more than 0.02 would result in dismissal.

Mr Carl Bilbe, Mr Palmer's manager, was asked by Mr Grala to manage Mr Palmer's rehabilitation which included a weekly meeting to review performance. In an email to Mr Bilbe written on 6 January 2006 Mr Grala said:

He has agreed to a program of random breath testing for alcohol. He also realises that if he tests positive for alcohol, he will lose his job. This may seem harsh, but it is the only approach which stood a reasonable chance of success.

It is readily apparent from the Agreement, the email and Mr Grala's conversations with Mr Palmer that was being put in place was a "one strike and you're out" scenario.

Breath Tests

Before Mr Palmer returned to work on 6 January 2006 he met with Dr Burley and Mr Grala to discuss his reintegration into the work force. Mr Grala asked Mr Palmer's supervisor to ensure that he was randomly breath tested. Mr Palmer had three breath tests which were within the 0.02 limit.

On 3 February Mr Grala had a phone call from Mr David Hyde, a supervisor, who told him that Mr Palmer had failed a breath test and had been sent home in accordance with the Medical Centre Voluntary Breath Alcohol Testing Policy.

Mr Palmer had had an initial reading of 0.025 and had protested that he had not consumed any alcohol. Very shortly thereafter Mr Palmer had a second test which gave a reading of 0.029. Mr Palmer said he asked his partner, who came to collect him, to take him to the local police station so that he could obtain a blood test but the police station was closed. No offer of a blood test was made by the employer.

Suspension

Mr Palmer was told not to attend work for his next shift. The parties agreed at the hearing that this was a suspension. The suspension was not carried out in accordance with the company's policy.

7 February 2006 Disciplinary Meeting

Mr Grala met with Mr Palmer and his two union representatives, Mr Peter Elsley and Mr Mark Palmer. Mr David Ronaldson was the company witness. Mr Grala said that they were meeting to discuss the failed alcohol breath test and that dismissal was a possible consequence.

Mr Palmer said the reading might have been affected by his use of mouthwash and Mark Palmer provided some information about possible reasons for false readings. Mr Grala adjourned the investigation in order to undertake further investigations and to conduct tests with the mouthwash and to check the calibration of the testing machine.

Mr Mark Palmer said that Mr Jason Palmer had had no problem taking the test and had indicated to Mr Hyde that it would best to do it before the shift started and did not use any delaying tactics.

The notes of the meeting taken by Mr David Ronaldson state: "After reviewing the contract with Jason was it clear to him that if he tested greater than 0.02, he would be dismissed. Jason confirmed that he understood this."

9 February Disciplinary Meeting

The meeting was reconvened. Mr Palmer said he had had a drink on New Year's Eve and had not had one since. Mr Grala asked when he had used the mouthwash and whether he could think of anything else that might have affected the result. Mr Grala said that the mouthwash had been trialled and had not given a positive result. The reading was over 0.02 and he had no reason to doubt the reading. At the hearing he said that other possibilities such as smoking had been put forward but he did not consider those possibilities probable explanations. When I asked him to explain that he said that it did not seem real. Research indicates that smoking within half an hour can affect the outcome a breath test, at least on some machines; Mr Palmer was a smoker.

Mr Grala then took an adjournment to consider matters and the possible explanations that had been put forward. He decided it was more probable than not that Mr Palmer had drunk alcohol and that that explained the reading. He decided he could not trust Mr Palmer to stop drinking and comply with the Rehabilitation Agreement and that trust and confidence had been impaired. The meetings appear to have concentrated on whether or not the agreement had been breached and not health and safety concerns.

Decision

Mr Palmer volunteered the information about his alcohol problem. At the time he did so no problems with his performance had been observed. If he had not volunteered the information and sought the company's assistance with his rehabilitation the company would have been in the

situation of unknowingly employing a person with an alcohol problem. Potentially, this would have been a more dangerous situation for all concerned: the company, the other employees and Mr Palmer. Mr Palmer did the decent thing. His revelation was of benefit to him as well as to the company, at least initially, in that he was given leave without pay to undertake rehabilitation.

The problem is that by entering into the Rehabilitation Agreement Mr Palmer entered into an agreement that placed him in a less advantageous position than other employees in that employees who had not disclosed their alcoholism and sought help but were found to be impaired would not be subject to the “one strike and you’re out” regime set out in the Rehabilitation Agreement. I appreciate that Mr Palmer was offered the opportunity to seek advice about the Agreement and that he declined to do so. However, I am not convinced that that failure means that the Agreement entered into was fair and reasonable.

This was Mr Palmer’s first breach. Alcoholism is an illness and rehabilitation is difficult. It is more than likely that an alcohol impaired employee who had not entered into an agreement like this would have received an employment warning for a first offence with a reading at the level of Mr Palmer’s.

Obligation to accommodate

Ms White submitted that the company was obliged to accommodate an employee with a serious illness or disability pursuant to s21 Human Rights Act 1993 and that to have withheld leave would have been an unreasonable act; and to withhold leave unless the agreement was signed was an unreasonable and unconscionable act. She also submitted that a reasonable rehabilitation plan would have focused on ensuring the safety of Mr Palmer and others during his recovery. The particular terms of the agreement were unreasonable, unrealistic and punitive and did not focus on treating Mr Palmer as an ill employee.

