

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 95
3024076

BETWEEN	JASON TE KANI Applicant
AND	FOODSTUFFS NORTH ISLAND LIMITED Respondent

Member of Authority: Michael Loftus

Representatives: Gayaal Iddamalgoda, counsel for the Applicant
Andrew Caisley and Nia Statham, counsel for the Respondent

Investigation Meeting: 1 and 2 November 2018 at Palmerston North

Submissions Received: At the Investigation Meeting

Date of Determination: 28 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Jason Te Kani, claims he was unjustifiably dismissed by the respondent, Foodstuffs North Island Limited (Foodstuffs), on 21 July 2017.

[2] Foodstuffs accepts it dismissed Mr Te Kani. In doing so accepts it is required to justify its decision and believes it can do so.

Background

[3] Mr Te Kani was employed as a storeman at Foodstuffs distribution centre in Palmerston North.

[4] Incorporated into Mr Te Kani's terms and conditions of employment were various policies including one which addressed Drug and Alcohol use. The version current at the time of these events was dated 3 August 2015 and provided for post-incident drug testing. It also provided that *returning a positive drug... test* was a potential breach which might constitute serious misconduct and warrant disciplinary action up to and including dismissal.

[5] Mr Te Kani was aware of the Policy. He had received a briefing about it and signed a form confirming that on 14 December 2016 though he gave oral evidence that while he was aware of the policy and various details he did not remember the December 2016 briefing.

[6] On 17 July 2017 Mr Te Kani was involved in a collision between two forklifts. Both drivers were required to undergo a urine test that day and Mr Te Kani accepts that before taking the test he told his supervisor he was a recreational cannabis user and anticipated he would return a non-negative result. That is what then eventuated and the samples were sent for further testing.

[7] In the interim Mr Te Kani, along with a support person, met with Foodstuffs having been told suspension was being considered. He did not object.

[8] On 19 July Foodstuffs was advised Mr Te Kani's test result was positive. He had a reading for THC of 1060 nanograms/litre which was some 70 times the accepted limit of 15 nanograms/litre.

[9] On 19 July Foodstuffs wrote to Mr Te Kani inviting him:

... to a formal employment meeting to further investigate the allegation that you have breached our drug and alcohol policy after a laboratory analysis has confirmed a non-negative result for THC on a drug and alcohol test sample provided by yourself on the 17th July 2017.

[10] Mr Te Kani was provided with copies of the relevant policies and the test results along with other information. The meeting was scheduled for Friday 21 July 2017 and he attended with along with a union representative.

[11] Foodstuffs says Mr Te Kani acknowledged he had a drug problem and had been a heavy cannabis user for some time. He also advised he had sought counselling services for his addiction the preceding day.

[12] Mr Te Kani said he felt the appropriate outcome was a final written warning given his long and good work record. He also explained he had never attended work in a state of impairment attributable to the use of prohibited and/or controlled substances; that this was a first offence and he was now taking steps to address his illicit drug use.

[13] Foodstuffs representatives adjourned to consider the issues raised by Mr Te Kani but notwithstanding those points formed a preliminary view that dismissal was appropriate. The meeting resumed and this was conveyed to Mr Te Kani who responded by maintaining that a final warning was a more appropriate outcome.

[14] The meeting was again adjourned while Mr Te Kani's comments were considered but the final decision remained unaltered. Mr Te Kani was advised of that on resumption and the dismissal was confirmed in writing on 21 July.

Discussion

[15] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[16] As already said Mr Te Kani claims he was unjustifiably dismissed. Foodstuffs accepts it dismissed Mr Te Kani and therefore accepts it is required to justify its actions.

[17] Section 103A of the Act states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[18] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and a procedural perspective. Whilst it is clear issues of substance and process overlap and there is no such thing as a firm delineation, separation provides a useful means of analysis.

