

Attention is drawn to the order prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 353
3131296

BETWEEN PEX
 Applicant

AND LYTTELTON PORT COMPANY
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Ashleigh Fechney, advocate for the Applicant
 Andrew Shaw and Alex Beal, counsel for the Respondent

Investigation Meeting: 11 and 12 May 2022

Submissions Received: 12 May 2022 from the Applicant
 12 May 2022 from the Respondent

Date of Determination: 1 August 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] PEX was employed by the Lyttelton Port Company Limited (LPC) as a General Hand.
- [2] PEX failed a random drug test on 16 October 2020 and was subsequently dismissed by LPC.
- [3] PEX says his dismissal was unjustified, that in dealing with him over the drug test LPC breached its Drug and Alcohol Policy and overall LPC breached the duty of good faith it owed to him.

[4] LPC denies any wrongdoing in respect of the random drug test and how it dealt with PEX over his test result.

The Authority's investigation

[5] PEX and LPC were unable to resolve PEX's complaints and he lodged a statement of problem in the Authority. PEX's claims, set out in the statement of problem, are based on unjustified dismissal, breach of the Drug and Alcohol Policy and breach of good faith.

[6] I investigated these claims by receiving written evidence and documents, holding an investigation meeting on 11 and 12 May 2022 and assessing the oral and written submissions of the parties' representatives.

[7] I received witness statements from PEX, Dr David Payne (Occupational, Environmental and Aviation Physician), Grant Moore (Toxicologist), Tony Simpson (Senior Manager at LPC), Timothy Carter (People Business Partner with LPC), Julie McHardy (People and Safety Coordinator at LPC), Robyn McMurdo (Drug Testing Technician at TDDA Canterbury) and Melanie Hendriks (Randoms Coordinator/Administrator/Testing Technician at TDDA Canterbury). In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Non-publication orders

[9] PEX seeks a non-publication order in relation to his identity on an interim basis. This is because of particular circumstances relating to PEX that have arisen since the Investigation Meeting, which mean that publication of his identity may have an adverse impact on him.

[10] LPC did not oppose the application.

[11] Given the nature of the circumstances relating to PEX there is potential for publication of his identity to have an adverse effect on him; this being sufficiently serious that I am satisfied that the principle of open justice is displaced in this case and it is appropriate that I prohibit from publication PEX's identity and any information that may identify him, on an interim basis.

[12] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 I prohibit from publication the name and identity of the applicant; the applicant will be referred to as PEX.

Issues

[13] PEX has three areas of concern that inform his claims:

(a) He says LPC's Drug and Alcohol Policy is flawed and does not provide the correct approach to assessing and minimising the risk of intoxication or impairment in the workplace, rather the policy is simply punitive for those who use cannabis, which is a legitimate and acceptable practice.

(b) He says LPC did not follow the correct process in terms of the Drug and Alcohol Policy as that relates to him being on rehabilitation for a prior failed drug test and his selection for random testing and LPC did not carry out a fair disciplinary process following the failed drug test.

(c) He says the failed drug test did not warrant dismissal in all of the circumstances.

[14] These areas of concerns are all relevant to the issues for each claim.

Unjustified dismissal

[15] The issues for the unjustified dismissal claim are:

(a) Was PEX dismissed; and

(b) If so, were LPC's actions in deciding to dismiss PEX, justifiable?

[16] In this case LPC did dismiss PEX so the focus is on justification. The onus rests with LPC to show that its actions in coming to the decision to dismiss PEX (the process) and the decision itself (the substantive basis), were justified in all of the circumstances.

[17] There are two parts for me to consider in terms of the process adopted by LPC:

- (a) Did LPC comply with its own Drug and Alcohol Policy?
- (b) Did LPC carry out a fair disciplinary process, a process that met the requirements of s 4(1A) and s 103A of the Act?

[18] In terms of the substantive justification for his dismissal PEX says his failed drug test did not warrant dismissal given the circumstances and in this regard the Drug and Alcohol Policy, which is relied on to justify dismissal, is not appropriate. So the issues are:

- (a) In the circumstances was the decision to dismiss PEX one that a fair and reasonable employer could have come to?¹
- (b) Could LPC rely on its Drug and Alcohol policy to conclude that PEX's failed drug test was serious misconduct which warranted dismissal?

