IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 11
CRC 48/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KEITH HOOPER Plaintiff
AND	COCA-COLA AMATIL (NZ) LTD Defendant

Hearing: 29, 30 November 2011 and 1 December 2011
(Heard at Christchurch)

Appearances: Tim Oldfield, counsel for the plaintiff
Mark Lawlor and Tania Fletcher, counsel for the defendant

Judgment: 2 February 2012

JUDGMENT OF JUDGE A D FORD

Introduction

[1] Mr Keith Hooper was employed by the defendant at its Woolston plant in Christchurch as a syrup maker. He was dismissed on 4 March 2010 after failing a urinary drugs test which returned a positive result for cannabis use. The test recorded a THC-Acid level of 300 nanograms per millilitre (ng/ml). The relevant cut-off level, as prescribed in the current Australia and New Zealand standards,[1] is 15ng/ml.

[2] There was no dispute as to the test results. Mr Hooper freely admitted to being a recreational cannabis user and having smoked marijuana every day outside of work for 20 years. A medical expert called as a witness on his behalf told the Court that Mr Hooper's cannabis use "is better described as chronic rather than

[1] (AS/NZS 4308:2001).

recreational". The same witness said that he would be very surprised if somebody smoking daily scored below 300 because, in his experience, most daily users would score somewhere between 1,000 and 3,000.

[3] The essence of the plaintiff's case is that, in all the circumstances, he was not treated fairly. As his counsel, Mr Oldfield, expressed it: "The defendant's dismissal process was grossly unfair, breached good faith and the dismissal was effected in breach of statute. These were not mere procedural peccadilloes; they strike right at the heart of the justification for dismissal."

[4] Counsel for the defendant, Mr Lawlor, accepted that the central issue in the case is whether the defendant's decision to dismiss was consistent with what a fair and reasonable employer would have done in the circumstances. He invited the Court to conclude that procedural failings on the part of the defendant were not sufficient to render the dismissal unjustified.

[5] In its determination,[2] the Employment Relations Authority (the Authority) rejected Mr Hooper's claim. In this proceeding, Mr Hooper has challenged the whole of that determination de novo.

Background

[6] Mr Hooper is 37 years of age. At the time of his dismissal he had been working for Coca-Cola for approximately 18 years having joined the company after leaving college. In evidence he told the Court about what he referred to as his "colourful days" in the 1990s when he consumed alcohol and smoked marijuana. He admitted to having developed a drinking problem and having received "a couple" of written warnings for turning up to work drunk. Although the date was not pinpointed, the plant manager at the time arranged for him to undergo a six to seven month alcohol awareness course conducted by the Salvation Army. The result was that he gave up alcohol and retained his job. He said that he continued to smoke marijuana but only on a recreational basis outside of work.

[7] Thereafter Mr Hooper's work record appears uneventful. In approximately 2005 he was promoted from production to the syrup room. As a syrup maker he

[2] CA 211/10, 18 November 2010.

enjoyed greater responsibilities having to make up syrup recipes for the 15 different products produced at the plant. In August 2006, Mr Hooper suffered an injury while at work in the syrup room. He was handling chemicals and there was a spill leading to burns to his leg. He was off work for three days. The cause of the accident was found to be partly Mr Hooper's fault and partly the result of unsafe conditions (a broken pump). There was no evidence of any other accident in the course of Mr Hooper's 18 years of employment with the company.

The drugs regime

[8] At all material times, Mr Hooper was a member of the Service and Food Workers Union and the terms and conditions of his employment were those contained in the relevant collective employment agreement made between that union, the Engineering, Printing and Manufacturing Union and the company (the collective agreement). Up until 2008 the collective agreement was silent in relation to drugs. In July 2007, the company introduced a formal Drug and Alcohol Policy which provided (inter alia) that employees should be drug free and alcohol free while at work. Employees were prohibited from working under the influence of an illegal drug or in an impaired condition.

