

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 515
5326339

BETWEEN KERRY RUSLING
 Applicant

AND B R & S L PORTER LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: D Andrews, Counsel for Applicant
 M Beech and A Scott, Counsel for Respondent

Investigation Meeting: 5 July 2011 at Tauranga

Submissions Received: 19 July 2011 for the Respondent
 1 August 2011 for the Applicant

Determination: 6 December 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Rusling, says that he was unjustifiably dismissed on 11th June 2010; and that his employer failed to deal with him in good faith. Mr Rusling asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages and compensation. I record that while Mr Rusling raised some health and safety issues in his *Statement of Problem* and also gave some evidence pertaining to such, he has not pursued any particular claim relevant to his evidence. The respondent, B R & S L Porter Limited (the Company) says that Mr Rusling was not dismissed. Rather, he resigned or abandoned his employment following the failing of a drug test.

Background Facts and Evidence

[2] The Company is a specialist bulk liquid transportation operation based at Mt Maunganui. Its primary line of work involves the haulage of various liquid products throughout New Zealand. Mr Rusling had worked for the Company for various periods between late 1999 and 2010, with the most recent period of employment being from May 2008 until 11th June 2010. During the later period of employment, he was employed as a fleet tyre fitter, commencing in that role from 16th March 2009.

[3] The terms and conditions of Mr Rusling's employment were provided by an individual employment agreement. Two such agreements have been produced; one signed by Mr Rusling on 15th October 2008 and a second one, unsigned, but informing that the agreement was "made" on 16th March 2009. The content of both agreements appear to more or less identical. It seems to be established that the terms and conditions were mutually accepted and applied to Mr Rusling. Particularly relevant to the matters before the Authority is the content of clause 18 of the later agreement (clause 17 of the earlier agreement). It provides that:

- 18.1 The Company may require the Employee to undertake testing for the presence of drugs or alcohol, which would endanger the employee or other employees or the public. An agreed independent medical practitioner will complete the testing in private.
- 18.2 The reasons for such tests may be a random sample or for just cause where the Company suspects drug or alcohol has affected the employee and his ability to perform the duties of the position.
- 18.3 The consent of the employee is required before a test is carried out, however failure to provide consent will mean the Employee is in breach of this employment agreement and therefore liable for dismissal.

[4] Schedule Four of the employment agreement sets out a **CODE OF BEHAVIOUR** (the Code) for employees. It informs that:

The following Code of Behaviour is published for the guidance of ALL employees in setting and maintaining professional and ethical standards of behaviour at all times. The rules should be read carefully and observed on a daily basis. Failure by an employee to observe these guidelines may, where deemed appropriate, result in disciplinary action ranging from verbal or written warnings to instant dismissal from the Company.

And relevant to Mr Rusling's circumstances, the Code provides at clause 4:

Employees will remain free of drugs and alcohol and their effects while at work (other than those drugs personally prescribed by a doctor). However, if the doctor's prescription states 'Do not operate machinery or drive vehicles while taking these

drugs' the employee must consult with his doctor and inform the Company immediately.

And at clause 5:

Employees will promptly comply with any reasonable request by the Company to undertake medical assessment or a drug test,

[5] The evidence of Mr James Carroll, the General Manager of the Company, is that on 12th February 2010, all employees were advised by notices that were placed on notice boards at the Company's yards; and via a notice in pay packets, that random drug testing would commence in June 2010. The notice informs of the introduction of a *Workplace Safety Management Programme* and among other matters, informs that:

We will be initiating random drug testing for all employees and spot drug testing in the case of vehicle accidents/incidents. This will commence June 1 2010, and only after all staff have been fully informed on the proposed process.

[6] Via a notice to all staff dated 25th May 2010, the Company informed that:

A reminder to everyone that it is our intention to commence Drug screening of all new employees and random testing of current employees as from the start of next month. We will also be initiating Annual Health Checks on permanent staff. If anyone has any questions or concerns with this, please come and discuss with me. [Mr Carroll]

Mr Rusling's drug test

[7] The evidence of Mr Carroll is that in June 2010, he randomly selected 10 employees to undergo a random drug test. Mr Carroll explained the method he used to ensure that the selection of the employees was absolutely random. I accept that this is so and that Mr Rusling was not especially chosen. On Friday, 11th June 2010, Mr Carroll informed Mr Rusling that he had been selected for a random drug test that was to be carried out that day. Mr Carroll attests that Mr Rusling informed him that he would probably fail the drug test. Mr Rusling confirms that this is correct and that he told Mr Carroll that he had taken "a small amount" of cannabis on Wednesday night to help him sleep as he was in pain from a recent back injury and under stress related to the care of his daughter. Mr Carroll says that he was surprised by Mr Rusling's admission, as Mr Rusling had previously failed a drug test with another employer and when Mr Carroll spoke to Mr Rusling about this, Mr Rusling had informed him that it "was not an issue" as the reason for the earlier failure was that he had been exposed to cannabis at a party he had attended.

[8] Mr Rusling went ahead with the drug test. It was carried out by an independent occupational health nurse (the nurse). The outcome was that Mr Rusling returned a positive test for cannabis, as confirmed in the certificate provided by the health nurse. Mr Rusling was informed immediately by the nurse of the positive test. The evidence of Mr Rusling is that he was also advised by the nurse, that when the Company set up the drug testing regime, a procedure had been agreed to, whereby should an employee return a positive test, they would be obliged to participate in counselling for two or three weeks and then be re-tested. The employee would then be obliged to undertake random drug tests over the next 18 months. Mr Rusling says that he relied on this information and simply returned to work.

[9] Mr Carroll accepts that the nurse did advise Mr Rusling as he has said, but Mr Carroll's view is that the nurse was only advising Mr Rusling as to what "might" happen following a positive drug test. Mr Carroll says that the nurse's advice to Mr Rusling "is only one option" and that the Company has to take into account the "high risk" nature of the workplace. Mr Carroll says that the nurse was "certainly not" speaking on behalf of the Company. And he understands that the nurse also told Mr Rusling that termination of employment is another option that an employer could take.

[10] Subsequent to Mr Rusling returning to work, he was required to attend a meeting with Mr Carroll (at approximately 3:00-3:30p.m.). Also present was Mr Bruce Porter, a director and shareholder of the Company. The evidence of Mr Rusling is that he was told by Mr Porter that: "*You are correct, you failed your test. The upside is that you are now sacked.*" Mr Rusling says that he was then told to hand over his keys and leave the premises. The evidence of Mr Porter is that it was Mr Carroll that spoke to Mr Rusling; but he acknowledges that there were words used "*to that effect*" - as Mr Rusling has attested. Mr Carroll confirms that he informed Mr Rusling that he had failed the drug test. Mr Carroll says that:

"I went on to say something along the lines that based on our policy the upside is you don't have a job."

Mr Carroll says that what he meant by this was that: "*this was the worst case scenario of the situation.*" The further evidence of Mr Carroll is that he intended to "*talk through some options about what would happen next*" but Mr Rusling then responded by saying: "*something like - "so you're giving me the sack."*" Mr Carroll says that Mr Porter then told Mr Rusling that he knew what the consequences of failing the drug

test were. Mr Carroll states that he then began to advise Mr Rusling that the failed drug test “... *could result in instant dismissal from his employment. However, before I could go into any detail, [Mr Rusling] became upset and threw what I would call a tantrum.*” Mr Carroll says that Mr Rusling then “stormed out” of the office with the leaving comment being: “I will see you in court.” The evidence of Mr Porter is of a similar nature.

Was Mr Rusling dismissed or did he resign or abandon his employment?

[11] It is the evidence of Mr Carroll and Mr Porter that if Mr Rusling had not left Mr Carroll’s office in the manner that he did, then they would have had further discussion with him about what the possible options were following the failed drug test. But I do not accept that proposition. While there is some irregularity in the overall evidence, from all concerned, one aspect of the evidence is quite consistent. This is that Mr Rusling was almost immediately told that “the upside” was that he did not have a job as a result of the failed drug test. While one can only ponder what the possible downside for Mr Rusling could have been, I have little hesitation in finding that Mr Rusling was dismissed at the meeting on 11th June 2010, despite the attempts of Mr Carroll and Mr Porter to suggest otherwise. Mr Rusling clearly understood that he had been dismissed and I find that his understanding was well founded, given what was said to him.¹

Was the dismissal unjustifiable?

[12] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied to a dismissal. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would² have done in all the circumstances at the time the dismissal or action occurred.

¹ I have not found it necessary to take into account the evidence of Mr Bradford Thomas, but in any event, I did find his evidence to be reliable.

² Given that Mr Rusling was dismissed prior to 1st April 2011, the changes introduced by the Employment Relations Amendment Act 2010 are not applicable.

[13] But as was held by the Employment Court in *Air New Zealand v Hudson* [2006] ERNZ 425:

However, the s103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer's actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer's actions by that objective standard. It may mean that the Court [Authority] reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

[14] The meaning of s103A was again clarified by a full bench of the Employment Court in *Air New Zealand Ltd v V* [2009] ERNZ 185:

The meaning of the text of s103A is clear on its face and in the light of its common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.

Were the actions of the Company those of a fair and reasonable employer in all the circumstances?

[15] As established in *Air New Zealand v V* (above), in determining whether or not the actions of the Company were those of a fair and reasonable employer in the circumstances, the Authority is required to objectively review "all of the actions of the employer up to and including the decision to dismiss." The circumstances applying to Mr Rusling were:

- (a) The *Code of Behaviour*, which was a term of Mr Rusling's employment, states that he: "... will remain free of drugs and alcohol and their effects while at work."
- (b) A failure to observe the Code "... may, where deemed appropriate, result in disciplinary action ranging from verbal or written warnings to instant dismissal from the Company."
- (c) The positive drug test revealed that Mr Rusling was not free from drugs while at work as required by the Code; hence his conduct entitled his employer to take disciplinary action, up to the ultimate sanction of instant (summary) dismissal, providing a fair and reasonable process is adopted.

[16] Therefore, given the failed drug test, the Company was entitled to implement a disciplinary process regarding Mr Rusling; but it was incumbent upon the employer to

apply the well established principles set down by such cases as *Auckland City Council v Hennessy*³ where the Court of Appeal stated that:

A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness. It follows that a dismissal may be held to be unjustifiable where the circumstances are such that justice or fairness requires that the employee should have the opportunity which he has not been afforded, of stating his case. Whether such circumstances exist will depend on the facts of a particular case including such matters as the nature of the employment and the occurrence that gives rise to dismissal.

[17] In Mr Rusling's circumstances, the employer was entitled to implement a disciplinary process, following which dismissal may have been an appropriate sanction pursuant to the *Code of Behaviour*. However, a fair and just process required that the employer inform Mr Rusling of the fact that disciplinary action was contemplated and why, allow him an opportunity to obtain representation, and then give him a fair and reasonable opportunity to explain his circumstances. Only then, following a fair consideration of any explanation that Mr Rusling may have offered, was the employer entitled to implement a disciplinary sanction such as dismissal.⁴

[18] The actions of the Company were not those of a fair and reasonable employer in all the circumstances as it (in the form of Mr Carroll and Mr Porter), failed to observe any of the established principles that apply to a fair and just procedure when implementing the dismissal of Mr Rusling. The departure from a fair and reasonable process was not minor, rather it was substantial. I therefore find that the dismissal of Mr Rusling was unjustified and he has a personal grievance.

Remedies

[19] Having found that Mr Rusling was unjustifiably dismissed, pursuant to s.123(1) of the Employment Relations Act 2000 (the Act), the Authority may in settling the grievance, provide for one or more remedies, including, as sought by Mr Rusling, reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

³ (1982) ERNZ Sel Cas 4; [1982] ACJ 699 (CA)

⁴ *NZ etc Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35

Reimbursement of lost wages

[20] Mr Rusling seeks an award equivalent to the loss of wages for 3 months; the gross sum of \$17,106.25. But at the investigation meeting, Mr Rusling told the Authority that he and his partner made a decision “maybe three or four weeks” after the date of his dismissal (11th June 2010) that he would stay at home with his daughter, who was experiencing some health problems, rather than seek alternative employment, for the next 10 months.⁵ That is a commendable decision but the effect of it, in regard to Mr Rusling’s claim for reimbursement of wages, is that the maximum period for which any loss of wages can be calculated is four weeks. Therefore, subject to any reduction for contribution under s.124 of the Act, Mr Rusling is awarded the gross sum of \$5,263.46.

Compensation for humiliation, loss of dignity and injury to feelings

[21] Mr Rusling seeks an award of the sum of \$5,000. But there is nothing in his statement of evidence pertaining to the affect of the dismissal upon him. Nor did he give any evidence about such at the investigation meeting; hence there is no evidence before the Authority on which any award can be based. Therefore, I decline to make any order pursuant to s.123(1)(c)(i) of the Act.

Contribution

[22] The Authority must give consideration to s.124 of the Act which provides that:

Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that 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.

Given that Mr Rusling was in breach of the *Code of Behaviour* in that he was not free of drugs while at work, and he was working in an area that required his full attention without any possible impairment (the fitting of tyres for heavy duty trucks), I find that his actions substantially contributed towards the situation that gave rise to the personal grievance. This contribution warrants a substantial reduction in remedies accordingly; The reduction should be 80%.

⁵ Mr Rusling became entitled to a benefit paid by WINZ.

Determination

- [23] (a) For the reasons set out above, I find that the dismissal of Mr Rusling was unjustifiable and he has a personal grievance.
- (b) Pursuant to s.123(1)(b) of the Employment Relations Act 2000, B R & S L Porter Limited is ordered to pay to Mr Rusling the gross sum of \$1,052.70 (\$5,263.46 less 80%).
- (c) Any award pursuant to s.123(1)(c)(i) of the Act is declined for want of evidence.

Costs: Given the outcome of the investigation, I find that it is appropriate that costs should lie where they fall. It is so ordered.

K J Anderson
Member of the Employment Relations Authority