[19] The reason for the dismissal is stated to be that Mr Te Kani was guilty of *a serious breach of our drug and alcohol policy by returning a non-negative DNA confirmatory test result.*

[20] About this Foodstuffs says it has a Drug and Alcohol Policy which is aimed at managing the risk posed by drugs. It says that as with any risk it aims to minimize, if not remove, that risk and in order to do so has set as a requirement that its employees have less than 15 micrograms per litre of THC in their system while at work. It is then noted that is a near universally accepted standard and very common in New Zealand workplaces.

[21] Foodstuffs goes on to say *There is no doubt that the Applicant breached the Policy by having more than 70 times the limit in his system when he was tested.*

[22] Mr Te Kani does not dispute he produced a negative result. Nor does he dispute he expected such an outcome and said so.

[23] What he argues is that Foodstuff's policy allows for testing to determine *fitness for work* and focusses on having employees capable of performing their duties without impairment. Mr Te Kani says there is no evidence he was impaired.

[24] Mr Te Kani also takes issue with the fact the policy states post impairment testing is at a manager's discretion but the exercise of this discretion was unilaterally superseded by an instruction post-accident testing be an automatic response.

[25] To this Foodstuffs replies by referring to *Thorne v Kiwirail*.¹ *Thorne* was a case with a remarkably similar set of facts and the claim dismissal was unjustified was mounted on grounds similar to those raised by Mr Te Kani. About *Thorne* Foodstuffs says:

Kiwirail had a zero tolerance policy akin to the Respondent's. Like the Applicant, Mr Thorne was also a long-standing member of staff who was aware of the relevant policy. Like the Applicant, Mr Thorne was picked up in post incident testing. And, like in the current case Kiwirail was not concerned about the cause of the accident, but instead was taking action purely because of a breach of the drug and alcohol policy.

¹ *Thorne v Kiwirail* [2015] NZEmpC 48

[26] That submission carries weight. As already said it is accepted Mr Te Kani breached the policy despite an awareness of it in that he attended work with an amount of THC which exceeded that permitted under the policy. That, however, leads to consideration of the other arguments tended on Mr Te Kani's behalf –namely a lack of evidence of impairment and the alleged removal of the manager's discretion. In this respect the policy states that post accident a worker *may* be tested, not *will* be tested. It is argued this is therefore a breach of the policy which invalidates all that followed.

[27] On the issue of impairment I first note Mr Te Kani was not dismissed for being impaired but for breaching the policy. That he admits.

[28] There is then the evidence of Ms Nolan, a biochemist with an acknowledged degree of expertise in the area, that while there is some correlation between consumption and impairment it is inexact and can vary from person to person. Using her words, *there is no foolproof measure* but the evidence is 15 micrograms per litre is accepted in a number of jurisdictions as showing deliberate as opposed to accidental use at a level which creates a material health and safety risk.

[29] This evidence leads to two conclusions. The first is the level chosen is one that has justification and which Foodstuffs is entitled to apply. The second is that if, as the evidence confirms, it is a level that shows the possible existence of a material health and safety risk then it is, in current times where ensuring the health and safety of a company's employees is taking on an ever increasing importance, one that must be addressed. The requirement to reduce or preferably remove risk is now paramount and an employer is not only entitled, but required, to respond when faced with evidence of risk. To that end I find nothing unjustified in the company directing that a potential risk be investigated and in circumstances such as this that identification is performed via the testing regime. In any event I note the policy places the prerogative with the company and not a specific manager which negates the argument Mr Te Kani's manager was deprived of the ability to exercise a discretion as it was never expressly assigned to him in the first place.

[30] Turning now to process. In essence the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. A sufficient investigation requires,

as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[31] Foodstuffs is a large employer with significant resources but in any event I conclude there can be no doubt the statutory requirements have been met. Mr Te Kani was advised of Foodstuffs concerns and the parties met so that he could, with assistance, provide his views. The meeting then adjourned and the evidence shows the responsible manager, Mr Hunt, not only spent time considering Mr Te Kani's views but discussed them with another. The evidence also shows Mr Hunt was cognisant that Mr Te Kani was a *top worker* and as a result the decision to dismiss was not taken lightly.