[9] In the collective agreement dated 1 July 2008, the unions and the company agreed for the first time on a drug testing process. Significantly, the collective agreement did not allow for random drug testing. It provided for the employer to be able to drug test employees for cause. Because of its significance, I set out the relevant provisions of the collective agreement in full:

> **38 DRUG AND ALCOHOL SCREENING**
>
> ...
>
> 38.1 If it is believed that the employee has an addiction to, or dependence on, or problems with alcohol, drugs or another personal problem relating to an employee's job performance, where appropriate and whenever practicable, the Company will provide employees and their families with confidential, professional assessment, counselling and/or referral for assistance in an attempt to resolve the problem.
>
> 38.2 Consent to Undergo Drug and/or Alcohol Testing

Upon commencement of employment where the company has reasonable concern regarding the employee's fitness for work, the employee may be requested to consent to a drug and alcohol test.

If, at any other time there is a reasonable suspicion that an employee will not be fit to work due to being under the influence of drugs or alcohol, that employee may be requested to consent to a drug or alcohol test. If an employee unreasonably refuses consent they may be liable for disciplinary action.

38.3 Drugs and Alcohol

...

iii The use, consumption, possession, transportation, promotion, supply or sale of drugs (including marijuana) by employees while at work, or travelling in a company vehicle whether or not on company business is absolutely prohibited.

iv Similarly, in all of the above situations employees may not be under the influence of controlled drugs unless they are prescribed by a medical practitioner and are being taken in accordance with the prescribed dosage.

38.4 Disciplinary Action

If the steps taken in Clause 38.1 have failed, continuing evidence of the use of drugs and/or alcohol on the premises as defined under Section 38.3 may be treated as Serious Misconduct and may result in actions up to and including dismissal. Notwithstanding the foregoing, if an incident is considered by the employer to be serious, the employer may elect to ignore the option of following the provisions of Clause 38.1 and instead proceed with the disciplinary process.

38.5 Extenuating Circumstances

The employer will be given an opportunity to explain any extenuating circumstances such as the use of prescription or over-the-counter drugs.

[10] In September 2009, the company updated its Drug and Alcohol Policy to provide for a drug testing regime based on the relevant Australasian Standards. There is no evidence indicating that the unions opposed or took any issue with either the 2007 or 2009 policy documents. There were two particular parts of the 2009 policy which received close attention in the course of the hearing and again, for completeness, I set them out in full:

DRUGS

- Any of the following actions constitutes a breach of this Policy and may subject an employee to disciplinary action including immediate termination:

...

  + Working or reporting to work, conducting company business or being in the workplace while under the influence of an illegal drug, alcohol or in an impaired condition.

...

DRUG & ALCOHOL TESTING

Drug and Alcohol testing may be conducted as part of the investigation and disciplinary process in the following situations;

- After an incident or accident occurs where either the person's actions may have contributed or their behaviour/conduct was observed as potentially indicating drug and/or alcohol use and where no other reasonable explanation is provided.

- With reasonable cause...

  + If an employee's behaviour/conduct is symptomatic of impairment and where no other reasonable explanation is provided, or

  + Where there is reasonable belief that consumption is occurring during working hours.

...

[11] There was one other significant development around this time. In September 2009, the company introduced a "Whistleblower Protection Policy". The Policy Summary provided:

POLICY SUMMARY

- All employees/contractors have the right to report any suspected fraud, corrupt conduct, inappropriate behaviour or illegal activity involving the Company or its employees in any way.

- Any suspected fraud, corrupt conduct, inappropriate behaviour or illegal activity involving the Company should be reported to the CFO or appropriate officer identified in Appendix 1.

- Employees/contractors are given every assurance (as much as applicable to each individual scenario) that they have protection against name recognition and/or reprisal should they report such behaviour.

- In addition to our legal obligations, the Company extends its assurance of confidentiality in all other matters.

The drugs test

[12] Mr Hooper told the Court that the first inkling he had that he was in any sort of trouble came after the afternoon tea break on Monday, 22 February 2010. On that particular day he was working the overtime shift filling in for his boss, the team leader, who was away for the whole of the month. After the smoko break a team leader's meeting was held in the cafeteria. When the meeting concluded, the company's Christchurch manufacturing manager, Mr Peter Kelly, called Mr Hooper out to the front office where he met with Mr Kelly and Ms Natasha Dunbier, the company's human resources manager from Auckland. Ms Dunbier informed Mr Hooper that they had reasonable cause to believe that he was consuming drugs during working hours and he was, therefore, required to undergo a drug test and give a urine sample. Mr Hooper said that he was given no other information except that he was told someone at work had said that he was smoking marijuana. Ms Dunbier told him that if he did not carry out the test then disciplinary action would be taken.

[13] In a letter Mr Hooper subsequently received from Mr Kelly dated 8 March 2010 confirming his dismissal a different explanation was given as to why the company required him to undergo a drug test. The second paragraph of the letter stated:

> ... To summarise, as a result of reasonable concerns regarding your fitness for work and reasonable suspicion that you may not be fit for work due to being under the influence of drugs, you were required to consent to undertake a drug test. That test was conducted on 22nd February.
>
> ...

Further on in that same letter, Mr Kelly expanded on that explanation and I will need to return to this topic.

[14] I should record that there was no suggestion at any stage in the evidence that there were any problems or question marks about the way in which Mr Hooper was carrying out his duties on 22 February 2010. Nor for that matter, apart from the alcohol problem I have referred to and the 2006 accident, was there any suggestion

that Mr Hooper's work performance had been less than satisfactory at any other time during the course of his employment history with the company. His promotion in 2005 would tend to corroborate this observation. In other words, despite his admissions about out-of-work drug use, there was no credible evidence that at any stage the plaintiff was impaired, intoxicated or under the influence in the work place.

[15] There was evidence about information Mr Hooper had "volunteered" after he had been asked to undergo the drug test. Ms Dunbier said that initially Mr Hooper commented that he had consumed cannabis "a few years ago but not in years". She said that she had then provided him with a copy of the Drug and Alcohol Policy and at that point Mr Hooper advised that he "smoked pot every day outside work". Referring to this same discussion, Mr Hooper said:

> 9. I did tell them I used to smoke marijuana years ago but not now but I meant that I used to smoke it at work years ago, during the 90s during my colourful days. I did not tell them I smoked marijuana at work currently because I was not smoking marijuana at work. I admitted I was a recreational cannabis user. I told them I smoked marijuana every day outside of work and that I'd done so for 20 years instead of using alcohol. I knew I was going to be tested and knew I was going to test positive so I admitted that I smoked marijuana.

[16] As noted above, the test results proved positive for cannabis and Mr Hooper was immediately suspended from work and sent home. The test sample was subsequently independently analysed by the ESR (Environment Science and Research). The Court was told that the ESR reported a higher level of THC-Acid than 300ng/ml but because of the accuracy of the equipment used, any result over that figure is simply recorded as >300ng/ml as an accurate level cannot be attained once the level is in excess of that amount.

The disciplinary meeting

[17] On 2 March 2010, Mr Kelly wrote to Mr Hooper inviting him to attend a disciplinary meeting on 4 March 2010. The letter recorded that the company was concerned over the test results and about "the health and safety risks of an employee working under the influence of illegal drugs, both to himself and to others in the workplace." A copy of the report from the New Zealand Drug Detection Agency

dated 25 February 2010 was attached to Mr Kelly's letter. The report noted that the THC-Acid levels did not indicate "impairment". On that topic it stated:

> The level of THC-Acid was 300 nanograms per millilitre. Urine THC-Acid levels cannot be used to compare individuals or samples from the same person. In addition, THC-Acid levels do not indicate impairment or when and how much cannabis was used.

[18] Mr Hooper attended the disciplinary meeting on 4 March 2010 accompanied by two support people, Mr Ian Hodgetts, Christchurch organiser for the Service and Food Workers Union and the union site delegate, Mr Poli Palamo. Mr Palamo had disclosed to Mr Hodgetts prior to the meeting that Mr Hooper was a recreational user of cannabis. Mr Hodgetts told the Court:

> 6. Poli (Mr Palamo) called me a few days before 4 March 2010 to say that the company wanted a formal meeting with Keith and that they were flying someone down from Auckland to deal with the issue. I told Poli that Keith should front up, admit he was a recreational cannabis user and ask for help. My understanding of the company's policy was that they would offer rehabilitation and counselling to employees with any drug or alcohol issues.

[19] Mr Hodgetts said that the only information the company had provided prior to the disciplinary meeting was the test report showing that Mr Hooper had a positive result for cannabis. He said that he recalled Mr Kelly saying that the result was very high and was of considerable concern but Mr Hodgetts pointed out that the report stated that the THC-Acid levels did not indicate impairment or when and how much cannabis was used. In Mr Hodgetts' words, "I raised this with Peter Kelly and said that the test couldn't be used to show that Keith was impaired or intoxicated at work."

[20] Apart from Mr Hooper and his two support persons, Mr Hodgetts and Mr Palamo, the others present at the disciplinary meeting were Mr Kelly and Ms Margaret Louie, then a member of the company's human resources team in Auckland. Notes were taken at the meeting by Mr Hodgetts, Mr Kelly and Ms Louie and they were produced in the agreed bundle of documents. Ms Louie did not give evidence in the case, however, and I have taken that into account in weighing the probative value of what she recorded. In his evidence relating to the meeting, Mr Kelly said that Mr Hodgetts made a number of points on Mr Hooper's behalf.

He also asked why the company had carried out a random drug test and he queried whether it had missed out on a "few stages" in the collective agreement. Mr Kelly advised Mr Hodgetts that the testing had "been for cause, not random" but he agreed to take into consideration Mr Hooper's acknowledged drug problem when making a decision.

[21] There were at least two adjournments taken during the course of the disciplinary meeting. Mr Kelly said that at one of the adjournments he and Ms Louie discussed Mr Hooper's assertion that he had stopped smoking drugs during working hours. Mr Kelly said he was concerned because that statement appeared to be at odds with other information the company had in its possession. Mr Hodgetts then described in further evidence, which I accept, what happened when the meeting resumed:

> 12. It was at this point that Peter took an adjournment. When he returned he said that they had additional evidence of Keith smoking cannabis. He said that the company had engaged a private investigator. This was the first we had heard of that. It seemed to me that Peter was only raising this with us because we had challenged the drug test as proof of impairment. He told us that Keith had been seen smoking cannabis in a park during his break some months earlier by a private investigator. We were not given any other detail of this allegation, such as the date or time or what the investigator allegedly saw or smelled. I asked for a copy of the information Coca-Cola had received from the private investigator. Peter said that he had that information but that he couldn't share it with us because it contained confidential information and that it would be provided later. Coca-Cola did not provide me with the 29 July 2009 e-mail or 20 July file note (the information) until after the dismissal.
>
> 13. Keith's response was that he didn't recall a particular day when he was in the park. He admitted he went to the park occasionally with the person he was alleged to have been smoking cannabis with but said that if he had been smoking it would have been a cigarette.
>
> 14. I asked why all this wasn't put to Keith at the time. Peter Kelly said it was because they were gathering evidence and building a case against Keith. I said that not raising their concerns was contrary to their policy and that if they had a suspicion of drug use they should have raised it with the employee at the time.
>
> 15. I asked Peter why they had carried out a random drug test. Peter said it was not random but that a whistleblower had named Keith as a drug user. He wouldn't provide us with any details whatsoever, such as who the whistleblower was, when the whistleblower had made their allegations or what Keith was alleged to have done. They certainly did not show us the 8 February 2010 whistleblower report or convey

anything that was in that report to us at all. Peter just acted like he had watertight evidence against Keith, but he wouldn't share it with us for comment. It seemed as if he thought the drug test was conclusive proof of intoxication at work.

16. I asked why they didn't immediately approach Keith about the issue. They said it was because it only gave them suspicion and that they needed to investigate.

[22] The park in question, known as the Mary Duncan Park, is located a short distance from the Coca-Cola factory. Mr Hooper told the Court that it was opposite the French bakery where he purchased his lunch and he and his workmate, Mr Jared Ziegler, would go there during their half-hour lunch breaks. He said that at the disciplinary meeting he had explained that if he had been smoking, it would have been cigarettes because he is a smoker, smoking about 20 Dunhill cigarettes per day.

[23] At that point, Mr Kelly and Ms Louie took another adjournment to consider the matter and when they returned to the meeting room Mr Kelly advised Mr Hooper that he was dismissed with immediate effect for serious misconduct.

[24] Mr Kelly said that on 8 March 2010, he wrote to Mr Hooper, "to confirm the outcome of the meeting and the reasons for dismissal". The letter, (the "dismissal letter") was copied to Mr Hodgetts. As it was the subject of considerable attention during the course of the hearing, I set it out in full:

Dear Keith

CONFIRMATION OF DECISION FOLLOWING DISCIPLINARY MEETING

We refer to our meeting on 4th March 2010. We record that you had two representatives present at the meeting being Ian Hodgetts of SFWU and Poli Palamo, union delegate.

As you are aware, the purpose of this meeting was to discuss the allegation of serious misconduct and to receive your response. To summarise, as a result of reasonable concerns regarding your fitness for work and reasonable suspicion that you may not be fit for work due to being under the influence of drugs, you were required to consent to undertake a drug test. That test was conducted on 22nd February.

- The drug test results from the NZDDA, raised concerns regarding your ongoing employment with CCANZ which we discussed with you in our meeting along with other concerns we had surrounding drug use. In particular, our concerns relate to: your drug test results

which when analysed by the laboratory, confirmed the presence of greater than 300 nanograms per millilitre of cannabinoids;

- the fact the cut-off limit in the CCANZ Drug and Alcohol Policy for cannabinoids is 15, therefore a result of greater than 300 nanograms constitutes a significant breach of Drug and Alcohol Policy; and

- the health and safety risks of an employee working under the influence of illegal drugs, both to himself and to others in the workplace.

You questioned in our meeting what led us to drug test you. As discussed in the meeting the reason for the drug testing was due to reasonable concern and suspicion raised as a result of fellow employees expressing concerns to management late in 2009, and an investigation we conducted concurrently using a Private Investigator from Paragon New Zealand. As discussed with you, you were identified with another person in a car at a nearby park during a lunch break on a working day smoking, and on approaching the car, confirmed that the smell was marijuana. A file note of a verbal conversation of his findings and a copy of the invoice showing the dates he was assisting us is enclosed with this letter.

Notwithstanding the above (which raised the concerns that led to the testing), your drug test result confirmed that on the day you were tested at work, your level of cannabinoids was over 300 nanograms. The cut-off limits in the CCANZ Drug and Alcohol Policy is 15 nanograms, therefore you were in serious breach of the Drug and Alcohol Policy. As discussed during our meeting, these levels are set by an Australian and New Zealand Standards Board, and if you are above these cut-off levels you are deemed to be at risk according to the Health and Safety in Employment Act.

CCANZ takes Safety in the workplace very seriously including the responsibility of ensuring we fulfil our duty of care to all employees to provide a safe working environment.

During the course of the meeting, the meeting was adjourned several times to allow you to discuss the matter with your representatives. You provided a series of responses to the allegations raised. You denied smoking marijuana during working hours; however your test results show that you were under the influence of an illegal drug during work hours which is a serious breach of CCANZ's Drug and Alcohol Policy which amounts to Serious Misconduct.

This letter is to confirm the decision which we have reached (as communicated to you at the end of our meeting). Based on the evidence from our investigation, and having considered your explanation, our view is that the allegation of serious misconduct is proven and is sufficiently serious to warrant proceeding with the disciplinary process rather than pursuing options of professional assessment or counselling.

We believe that your actions have destroyed the trust and confidence that is inherent in the employment relationship and we no longer have the trust and confidence in you to diligently discharge the duties of your role.

In our view, your actions warrant summary dismissal, and that is the decision we have come to.

Yours sincerely

Peter Kelly
Manufacturing Manager – Christchurch

[25] The "file note" referred to at the end of the third paragraph of the dismissal letter was a handwritten file note by Mr Dean Kilpatrick of the Christchurch office of the law firm Duncan Cotterill (the defendant's solicitors) dated 20 July 2009. Mr Kilpatrick did not give evidence but his note was apparently a brief record of what he had been told by the private investigator (Mr Ross Carrie) following a visit to Mary Duncan Park that day. The significant part of the note stated: "But did walk past & can confirm smoking W/C/S can provide statement to that." Mr Oldfield speculated, and Mr Lawlor did not disagree, that "W/C/S" meant "with cannabis smoke".

[26] Mr Carrie gave evidence on behalf of the defendant. He denied that he had been able to confirm that cannabis was being smoked. He said that when he walked past the car he had been unable to smell anything. One of the points Mr Oldfield made strongly in his submissions was that, in attaching Mr Kilpatrick's note to the dismissal letter and in confirming in the body of the letter itself that the private investigator had identified marijuana smoke when he had not done so, Mr Kelly had been "totally misleading". In his evidence, Mr Kelly described the matter as "a mistake". In cross-examination, he confirmed that Mr Carrie had told him he had been unable to determine whether the item being smoked was cannabis or a plain cigarette.