Breach of the Drug and Alcohol Policy

[19] The issues in relation to LPC's alleged breach of the Drug and Alcohol Policy are:

- (a) At the time of PEX's positive drug test was he still on a rehabilitation plan and, if so, was this in compliance with the Drug and Alcohol Policy?
- (b) Was LPC obliged to test PEX as part of the rehabilitation plan and if so, did it meet this obligation?
- (c) Was PEX randomly selected for the drug and alcohol test, in accordance with the Drug and Alcohol Policy?

¹ Section 103A of the Employment Relations Act 2000.

Breach of good faith

[20] The duty of good faith is set out in s 4 of the Act and it requires the parties to an employment relationship to not do anything when dealing with each other that would mislead or deceive each other or would be likely to mislead or deceive each other. More specifically the parties must be active and constructive in maintaining the employment relationship and the parties must be responsive and communicative.

[21] So, the issue is whether LPC meet this obligation in dealing with PEX over his positive drug test.

What happened?

Background

[22] LPC operates Lyttelton Port, a major deep-water port which is the largest port in the South Island. The Port Services team at LPC works with and around heavy machinery in constantly mobile and congested areas; this is a high-risk environment where the risk of death or severe injury is very real. Health and safety is paramount and a safe work environment is created through protocols and safe methods of working, which must be strictly adhered to. Employees are expected to be physically and mentally fit for the environment and, as part of this, employees along with LPC must manage fatigue and ensure the workplace is drug and alcohol free.

[23] PEX was employed by LPC and began work as a Relief Pool Cargo Handler on 14 August 2017. PEX became a Port Services General Hand on 21 November 2018.

[24] PEX was a member of the Rail and Maritime Transport Union (RMTU) and his employment was covered by the RMTU Collective Agreements during his employment. In 2020 the applicable Collective Agreement was the LPC and RMTU CEA for 2020 – 2023.

[25] Under the health and safety provisions in that CEA LPC and PEX had an obligation to proactively contribute to a safe work environment which included a commitment to maintaining an alcohol and drug free workplace.

[26] In addition to the health and safety provisions in the CEA LPC also had a Drug and Alcohol Policy (which was updated in January 2020, but in all material aspects was the same policy applicable for 2019), which amongst other things provided for drug and alcohol testing and dealing with employees who fail drug and alcohol tests (the Policy).

PEX failed a first drug test

[27] On 5 September 2019 PEX was selected for a random drug test at LPC. He returned a non-negative test for cannabinoids and explained at that time that he had recently smoked cannabis.

[28] As a result, PEX was suspended from work pending a further evidential test being conducted on the sample he had provided.

[29] The subsequent evidential test on 10 September 2019 returned a reading for THC (a cannabinoid that is the main psychoactive component of cannabis) of 165 ug/L. With the cut off or acceptable level of THC being 15 ug/L, PEX's evidential test was a positive test result.

PEX is placed on rehabilitation

[30] The end result of PEX's positive drug test was that he was placed on a rehabilitation programme that included a period of 24 months post rehabilitation in which he would be tested again.

[31] PEX described this as being on a 24-month rehabilitation plan. He was not offered a 12-month plan, which he would have preferred and was an option under the Drug and Alcohol Policy at the time.

[32] The circumstances giving rise to PEX being placed on rehabilitation are that on 11 September 2019 Mr Simpson (Senior Manager at LPC) and Mr Carter (People Business Partner at LPC) visited PEX at home as he was suspended from work at the time.

[33] Both Mr Simpson and Mr Carter say they discussed rehabilitation with PEX in terms that he needed to undertake it as a consequence of the failed drug test and his options were to

undertake a rehabilitation programme that had a 12-month or a 24-month term, with them recommending the 24-month term.

[34] PEX then signed a form committing to undertaking the rehabilitation programme which was based on a 24-month term (the Form).

[35] I note here that the Form and the Policy do not actually provide for the rehabilitation programme to be conducted over 12 months or 24 months rather the employee must undertake the rehabilitation programme and then is subject to subsequent drug and alcohol tests for a period of either 12 months or 24 months after rehabilitation.

[36] The Form also recorded that PEX accepted that if he returned a subsequent positive test for drugs or alcohol, on any occasion, he could be dismissed without notice.