[32] Even then the evidence shows that once Mr Hunt reached a preliminary view he returned, advised Mr Te Kani of the preliminary conclusion and gave further opportunity to comment. The evidence shows he then considered that input before concluding the issues raised were not sufficient to explain or justify the breach or to alter the preliminary decision to dismiss.

[33] There is little wrong with this process and Mr Te Kani does not seriously challenge it. What is argued is that contrary to the evidence about which I have already commented the matter was predetermined and Mr Te Kani's offer in respect to remaining and undergoing a rehabilitation program should have been accepted.

[34] With regard to predetermination it is argued that Foodstuffs *divests itself from any consideration of whether drugs and/or alcohol were actually connected to a workplace incident*. Here reference is made to Mr Hunt's statement that the disciplinary action had nothing to do with *why the accident happened, or who caused the accident*.² It is argued Mr Hunt therefore read the policy in a way that allowed him to excuse himself from all the normal enquires a reasonable employer should make about an accident and why it occurred and essentially change a discretionary test into a mandatory one.

[35] The important issue here is, once again, that Mr Te Kani was not dismissed for having an accident. He was dismissed for breaching the policy. That is admitted and the issue of discretion has already been discussed. As I have already commented the evidence shows Mr

² Paragraph 4.4 of Mr Hunt's brief of evidence

Hunt clearly listened to and considered Mr Te Kani's input. The evidence does not support a conclusion the outcome was predetermined.

[36] Similarly I note various references to a zero tolerance policy and the inference that this means that once Mr Te Kani failed the drug test dismissal was a forgone conclusion.

[37] While the policy itself refers to zero tolerance the evidence suggests that is not how it is applied. Before dismissing Mr Hunt accepts he was required to consider any mitigating circumstances which might see Mr Te Kani avoid dismissal. This raises Mr Te Kani's other argument – namely that he should have been given a final warning and assisted to remain via a rehabilitation program for which it was submitted he would have been *an excellent candidate*.

[38] The policy states *The Company may, at its discretion, assist with counselling and/or rehabilitation programmes ... This includes both those who have voluntarily sought assistance and those identified by the Company.*

[39] As already said Mr Te Kani argued strongly that this discretion should be exercised in his favour both during the meeting prior to dismissal and at the investigation.

[40] The evidence is also clear Mr Hunt considered the option but concluded it was not appropriate in the circumstances and that is reflected in the dismissal letter. In reaching this decision Mr Hunt considered two key points. The first is the policy states voluntary rehabilitation is no longer available once an employee has returned a positive test result. Here I also note that while Mr Te Kani told me he had acted to address his addiction some two weeks prior to the accident that statement is inconsistent with both his brief and the responses he gave during the disciplinary process where he said he had sought assistance after the accident. When pushed he accepted that was the case.

[41] Mr Hunt's second consideration was Mr Te Kani's admission he had been a long term user meant it was, in reality, a case of he hadn't been caught. As Mr Caisley said in submission:

In effect, the Applicant was saying to the company, now that I have been caught once, I will now start complying with the Policy. And, of course, if

the Company accepted that from the Applicant, it would have to apply the same rule to everyone.

[42] The evidence shows that was essentially the conclusion Mr Hunt reached having considered it and Mr Te Kani's admissions. He decided that was not good enough and he could have no confidence someone who had habitually broken the rules for some time could suddenly be considered to pose no future risk. That was, I find, a conclusion open to a fair and reasonable employer in the circumstances.

Conclusion

[43] For the reasons above I conclude the respondent, Foodstuffs North Island Limited, has discharged the onus it carries and established the decision to dismiss was one open to a fair and reasonable employer in the circumstances.

[44] Mr Te Kani's application therefore fails.

[45] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority