1998 CarswellBC 3161
British Columbia Supreme Court [In Chambers]

Birchall v. Canadian Helicopter Ltd. / Helicopteres Canadiens Limitee

1998 CarswellBC 3161, [1998] B.C.J. No. 3231, 91 A.C.W.S. (3d) 89

Stephen Birchall, Plaintiff and Canadian Helicopter Limited les Helicopteres Canadiens Limitee, Defendant

MacKenzie J.

Oral reasons: September 11, 1998
Docket: Vancouver C972922

Counsel: *R. Pelletier*, for Plaintiff.
K. O'Neill, for Defendant.

Subject: Employment; Public

Headnote

Employment law --- Termination and dismissal — Termination of employment by employer — What constituting just cause (grounds for dismissal) — Misconduct — Breach of employer's rules

Helicopter pilot had three to five drinks on night before scheduled flight — Pilot was summarily dismissed after 19 years' employment for single incident of breaching employer's substance abuse policy — Pilot was aware that policy provided for discipline "up to and including" dismissal — Pilot brought action for damages for wrongful dismissal and applied for summary judgment — While no evidence that pilot was alcoholic, his disobedience and inability to serve clients prejudiced employer to such degree as to warrant summary dismissal — Given paramount safety concerns, pilot breached fundamental term of employment contract — Application and action dismissed.

APPLICATION for summary judgment in action for damages for wrongful dismissal.

***MacKenzie J.*:**

1 *THE COURT*: For nineteen years, 53 years old Stephen Birchall was employed as a helicopter pilot by Canadian Helicopter Limited ("Canadian Helicopter") and its predecessors. On December 19, 1996, he was summarily dismissed after one incident of breaching the substance abuse policy adopted by the defendant and, I find, its own applicable manual. His blood/alcohol concentration had exceeded the allowable limit of 20 milligrams of alcohol in 100 millilitres of blood. His long record of employment was otherwise unblemished.

2 Mr. Birchall failed a breathalyzer test approximately half an hour before his scheduled flight.

3 Mr. Birchall now applies under Rule 18A for damages for wrongful dismissal.

4 The issues are:

(1) Did the defendant have just cause to dismiss Mr. Birchall, and

(2) if not, what is the reasonable notice period in the circumstances?

5 There is no dispute on the facts and the parties agree on the applicable principles of law. However, they disagree on the application of the relevant principles to the facts of this case.

6 The circumstances are that the defendant provides helicopter services to clients throughout the world. In Thailand, it provides services to clients through Thai Aviation Services Ltd.

7 Mr. Birchall was employed by the defendant as a helicopter pilot at the UNOCAL base at Songkhla, Thailand. The defendant is under contract to provide helicopter services to UNOCAL, a division of Union Oil of California. The defendant's pilots, one of whom is Mr. Birchall, fly UNOCAL employees to off-shore oil rigs. UNOCAL owns the Songkhla base used by the defendant. The defendant supplies helicopters, pilots and ground crew.

Policies on Intoxication

8 Employees are subject to two substance abuse policies. One is the defendant's own policy. The other is that of the contractee, UNOCAL. Both policies are relevant to these proceedings.

9 The Canadian Helicopter substance abuse policy forbids consumption of excessive alcohol within a 24-hour period before a flight. It has an absolute prohibition on consumption of alcohol eight hours before a flight.

10 When Mr. Birchall was dismissed, Canadian Helicopter pilots were contractually required to comply with the UNOCAL-Thailand Ltd. substance abuse policy dated June 20, 1994. Under it, UNOCAL had the right to order pilots who failed the UNOCAL blood/alcohol content, or "BAC", test to be removed from UNOCAL's projects. Any pilot who worked for the defendant and was removed from UNOCAL's projects could not continue to work for the defendant in Thailand.

11 The UNOCAL substance abuse policy emphasizes the importance of safety in the industry. The policy reads in part:

> Employees must comply with this policy as a condition of employment. Any violation of policy or refusal to consent to any test for any alcohol or drugs or medical evaluation are grounds for disciplinary action up to and including termination.

12 I pause to say the plaintiff takes issue with the phrase, "up to and including termination". It is this drastic measure which was the employer's response to the plaintiff's breach of the policy. I will address this issue later in this judgment.

13 Under the heading, "Disciplinary Action", the policy states that a positive test will subject an employee to disciplinary action up to and including termination, and that the testing could occur in pre-placement physicals at random intervals, and with cause.

14 The testing program is carried out competently by the company's medical department. Mr. Birchall was aware of the limit of blood/alcohol concentration as at November 24, 1995. It had been in effect over a year at the time he tested positive far beyond this permissible limit in December, 1996.

15 Around May 31, 1996, an engineer employed by the defendant tested positive and was impaired while working. He was suspended, however, and not terminated for exceeding the permitted blood/alcohol level of .02.

16 In around June 1996, as a result of the engineer's violation, the vice-president of safety of the defendant, Mr. Brian Small, instructed Mr. Clegg, the Canadian Helicopter's base manager at the UNOCAL Songkhla base, to meet all Songkhla base personnel to advise them of the seriousness of failing any substance abuse test. On July 3rd, Mr. Clegg held a meeting with all such staff. He advised them that any further failures of Unocal substance abuse tests would result in severe consequences. He stated that failed tests would lead to at least removal from UNOCAL operations and could result in full dismissal from the company. He advised the employees at this base that the defendant was in the midst of renegotiating a long-term contract with UNOCAL and any further infractions would be detrimental to the defendant's position in securing further contracts.

17 Because Mr. Birchall could not attend the July 3, 1996 employee meeting, Mr. Clegg had a personal meeting with him on August 28, 1996. Mr. Clegg specifically told Mr. Birchall about UNOCAL's substance abuse policy. He informed him that if he failed any substance abuse test, he would be subject to severe consequences up to and including discharge.

18 UNOCAL implemented a new policy in December, 1996 which, it seems was to take effect in early March, 1997. It had been planned for some time. Mr. Birchall relies on this test as reflecting some long-term planning. He says it supports his position that, in reality, UNOCAL did not take the position that a first-time breach of the substance abuse term in its policy would result in immediate dismissal rather than a warning.

19 The new policy, not in effect when Mr. Birchall breached the former policy, required 100 percent testing of all passengers on UNOCAL flights, additional staff, equipment and facilities at the Songkhla base.

Mr. Birchall's Conduct

20 Mr. Birchall deposed that his usual daily routine was to arrive at work around 5:00 a.m. to prepare for his first flight which was usually around 6:00 a.m. He finished work and was home around 12:30 to 1:00 p.m.

21 On December 4, 1996, he arrived home around 1:00 p.m. At 4:30 or 5:00 p.m., his wife poured him a rum and coke of about an ounce and a half with ice. Between 5:00 and 5:30 p.m. his friend, Walter Ramsay, arrived. Mr. Ramsay left Mr. Birchall's home at 8:00 or 8:30 p.m. and at that point, Mr. Birchall and his wife retired for the night. Mr. Birchall stated that he did not drink any more alcohol after Mr. Ramsay left.

22 He deposed that while Mr. Ramsay was his visitor, they each had two or three drinks of rum and coke containing approximately an ounce and a half of alcohol. Mr. Birchall poured the drinks except the first. He consumed three to four rums and cokes that evening between 4:30 and 8:30 p.m. Mr. Birchall weighed around 190 pounds and was approximately six feet tall.

23 The evidence of both Mr. Ramsay and Mrs. Birchall supports Mr. Birchall's evidence, except that I do observe that Mr. Ramsay put the amount Mr. Birchall had to drink at three to five drinks rather than three to four drinks. He also said they were approximately an ounce and a half each. I recognize that people rarely monitor in detail their number of drinks. I accept that probably, as Mr. Ramsay deposed, Mr. Birchall had closer to five one and a half ounce drinks during the period described.

24 Mr. Birchall arrived at work around 5:00 a.m. on December 5, 1996 to prepare for his first flight at 6:00 a.m. He was scheduled to pilot several employees of UNOCAL to an off-shore oil rig. There were three crew members scheduled to assist him.

25 Mr. Birchall knew that UNOCAL subjected the defendant's employees, with the defendant's acquiesence, to random drug and alcohol tests. This was part of the UNOCAL policy adopted by the defendant. UNOCAL employees conducted the tests. Mr. Birchall had been randomly tested several times before December 5, 1996. He had never before failed the test.

26 Mr. Birchall deposed that the only written company policy on drug and alcohol testing of which he was aware on December 5, 1996 was contained in the flight operations manual of Canadian Helicopters International. This is what I refer to as the defendant's own substance abuse policy. Section 2.7 of that manual provides:

> No excessive alcoholic drink is to be consumed by any member of the flight crew for a period of at least 24 hours, and no alcoholic drink for at least 8 hours, before undertaking flying duties or during such duties.

27 Mr. Birchall stated that the manual does not stipulate the consequences for breach of that section.

28 Mr. Birchall said he was "generally" aware, (which I take to mean "aware"), on December 5, 1996 of the UNOCAL policy which did not permit employees to have a reading of more than .02 or 20 percent. He was not aware, he said, of the UNOCAL policy where an employee exceeded a BAC of 20 milligrams per cent, nor was he aware of how the UNOCAL policy might affect him as he was not one of their employees. Mr. Birchall conceded he knew there would be a form of discipline. He did not know what form it would take. The UNOCAL policy does allow a range of disciplinary steps such as a letter of reprimand, suspension or counselling, although it does specifically include, "up to and including dismissal."

29 Mr. Birchall awoke at approximately 4:00 a.m. December 5, 1996. He was asked at 5:25 a.m. to submit to the breathalyzer test before flying. He did so. The technician told him his BAC was 55 milligrams percent, or a reading of .055, and that this exceeded the allowable limit of 20 milligrams percent or .02. Mr. Birchall deposed he was shocked by this information, and explained his drinking pattern of three to four drinks the evening before to the technician.

30 The blood/alcohol test was conducted by a UNOCAL medic whom I will call Mr. Boonchai. The testing took place in the hangar clinic at the air base. It was done using two testing machines. Both were Lyon alcometers, Model SD2, and they were calibrated four days prior to Mr. Birchall's test. Two other people were randomly tested the same day. Their readings were both zero percent.

31 I am satisfied that the defendant was entitled to rely on Mr. Birchall's BAC readings. No serious issue is taken with those readings.

32 Mr. Birchall's second test, it appears, was at 5:50 a.m. The result was 35 milligrams percent, or a blood/alcohol level of .035. He was cleared at 6:50 a.m. when both tests indicated then (they were conducted at the same time) a BAC test result of 5 milligrams percent. This was almost an hour after his scheduled flight time of 6:00 a.m.

33 Mr. Birchall completed his regular flying duties without incident that day. He finished work around 3:00 p.m. Mr. Clegg, the base manager, advised him then that he was temporarily suspended because his breathalyzer test exceeded the allowable limit.

The Dismissal

34 On December 6th, Mr. Small, vice-president of operations in Vancouver, told Mr. Birchall he was suspended without pay pending further investigation. Finally, on December 19th, Mr. Small told him he was being dismissed for cause. He said that although the company was not so obliged, he would receive severance pay of two days pay for each year with the company.

35 When he was dismissed, Mr. Birchall was receiving salary and per diem expenses of approximately $7,059 per month. On January 1, 1997, only about two weeks later, he started employment as a helicopter pilot with Cougar Helicopters in Koh Samui, Thailand. He conceded he was fortunate to obtain this position. However, he earns about 25 percent, or $1,725, less per month than with the defendant. He is still employed with Cougar Helicopters. He continues to earn $1,725 less per month than he did with the defendant company.

36 Before this single incident of December 5, 1996, Mr. Birchall had never failed any substance abuse test. In his nineteen years of employment, he had never been disciplined by the company.

The Parties' Positions

37 The defendant's position can be summarized as follows. The defendant does not take the position that Mr. Birchall is an alcoholic. There is no evidence before the court that he chronically abuses alcohol. The defendant argues, however, that the concentration of alcohol in Mr. Birchall's blood constituted just cause for dismissal because safety concerns made him unfit for his work as a helicopter pilot. It argues the prejudice to the defendant employer amounted to a fundamental breach of his employment contract.

38 The defendant says Mr. Birchall was given sufficient warning of the potential consequences for a breach of UNOCAL's policy on substance abuse which policy was adopted by the defendant. Mr. Birchall was, argues the defendant, specifically informed that a breach of this policy could have serious consequences of "up to and including dismissal." The defendant says, in any event, it was not required to give a warning considering the seriousness of the breach of the policy and the serious risks involved.

39 Counsel for Mr. Birchall argues that the defendant has failed to establish on a balance of probabilities, just cause for dismissal. He says it is necessary for the employer to consider the entire employment record to determine whether, in all the circumstances, dismissal was justified or whether it should have acted less drastically. Counsel says to justify summary dismissal

based on a single incident, the employer must satisfy the court that the plaintiff is guilty of serious misconduct which goes to the fundamental terms of his employment contract. Counsel argues that this isolated transgression of the company policy on alcohol consumption is an insufficient reason to summarily dismiss a long-term employee with an unblemished work record. He says usually such employees would be given a second chance.

The Law

40 Counsel for Mr. Birchall relies on the following in support of his position that the defendant has not proved just cause for dismissal: *Fleming v. Safety Kleen Canada Inc.* (1996), 20 C.C.E.L. (2d) 140 (Ont. Gen. Div.); *Ditchburn v. Landis & Gyr Powers Ltd.* (1995), 16 C.C.E.L. (2d) 1 (Ont. Gen. Div.); upheld on appeal (1997), 34 O.R. (3d) 578 (Ont. C.A.); *Doyle v. London Life Insurance Co.* (1985), 23 D.L.R. (4th) 443 (B.C. C.A.); *Wiebe v. Central Transport Refrigeration (Man.) Ltd.* (1994), 3 C.C.E.L. (2d) 1 (Man. C.A.), and excerpts from R.S. Echlin, *Just Cause, the Law of Summary Dismissal in Canada* (Aurora: Canada Law Book, 1998), as well as excerpts from D. Harris, *Wrongful Dismissal* (Toronto: Carswell, 1989).

41 I have referred to an excerpt from Harris. I note that the author observes at section 3.14 on intoxication that intoxication in itself is not sufficient grounds to dismiss. Management must also show resultant conduct prejudicial to its interests. He refers to several cases and then continues:

> Some consideration must also be given to mitigating factors and previous work record.

42 The decision in *Robinson v. Canadian Acceptance Corp.* (1973), 43 D.L.R. (3d) 301 (N.S. C.A.); affirmed (1974), 9 N.S.R. (2d) 226 (N.S. C.A.), is discussed. The author then states:

> The nature of an employee's job duties may be a relevant factor in this regard. The complainant in ***Niagara Air Bus Incorporated v. Arnold***, February 8, 1993, was a limousine driver employed by an airport shuttle hire service company. He was summarily dismissed after he appeared at the dispatch office in an argumentative mood and with alcohol on his breath. The adjudicator found the complainant was unjustly dismissed.

43 The comments of the adjudicator are set out. The author, Harris, goes on to discuss the decision in *Hayes v. Eastman Oil Well Survey Co.*, [1976] W.W.D. 104, as well as several other cases, to reach the conclusion that the more senior the level of employee, the "more just" the cause must be. He also echoes the judicial sentiment of sympathetic tolerance to such long and faithful servants as in *Robinson*.

44 The defendant bears the onus of proof on a balance of probabilities to establish just cause for the dismissal. The British Columbia Court of Appeal in dismissing the employer's appeal in *Doyle v. London Life Insurance Co., supra*, observed that the trial judge in *Doyle* had cited the passage of the judgment of Mr. Justice Schroeder in the *Port Arthur Ship Building* case as follows:

> If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.

45 The trial judge then quoted a passage from the reasons of Lord Evershed M.R. in *Laws v. "London Chronicle" (Indicator Newspapers) Ltd.*, [1959] 1 W.L.R. 698 (Eng. C.A.) at 700:

> The question must be - if summary dismissal is claimed to be justifiable - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.

46 The British Columbia Court of Appeal went on to state:

Whether the facts justify an employer in summarily dismissing an employee is ultimately a question of fact.

47 I agree with counsel for the defendant that the courts have generally insisted that the following two factors exist for alcohol consumption to constitute just cause for summary termination:

(1) It affected the employee's ability to perform the job functions; and

(2) It is prejudicial to the company.

48 H.A. Levitt, *The Law of Dismissal in Canada*, 2nd. ed. (Aurora: Canada Law Book, 1991), states under section 602.13 "Intoxication and Substance Abuse" that the above are the relevant factors the court must consider present to find that intoxication constitutes cause for a summary dismissal.

49 The author further observes that, at page 173:

If drinking could endanger the employee's safety or the public's safety, such as would be the case with a pilot, bus driver or rigger foreman, discharge would be justified on a less vigorous test than would otherwise be the case.

50 He continues:

If it is an employee of long service or there has been a record of excellent service, this will mitigate against any more recent alcoholism.

51 I have already observed there is no evidence that Mr. Birchall was an alcoholic.

52 The classic statement of the principles cited by Levitt is found in *Jupiter General Insurance Co. v. Shroff (Ardeshir Bomanji)*, [1937] 3 All E.R. 67 (India P.C.) at 74. The British Columbia Court of Appeal relied on Jupiter in *Atkinson v. Boyd, Phillips & Co.* (1979), 9 B.C.L.R. 255 (B.C. C.A.) at 273. It held that the plaintiff's disobedience and inability to serve his clients prejudiced the employer to such a degree as to warrant summary dismissal.

53 There are two cases from the Newfoundland Court of Appeal which support Mr. Levitt's proposition that drinking which could endanger the employee's safety or the public's safety is more deserving of dismissal. The first is *Anstey v. Canadian National Railway* (1980), 27 Nfld. & P.E.I.R. 95 (Nfld. C.A.). Mr. Justice Morgan affirmed that an employer had cause for dismissing the captain of a boat who had worked under the influence of alcohol. His Lordship stated at paragraph 2:

It is well settled a master can discharge his servant for cause. It is equally well settled that while there is no fixed rule defining the degree of misconduct which will justify dismissal, drunkenness during the performance of one's duty may constitute the cause for summary dismissal, particularly where attended by the possibility of serious consequences.

54 Counsel for Mr. Birchall distinguishes this case, saying the captain of the boat was noticeably drunk while working and moved the vessel in such a way as to endanger others. He says those factors are not present here.

55 In the second case, *Marystown Shipyard Ltd. v. Rose* (1985), 6 C.C.E.L. 220 (Nfld. C.A.), the plaintiff held the position of a rigger foreman in the employer's shipyard. He was dismissed for being under the influence of alcohol during working hours. The decision in *Anstey* was followed and the Court upheld the dismissal for cause. It noted that the plaintiff held a job of considerable responsibility to the company and the company had a policy that drinking on the job was an offence punishable by dismissal. Counsel for Mr. Birchall distinguishes this case, saying the plaintiff there was severely impaired while he was carrying out a supervisory role of considerable importance.

56 There are other cases in which the courts have found just cause for immediate termination where there was potential hazard in the occupation itself and potential prejudice suffered by the employer. These cases include *MacDonald v. Azar*, [1948] 1 D.L.R. 854 (N.S. S.C.). The Court upheld the dismissal of a manager of an automobile business who was dismissed for

intoxication. Here again, Mr. Birchall's counsel points out the distinguishing features that the manager had been away on a two-week drinking spree.

57 The defendant also relies on *Murphy v. Sealand Helicopters Ltd.* (1988), 72 Nfld. & P.E.I.R. 9 (Nfld. T.D.). It did not involve alcohol, but also involved a helicopter pilot. The case is significant although the circumstances of the breaches of the contract of employment were different. Mr. Justice Aylward said at paras. 92 and 93:

> The employer had the common law right to dismiss an employee without notice given the employee's serious misconduct.

He said what determines and constitutes serious misconduct depends on the facts in each particular case:

> It is impossible to outline a comprehensive definition of what constitutes serious misconduct. The determination as to what constitutes serious misconduct involves a review of the act and the circumstances upon which the employer relies to constitute serious misconduct. This involves an assessment of the duty and responsibility owed by the employee to the employer and in this case to others and the nature and consequences of a breach of that duty.

58 He continued:

> The captain had a duty to conduct the flight in a safe manner. To conduct the third approach at the altitude and in the circumstances that he did constitutes an obvious breach of that duty. The captain's conduct in this case was inconsistent with the proper discharge of his duty to conduct a safe flight from St. John's to the rig.

59 Mr. Justice Aylward found the potential consequences of flying under the influence were significant, as was the prejudice to the employer. He said at paragraph 95:

> In determining the seriousness of the misconduct, the court must consider the consequences of the wrongful act or omissions. The consequences to the travelling public, the passengers in this case, was extremely serious in that danger to life was involved. Also, the consequences for the defendant were severe. The property damage was substantial and the potential loss of business was very real.

60 The helicopter had crashed in that case due to the employee's misconduct.

61 Mr. Birchall's counsel argues that, unlike the situation in some of the cases cited, Mr. Birchall was cleared at 6:50 a.m. He was then below the permitted limit of alcohol concentration in his blood and successfully flew the helicopter. He was not in breach of the policies at the time he flew the helicopter. I observe, however, this was only through the good fortune of having been chosen for random testing. The results delayed his flight for almost an hour until his circumstances were safe.

62 Mr. Birchall's counsel argued his employer ought to have responded to his violation of their substance abuse policy with an intermediate disciplinary measure, such as a warning letter, suspension or counselling. This would, according to him, amount to a warning and a second chance. However, as S.R. Ball states in *Canadian Employment Law* (Aurora: Canada Law Book, 1998) at section 11:40:

> This does not mean that an employer must give a warning in all circumstances before there can be cause for summary dismissal. A warning is not normally required to dismiss for misconduct of a severe nature.

63 In *Murphy* , Mr. Justice Aylward dismissed the argument for a second chance and held that in the circumstances no warning was necessary. He said at paragraphs 96 and 97:

> In circumstances such as these where the employee's misconduct interferes with and prejudices the safe and proper conduct of the business of the employer, and has serious consequence, this constitutes serious misconduct and a single incident is sufficient to justify dismissal. The test to be applied will vary from case to case and depend upon the nature of the business and position held by the employee. The nature of the defendant's business demands a safe operation and that no chances

> be taken with respect to approaches in poor weather conditions. The position held by the plaintiff was pilot-in-command, and the consequences of his action was extremely serious. In this factual situation, I find a single incident sufficient.

64 I do recognize that in *Murphy* , the consequence of the pilot's misconduct was that the helicopter crashed. Fortunately, no one was injured. In the case before me, Mr. Birchall did not actually fly while his blood/alcohol concentration exceeded the permitted limit. However, as observed I earlier, it was only through the good fortune and chance of the random alcohol testing.

65 I find apposite the summary in *Just Cause, the Law of Summary Dismissal in Canada, supra*, at section 16:310. The authors state under the heading, "In summary":

> The following are factors relevant to a determination respecting whether an employee's breach of a workplace rule amounts to just cause for summary dismissal:
>
> (1) Whether the rule in question is reasonable and lawful;
>
> (2) Whether the rule is consistent with the employee's employment contract;
>
> (3) Whether the rule is applicable to the employee.

66 Counsel for Mr. Birchall agrees the answer to those first three questions is "yes."

67 The next factors are:

> (4) Whether the rule including the consequences for a breach thereof is known by the employee; and
>
> (5) Whether the rule is clear, unambiguous and consistently enforced by the employer.

68 Counsel for Mr. Birchall takes issue with the answer to these last two questions. He says it was not made clear to Mr. Birchall that the consequences for a breach of this policy would be immediate termination rather than an intermediate disciplinary measure. He also says the rule of automatic termination is not clear, unambiguous and consistently enforced. In particular, he points to the previous breach of the rule by an engineer on May 31, 1996, as evoking suspension rather than termination. I have already observed, however, that the position as engineer does not appear to have the degree of responsibility for the safety of the public as Mr. Birchall's. There is no evidence before me of the precise role and duties involved in an engineer position with the defendant company. Furthermore, it seems that his breach was what inspired the employer to make very clear to its employees, and in particular to the defendant in person on August 28, 1996, the importance of these particular provisions of its policy.

69 The final rule as summarized by the authors is:

> (6) Whether the employee's breach of the rule is sufficiently serious in the circumstances having regard to the employee's length of service, the employee's position, the nature of the rule and whether the employee has a reasonable excuse.

70 Here, plaintiff's counsel argues that Mr. Birchall's excuse really amounts to a lapse in judgment, that his length of service of nineteen unblemished years and the lack of clarity in the rule itself means that there was no just cause for dismissal.

Analysis

71 I find Mr. Birchall's blood/alcohol concentration, in breach of UNOCAL's substance abuse policy adopted by the defendant and the defendant's own policy in its manual, constituted just cause for dismissal of Mr. Birchall, given the paramount safety concerns respecting the occupation of a helicopter pilot and the prejudice to the employer. I find Mr. Birchall breached a fundamental term of his employment contract.

72 There is no question that the defendant had a drastic response to Mr. Birchall's single breach of the substance abuse policy when it immediately dismissed him. I am sympathetic to Mr. Birchall's position. He was a long time employee with an unblemished record. But he was well aware of the terms of both policies. He had been previously randomly tested. Also, Mr. Clegg had met individually with him in late August, 1996 and clearly explained the importance of the terms of the company's substance abuse policy. Despite this, Mr. Birchall voluntarily took the risk of drinking within 24 hours of his flight.

73 Viewed objectively, I find the consumption of three to five drinks containing around one and a half ounces of hard liquor each in the time period described by Mr. Birchall is "excessive consumption of alcohol within 24 hours of the flight". Thus, it was a breach of the company's own substance abuse term in its manual.

74 Mr. Birchall was aware, or ought to have been aware, of the risk he was taking. As an experienced pilot, he knew the dangers posed by alcohol and the impairment of judgment and faculties to a person in his occupation that follow upon the consumption of even limited amounts. He had a position of great responsibility. It involved the safety of innocent people. The public is acutely aware of and concerned about such risks. Publicity in the last decade of the risks of drinking and driving, for example, have contributed to general awareness of the risks posed by the consumption of alcohol.

75 The critical importance of the substance abuse terms of the UNOCAL policy as adopted by the company is unassailable. Failure to conform with the blood/alcohol limit creates life-threatening risk to passengers and other crew members. An accident caused by an impaired pilot could also be catastrophic to the employer's business and reputation. Furthermore, its UNOCAL contracts would be threatened, or there is at least a realistic probability that these contracts would be threatened. Consumption of alcohol affects the employee's ability to perform his job functions and is prejudicial. Mr. Birchall knew of the unequivocal conditions of his employment. There is no evidence before me of the company's response to previous violations of the substance abuse policy by pilots. There is only their response to an engineer's breach earlier in the year. It inspired the company to make its employees, including Mr. Birchall, acutely aware of the seriousness with which it viewed these terms of the policy.

Conclusion

76 Applying the principles in the authorities to which I have referred to the facts before me, I conclude that the defendant has met the onus of proof on a balance of probabilities that it had just cause to dismiss Mr. Birchall. I observe this is so even if there is an elevated or higher standard of proof, within the spectrum of proof on a balance of probabilities, where the issue is just cause for summary dismissal from employment.

77 I dismiss Mr. Birchall's application for damages for wrongful dismissal. The defendant shall have its costs on scale 3.

(SUBMISSIONS BY COUNSEL)

78 *THE COURT*: You are right. I will make that correction to make it clear that intoxication by alcohol was not a factor in *Murphy* . Thank you for drawing that to my attention and thank you for your able submissions.

Application and action dismissed.