[37] PEX described the rehabilitation programme as mandatory and “a total overkill”. He says it had connotations that he was a habitual user who needed counselling to deal with a problem. He did not accept that LPC’s stated purpose of the rehabilitation programme, being to prevent drug consumption, was legitimate. He described this as being a “stretch for what an employer can do”; PEX’s view being that consuming cannabis in his own home so long as it does not affect his work is his choice and it was not something his employer could prevent him from doing.

[38] PEX’s view on rehabilitation contrasts with his acceptance of the outcome of rehabilitation. In a letter to LPC on 11 October 2019 PEX’s counsellor advised:

Whilst [PEX’s] reading was relatively moderate it took three weeks for him to get a clear/negative result. He was surprised at the length of this time factor, however, it also accorded with our calculations. [PEX] recorded himself as being wiser and committed to the non-use of cannabis. He values and enjoys his job and appreciates how fortunate he is to have [LPC’s] support. As the attending clinician it is my professional opinion that [PEX] has now completed his clinical rehabilitation and that he is armed with enough knowledge to make better informed decisions about any future drug use, particularly as evidenced by his experience with this once only use. PEX is aware that under the contract he signed he will be randomly tested and any positive result may result in his dismissal without notice.

[39] I asked PEX about the conclusions the counsellor had drawn from his participation in the rehabilitation programme. I asked him if, as a result of the rehabilitation programme:

- (a) He was committed to not using cannabis – he accepted this.
- (b) He was better placed to make decisions about drug use – he accepted that he was.
- (c) He understood that if he failed a drug test again he could be dismissed – he said he did understand that.

[40] The simple point is, as a result of the rehabilitation programme PEX knew a positive result could lead to dismissal and the only way to avoid this was abstinence – which he accepted as being appropriate and was committed to.

PEX fails a second drug test

[41] On 15 October 2020 PEX was selected for a random drug test. PEX was not on the random list, which is the primary list of employees selected randomly to be tested on that day. PEX was on the reserve list, which is a second list of employees selected randomly who can be called up for a drug test if any employees on the random list are not available. As some of the employees on the random list were not available on 15 October 2020 PEX was called up for a drug test.

[42] PEX's screening sample was tested and produced a not negative result, indicating the presence of THC.

[43] Mr Simpson and Mr Carter were notified of PEX's result. They discussed the next steps and then met with PEX and suspended him pending the outcome of the evidential test.

[44] The evidential test was completed in respect of PEX's sample and this returned a positive result of 60 ug/L of THC.

The disciplinary process

[45] On reviewing the positive result and after discussion with the People Team at LPC, Mr Simpson decided to commence a disciplinary process with PEX for the second positive drug test. He commenced this process with a letter dated 20 October 2020 sent to Mr Smith.

[46] The 20 October 2020 letter recorded that PEX had returned a positive test for THC with a reading of 60 ug/L, that he had undertaken a rehabilitation programme following a positive test for THC on 5 September 2019, and LPC was concerned about a second positive test being produced despite PEX completing rehabilitation. The letter advised that LPC was concerned that this was a serious breach of the Policy and invited PEX to attend a meeting to respond to LPC's concerns and provide an explanation in relation to the positive drug test. The letter concluded with a warning that an outcome of the disciplinary process might be termination of PEX's employment for serious misconduct.

[47] PEX attended a disciplinary meeting with his union representative, Mr Simpson and Mr Carter on 22 October 2022. This meeting was recorded and a transcript produced as evidence in the investigation meeting.

[48] In the disciplinary meeting PEX was given an opportunity to explain or comment on the positive drug test. He advised that he was not a heavy cannabis user and the positive result was from a one-off consumption of cannabis. This was backed up by the low reading for THC.

[49] PEX then explained that after work on 12 October 2022, which was the day before two rostered days off work, he consumed a small amount of edible cannabis. He had obtained the edible cannabis for his wife who was suffering from chronic back pain; she could not take prescription pain medication and the standard Ibuprofen and Panadol she had been taking was not giving her any pain relief. However, his wife was not sure about taking the edible cannabis once he had obtained it so he ate a small amount so she could see it would not have any adverse effects. He did not feel that he was impaired from consuming the cannabis.

[50] PEX then asked if the people he had been working with on 15 October 2020 had been interviewed to find out if he was actually impaired at work. Mr Carter responded advising him that LPC does not consider impairment as they could not tell if someone was impaired; LPC relied on the Policy which set the limit at 15 ug/L and anything above that is a breach of Policy.