I accept Ms White’s submission that the agreement was unreasonable because of its strict liability approach. Mr Palmer was in a vulnerable position and also an embarrassing one so it is understandable that he did not seek union assistance. There was, however, nothing to prevent the company consulting with the union about an appropriate course of action regarding how disclosing employees were to be dealt with.

This is a situation where the existence of a policy to deal with employees who have alcohol and drug problems would have been very helpful as there would have been clear and agreed guidelines about what was to happen in such situations. I do not doubt that Mr Grala and Ms Simmons believed they were doing what was best for both Mr Palmer and the company.

It is not a question of my setting the agreement aside. It is a question of taking the reasonableness and fairness of the agreement into account as a relevant factor in deciding whether or not the dismissal was justified.

Mr Grala was not knowledgeable about breath testing equipment generally or the specific machine in question. Neither was the nurse. Her only experience was with Mr Palmer.

Even if the reading was correct the issue is whether, in all the circumstances, a dismissal was justified. There was no dismissal letter. The meeting notes and union delegates’ evidence indicate that the meetings focussed on whether or not the reading was accurate, not on any related health and safety concerns.

In his brief Mr Grala said “I made the decision to dismiss Jason by making a risk assessment of the implications of the positive breath test result for safety on site and my duty to provide a safe workplace”. He denied that Mr Palmer had been dismissed because he had a breath alcohol reading over 0.02. Mr Grala said he formed the view that Mr Palmer had drunk alcohol and he then had to decide what disciplinary action was appropriate and that the fundamental consideration was to ensure that a safe workplace was provided. He had to consider whether Mr Palmer would adhere to the boundaries that had been put in place and he decided there was a significant risk that he would not. A warning was not appropriate and for safety reasons Mr Palmer could not be allowed to continue working at the mill.

Mr Grala said he could not say with any certainty what he would have done in the absence of the rehabilitation agreement. He said an investigation would have occurred and the matter could have become a disciplinary one.

Ms White submitted that Mr Palmer’s voluntary disclosure, the lack of problems in his employment regarding alcohol use and the lack of a company policy were all factors which were relevant to the reasonableness of the decision to dismiss. I agree.

Clearly health and safety is an important consideration, particularly when an employee is working in a safety sensitive area. Employers have statutory obligations. The Health and Safety in Employment Act amendment in 2002 came into force in May 2003. It extended the definition of hazard to include a situation where a person’s behaviour may be an actual or potential cause or source of harm to any person.

An employer cannot dismiss every person who has an alcohol or drug problem so an employer has to manage the situation in such a way that the rights of the disabled employee and the rights of other employees are weighed fairly and reasonably. This will not always be easy to do and that is another reason why a policy would be of assistance. Paradoxically, the dismissal of Mr Palmer may result in an increased health and safety risk. This is because there will no incentive for any other employee with an alcohol or drug problem to disclose that fact.

Mr Grala agreed that there had been no performance problems with Mr Palmer and that he had never shown signs of alcohol impairment at work. Despite this, Mr Grala said he could not have trust and confidence in Mr Palmer and said he was concerned that, even with random breath testing or regular breath testing, Mr Palmer could circumvent that by bringing alcohol to work and drinking after he had been tested. Mr Palmer’s work history did not show any basis for such a concern.

In Harrison v Tuckers Wool Processors Ltd [1998] 3 ERNZ 418 and [2000] 1 ERNZ 572 the Court commented on the need for safeguards for employees in a drug and alcohol testing environment and noted the need to ensure that testing would be scientifically valid. These are issues that are raised by the instant case. There was no provision, for example, for the employee to ask for a blood test and in a situation where questions were raised about the scientific validity of the test result it was difficult for laypeople both to raise issues regarding the validity of the outcome and respond to such issues were raised.

A related matter, which was not raised, is that of the privacy of the person who has taken the test regarding who has access to the test results.

The BHP Steel Code of Conduct states that it “aims to implement a system for correcting unacceptable employee behaviour or persistent poor performance in a way which is essentially positive rather than punitive” and that it “aims to implement a system for correcting unacceptable employee behaviour or persistent poor performance in a way which is essentially positive rather than punitive”. It also makes

reference to alternative disciplinary action which includes redirection or retraining and redeployment. There was no evidence that these were even considered. The company's response was that the union did not raise it. However, the obligation is upon the employer.

Summary

The agreement was unfair.

Insufficient account was taken of Mr Palmer's ready agreement to undergo the test at that particular time.

Inadequate consideration was given to exploring other possible reasons for the reading.

The fact that Mr Palmer had not displayed any performance or impairment problems was not taken into account.

No consideration was given to alternatives to dismissal.

Was the Dismissal Unjustified?

The dismissal was unjustified.

Remedies

The parties should meet and try to resolve the issue of remedies. They may wish to seek the assistance of a mediator. If they are unable to do, they should contact the Authority with a view to arranging a hearing on the matter.

Costs

Costs were reserved. I will leave the issue of dealing with costs until the parties have attempted to settle the matter of remedies. It may be that they also wish to discuss the matter of costs at the same time as remedies are discussed.

Dzintra King
Member
Employment Relations Authority