[51] After the disciplinary meeting Mr Simpson considered what PEX had said, the Policy, the positive drug test from 15 October 2020, and that PEX had previously had a positive drug test and had completed rehabilitation. He reached a preliminary conclusion that the breach of the Policy – a positive drug test - was serious misconduct and the termination of PEX's

employment was appropriate. Mr Simpson set this out in a letter to PEX dated 27 October 2020. In this letter Mr Simpson advised PEX that this was a preliminary decision and he invited PEX to provide feedback on it.

[52] PEX responded to the preliminary decision through his advocate. In a letter dated 1 November 2020 Ms Fechny advised:

- (a) That the preliminary decision was that PEX had committed serious misconduct as he was under the influence of drugs while working in a hazardous environment. This decision was unfair and unreasonable in the circumstances.
- (b) LPC had not shown on the balance of probabilities that PEX was impaired whilst at work. And PEX's explanation – consuming a small quantity of edible cannabis over two days before returning to work – and the low THC reading indicated on the balance of probabilities that PEX was not impaired or intoxicated at work.
- (c) It was not fair nor reasonable to give weight to PEX's previous positive test result as that was more than 12 months prior and the reading was much higher: if anything, that showed PEX had modified his behaviour to regulate any cannabis use to ensure he was not intoxicated or impaired at work.
- (d) LPC does not have the right to dictate what PEX can or cannot do in his spare time.
- (e) PEX had met his obligations as an employee as he was not impaired or intoxicated whilst at work.
- (f) PEX's positive test was not in the circumstances serious misconduct or even misconduct. LPC's finding that it was serious misconduct would be unfair and unreasonable in the circumstances.

[53] LPC responded to Ms Fechny on 4 November 2020. It stated amongst other things:

- (a) PEX had a positive test for THC and he accepted, at the meeting on 22 October 2020, that he had cannabis in his system when he attended work on 15 October 2020. Whether PEX was impaired at the time of his test was immaterial as the drug test result showed PEX attended for work whilst under the influence of drugs, which is a breach of the Policy.
- (b) The issue of intoxication or impairment was not material to the situation as they were dealing with a drug test that showed that PEX was above the cut-off level for THC. Despite being a “relatively low” level (as Ms Fechny has labelled it) the positive result for THC was a breach of the Policy.
- (c) LPC did not accept that PEX had shown any level of responsibility to regulate his behaviour or meet his responsibilities to LPC; he had an obligation to attend work, which was a high hazard safety sensitive workplace, in a fit state and without being under the influence of drugs.

[54] LPC then followed that letter with its decision confirming the termination of Mr Smith’s employment in a letter dated 6 November 2020. In this letter LPC said:

LPC has a duty to keep all employees and other Port users safe in the workplace. By being under the influence of drugs while working in a hazardous environment, you put yourself and the people around you at risk of serious harm. Every employee has a responsibility to present themselves to a high hazard, safety sensitive workplace in a fit state, without being under the influence of drugs or alcohol.

After careful consideration, I have found that your breach of the LPC Drug and Alcohol Policy constitutes serious misconduct.

The purpose of this letter is to confirm my preliminary decision that was issued to you on 27 October 2020 for producing a positive drug test for THC while under a rehabilitation agreement. I am hereby advising you that I am terminating your employment at LPC, effective 5 November 2020.

[55] PEX’s employment with LPC came to an end on 5 November 2020.

Unjustifiable dismissal

[56] I will consider PEX's claim for unjustifiable dismissal in the two parts I identified in the issues section above: the process undertaken by LPC and the substantive justification for the dismissal.

Process

[57] In terms of process, there are two aspects; did LPC comply with the Policy and did LPC carry out a fair disciplinary process?

[58] Drug testing policies need to be interpreted and applied strictly, and a fair and reasonable employer must comply with its own policy with a failure to do so likely to render any disciplinary sanctions unjustified.²

[59] PEX says LPC did not follow the Policy because:

- (a) It imposed a 24-month plan on him for rehabilitation and had they not done this he would not have still been on rehabilitation when he returned the second positive test.
- (b) It did not carry out any additional testing on him during his rehabilitation period. And had they done this then they would have known that he was not a regular user of cannabis, as he told them.
- (c) His selection for a drug test on 15 October 2020 was not random.

PEX's rehabilitation programme

[60] PEX's concern in relation to being on rehabilitation for longer than he wanted or was necessary is misplaced. PEX was not on a rehabilitation programme for 24 months rather he had completed the rehabilitation programme and was subject to further testing (not random or for cause testing under the Policy) for a period of 24 months.

² *Parker v Silver Fern Farms Ltd (No 1)* [2009] ERNZ 301; and *Hayllar and Matene v The Goodtime Food Company Limited* [2012] NZEmpC 153.

[61] Having reviewed the evidence about how PEX came to accept the 24-month term for post rehabilitation testing I am satisfied that this was not imposed on him and he had a choice. LPC did not breach the Policy in this regard.

Post rehabilitation testing

[62] In the first 12-month period after completion of the rehabilitation programme Mr Smith was only subject to two additional drug and alcohol tests which he requested.

[63] However, a large part of this 12-month period spanned the COVID-19 national lockdowns. During these lockdowns LPC was concerned with minimising any risk of COVID-19 and as part of addressing this risk and complying with requirements around continuing work as an essential service during lockdowns it suspended all drug and alcohol testing. The union agreed to this.

[64] In my view this agreement changed the obligation that LPC had under the Policy to PEX for post rehabilitation testing – it was in effect a temporary amendment to the Policy – and there was no obligation to test PEX in the 12-month period and it follows therefore that there was no breach by LPC.

PEX's selection for a random drug and alcohol test

[65] I have reviewed the evidence from PEX, Ms McHardy, Ms McMurdo and Ms Hendriks and am satisfied that LPC followed the Policy correctly in making the selections for random drug and alcohol testing on 15 October 2020 which resulted in PEX being called up for testing.

[66] For completeness I record that the evidence also shows that the process for obtaining PEX's sample for testing, the onsite screening test, the chain of custody for PEX's sample and the arrangements for the subsequent evidential test were all adhered to in terms of the Policy requirements and there is nothing to suggest that PEX's sample and test results were in anyway compromised or questionable.

[67] I am satisfied that LPC complied with the Policy in respect of the selection and the random testing undertaken for PEX.

Did LPC carry out a fair disciplinary process

[68] A fair disciplinary process is governed by s 4(1A) and s 103A of the Act. Under these sections, in order to carry out a fair process when dismissing PEX LPC needed to:

- (a) Properly investigate the concerns it had regarding the positive drug test.
- (b) Clearly outline its concerns regarding this to PEX for him to respond to.
- (c) Give PEX a reasonable opportunity to respond to the information and the concerns before it made its decision to dismiss.
- (d) Consider any explanations given by PEX before it decided to dismiss him.

[69] Based on the evidence, particularly the written correspondence and the transcript of the disciplinary meeting I conclude that LPC did follow a fair process and PEX's dismissal was therefore justified on a procedural basis.

[70] I am satisfied that PEX was fully aware of LPC's concerns arising out of the positive test result and the possible outcome if the concerns were valid. Also, PEX had an appropriate opportunity to respond to the concerns with LPC considering the responses in coming to its decision to dismiss PEX.

Substantive justification

[71] PEX says dismissal was not a sanction that should have been imposed. He says in all of the circumstances a fair and reasonable employer could not have concluded that dismissal was appropriate. In particular PEX says:

- (a) He was not impaired whilst at work. On the issue of impairment the Policy does not address the risk of drug consumption and the possible effects at work i.e., impairment, and is therefore punitive only and not fair and reasonable.
- (b) The THC reading was low and was not serious misconduct. His positive drug test was from a one-off occurrence with mitigating circumstances including that he should not have still been on a drug rehabilitation programme at the time.

- (c) He was not a regular user of cannabis and not a risk in terms of future impairment at work.

Despite the positive test PEX was not impaired whilst he was at work

[72] PEX says that whilst there was THC in his system, he was not impaired when he attended work on 15 October 2020. He bases this on a self-assessment on the day, the low reading for THC in the evidential test and the fact that the cannabis consumed was a one-off incident and was only a small amount.

[73] The answer to this is, whilst PEX may have believed this and may even have been right, the fact is no one knows if he was impaired or not. The expert evidence of Dr Payne shows there is no safe and recognised test for impairment that employers such as LPC can use: self-assessment is subjective and unreliable – amongst other things the effects of cannabis would inhibit the ability to assess one's own impairment; third party assessment is not scientifically based on recognised parameters and a third party might easily miss symptoms or factors that evidence impairment; and swab testing is an inferior test and does not show impairment.

[74] As Dr Payne succinctly summarised the position, the only measurable result that can exclude impairment is a negative result from a urine sample. This is why the level is set at 15 ug/L – anything below is considered as no THC and anything above shows the presence of THC. So, unless PEX's test result was less than 15ug/L there is no basis to conclude he was not impaired.

[75] It is for this reason that disciplinary action for a positive drug test is not about intoxication or impairment – it is simply about having THC in your system whilst at work as this means the employer cannot exclude the possibility of the employee being impaired. And in a health and safety setting, particularly a high risk setting such as that at Lyttelton Port that risk is unacceptable. The risk is mitigated or removed by not having THC in your system and not meeting this standard is a health and safety risk and a breach of the Policy.

[76] In considering whether PEX was intoxicated or impaired at work and whether this was relevant LPC's position was clearly stated; it is not about impairment or intoxication it is simply

about having THC in your system. LPC did not dismiss PEX because he was impaired or intoxicated.

[77] In saying this I recognise there is one aspect of LPC's decision making and how it expressed its concerns and decision to PEX that had potential to confuse things. LPC referred to its concerns as being about the positive test and a breach of the Policy. LPC ruled out intoxication or impairment but when referencing PEX's positive test and PEX having THC in his system LPC used the term "under the influence of drugs".

[78] On first read it appears that LPC is saying it was concerned PEX was impaired but this is not the case. I believe, from all of the evidence on this point that Mr Simpson, who expressed LPC's view on this point, was only describing the presence of THC in PEX's system as him being under the influence but not as being impaired, i.e., because the presence of THC would have some influence but whether this was to the level of impairment or intoxication was not relevant.

[79] What was clear throughout the disciplinary process, including the decision making was that this was about PEX having THC in his system at work i.e., a positive drug test, and not about whether he was impaired or not.

[80] Ms Fechny has taken the lack of focus on impairment in drug testing further and has advanced an argument that the Policy is punitive towards cannabis users and this is not fair and reasonable.

[81] In support of this argument Ms Fechny says:

- (a) The Policy and LPC's approach to drug testing does not account for the possibility of cannabis (or other drugs) being consumed under prescription for medical reasons. She points out that PEX now has a prescription for medicinal cannabis. And she says if PEX had consumed cannabis under that prescription and returned a positive result any sanction based solely on that drug test would be discrimination and a breach of human rights.
- (b) LPC does not test for a range of other drugs that could mean an employee is impaired at work.

- (c) Overall LPC is failing to address the issue of impairment in the way it tests, which leads to perverse outcomes - an employee could be impaired by cannabis or some other drug but return a negative screening test and therefore not be disciplined yet an employee who consumed cannabis some time ago and was not impaired could return a positive test and be subject to a disciplinary sanction.
- (d) LPC is actually stigmatising legitimate cannabis use – under prescription or personal use outside of work – and punishing employees who do not pose a health and safety risk.

[82] I note two things here, in relation to the argument advanced around the use of medicinal cannabis:

- (a) There is no evidence that shows an employee who consumes medicinal cannabis is not impaired – just because it is legitimately prescribed does not mean the employee can consume it and assume they are not impaired. The risk remains the same for an employer and a positive test result arising out of consumption of medicinal cannabis is likely to be a breach of the relevant drug and alcohol policy with the prescription being a factor for the employer to consider. PEX’s positive test did not result from the use of prescription medication so this was not a relevant consideration for LPC. The fact that he now has a prescription for medicinal cannabis is of no consequence.
- (b) In this case the Policy deals with “Legal Medications” and “Drugs at Work”. An employee who takes prescription medication must check with their Doctor or Pharmacist about any side effects from the medication that could be a risk in their work and then notify their manager if there are side effects so that LPC can take a view on mitigating any risk, including getting an opinion from a Medical Review Officer. This must apply to medicinal cannabis so if properly applied it is likely that an unfair sanction in relation to consuming medicinal cannabis would not occur because specific arrangements would be in place for that employee.

[83] Ms Fechney's general argument based on impairment is compelling and has some merit. However, based on the expert evidence about testing for impairment, the evidence about the safety sensitive nature of LPC's work environment and the accepted national approach to drug testing levels I do not accept that testing based on only ascertaining the presence of THC is inappropriate or, as Ms Fechney submits, unfair or unreasonable.

[84] I do accept that the Policy and the approach to testing for THC may lead to some unusual results where an employee may be impaired at work but this is not detected or that an employee may be in breach the Policy by consuming prescription medication but this does not render the Policy unfair nor does it mean LPC cannot rely on it. Also it does not mean that LPC had to be satisfied that PEX was impaired before it found he was guilty of serious misconduct which warranted dismissal.

The low level of THC means the positive test was not serious misconduct and other mitigating circumstances mean dismissal was not appropriate

[85] Ms Fechney submits that PEX's low THC reading means this was not a serious breach of the Policy. Further, she says whilst it was a second breach the two breaches were 13 months apart and PEX had returned two negative screening test results in that time.

[86] I do not accept this submission.

[87] The positive test was a breach of the Policy and, in the circumstances, including the low reading and PEX's explanation for the consumption, LPC still concluded it was serious misconduct.

[88] Given the basis for testing and the tolerance that is set for positive tests as that relates to excluding impairment as part of the health and safety measures in a high-risk environment, I find that a fair and reasonable employer could have concluded, in all of the circumstances, that the positive test was serious misconduct and warranted dismissal.

[89] Ms Fechney also says PEX should not still have been on the rehabilitation programme and this is relevant – had he not been on the rehabilitation programme he would not have been dismissed.

[90] I have already dealt with the allegation that PEX was on an enforced rehabilitation programme of 24 months and that he should not have been on this at the time of his positive test. The point is he was not but rather he was in a period of 24 months post rehabilitation in which he was going to be tested for drugs and alcohol (in addition to any random or for cause testing). And it made no difference whether he was in this period of additional testing or not – he knew if he failed a second drug test at any time then dismissal could be possible.

[91] The other mitigating circumstances advanced by Ms Fechny are that PEX only consumed a small amount of edible cannabis at the start of his two-day break, he did this to support his wife and believed given the amount and timing of the consumption the cannabis would not impact on his ability to attend work. PEX said he believed the cannabis was out of his system when he attended work on 15 October 2020.

[92] I am satisfied that PEX explained this to LPC in the disciplinary process and that LPC considered these factors – Mr Simpson stated he did not dispute PEX’s explanation of the consumption of cannabis nor did he consider that PEX was a habitual user of cannabis. However, LPC concluded that the positive test result was a breach of the Policy and dismissal was appropriate.

[93] I conclude that based on all of the circumstances LPC’s decision that PEX’s positive test was serious misconduct and dismissal was the appropriate sanction, was one that a fair and reasonable employer could have come to.

PEX did not pose and ongoing risk in terms of cannabis use

[94] LPC’s decision to dismiss PEX was not based on him being an ongoing risk – whether he was or not is a moot point. That said, it might have been open to a fair and reasonable employer to conclude that as PEX had failed the only two random drug tests he had been selected for he was a high risk of repeating this.

[95] Mr Simpson’s evidence was that he accepted PEX’s explanation that this was a one-off occurrence and that he was not a habitual user. And from his perspective the breaches of the Policy were clear and PEX had admitted them.

[96] And, as I have already said, LPC's conclusion that in all of the circumstances Mr Smith's breach of the Policy was serious misconduct and dismissal was appropriate was a decision a fair and reasonable employer could have come to.

Conclusion on PEX's unjustifiable dismissal claim

[97] In conclusion, LPC's dismissal of PEX was justified.

Breach of Policy

[98] Based on my various findings on LPC's actions in connection with the Policy set out above, I conclude that LPC did not breach the Policy in connection with PEX's positive drug tests and the actions in took in response to those tests.

Breach of good faith

[99] LPC complied with the Policy, it carried out a justifiable disciplinary process, and its decision to dismiss PEX was substantively justified. So, I conclude LPC did not breach the duty of good faith.

[100] Overall, I am satisfied that LPC acted in compliance with s 4 of the Act; LPC was active and constructive and communicative and responsive in its dealings with PEX over both random drug and alcohol tests and the disciplinary sanctions imposed as a result of the two positive drug tests.

Summary

[101] LPC's dismissal of PEX was justified, LPC did not breach the Policy in connection with PEX's positive drug tests and the actions it took in response, and LPC did not breach the duty of good faith.

[102] PEX's claims are dismissed.

Costs

[103] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed,

LPC may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum PEX will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[104] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.³

Peter van Keulen
Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.