[27] The other enclosures Mr Kelly attached to the dismissal letter were the invoices the company had received from Paragon, the private investigator company. The evidence was that Mr Carrie left Paragon in mid-September and another private investigator, Mr Neilson, then took over the surveillance work. The invoices recorded that the private investigators had apparently carried out "surveillance" work

at Mary Duncan Park on several different occasions between 17 July 2009 and 5 November 2009 but there was no evidence that Mr Hooper had been observed smoking cannabis on any of those occasions.

[28] Apart from the alleged evidence from the private investigator, Mr Kelly stated in the dismissal letter that the other matter which gave him reasonable cause to require the drug test was that fellow employees had expressed "concerns to management in late 2009". Mr Oldfield was also highly critical of this statement which he again submitted was "totally misleading". The reference apparently related to information that had been passed on to Mr Kelly by an employee (the whistleblower), whose name was not disclosed, on 1 July 2009. What the whistleblower told Mr Kelly was apparently something which the whistleblower in turn had been told by another colleague. In other words, the evidence was double hearsay. An email was produced dated 13 July 2009 which Mr Kelly sent to Ms Dunbier recording what he had been told by the whistleblower. According to the email, the whistleblower told Mr Kelly that his (the whistleblower's) work colleague had admitted visiting a park during a work break with Mr Ziegler and upon arrival at the park Mr Ziegler's wife had arrived and provided some marijuana. Mr Zeigler smoked some of the marijuana during the break. It was not reported if any of the other staff smoked marijuana. Mr Hooper's name was not mentioned in the email.

[29] In cross-examination and in his answers to questions from the Court, Mr Kelly freely admitted that, as at the end of July 2009, he did not have "reasonable cause" to conduct a drug test on Mr Hooper. The obvious question that arises is what then happened between the end of July 2009 and 22 February 2010 (when the testing was carried out) that gave the company reasonable cause to require Mr Hooper to undergo the drug test.

Additional evidence

[30] Following his dismissal on 4 March 2010, Mr Hooper filed his claim in the Authority. Although I am not privy to the conduct of the Authority's investigation, I am satisfied on the evidence before me that in its evidence in response to Mr Hooper's claim before the Authority, the company provided additional evidence

relating to its decision to drug test and dismiss Mr Hooper. The plaintiff and his legal advisers were completely unaware of that evidence until that point in time. There were four additional matters, not mentioned in the dismissal letter, which were the subject of evidence before this Court and I summarise the evidence in relation to each.

a) The visit to the park

(i) This incident was described by Ms Dunbier in her evidence in these terms:

> 21. In late December 2009, while in Christchurch, Peter (Kelly) and I decided to go to the park and see for ourselves what, if anything, was going on. We went to the park at lunchtime. Mr Hooper and Mr Ziegler were there, sitting in a car, smoking an item and passing it between them. We pulled up alongside their car. I could see that the item which they smoked was not a tailor-made cigarette. However, I could not see whether the item was a "roll your own" or a joint of cannabis. I was also not able to get close enough to detect any identifying smell coming from the car. When we pulled up to the car Peter introduced me to them. Initially the windows of the car were up. It was not raining at the time.

(ii) In cross-examination, Ms Dunbier confirmed that she spoke to them through the passenger window. In her own words: "The windows were up and so they rolled the window down and we spoke to them through the window." Ms Dunbier confirmed that she could not smell marijuana and the two men did not appear to be "intoxicated or impaired".

(iii) Mr Kelly gave similar evidence:

> 35. When we got to the park, we observed Messrs Hooper and Ziegler sitting in the car. They were smoking and passing an item between them. We pulled up alongside their car. We were hoping to get close enough to be able to smell what they were smoking. When we arrived, the windows of the car were closed. As the passenger window on their car was wound down, I said hello to the two of them and introduced Natasha. Unfortunately, we were not able to detect the smell of what was being smoked.

(iv) In cross-examination, Mr Kelly confirmed that he spoke to Mr Hooper and Mr Ziegler "through the passenger window" and he did not smell marijuana. He freely admitted that he was looking for "reasonable cause to test". He agreed that neither worker appeared to be "intoxicated or impaired or anything like that".

(v) Mr Hooper recalled the incident and he indicated that before the Authority, the company claimed that he was smoking marijuana on that occasion. He was not challenged on that statement. Mr Hooper told the Court that the incident had not been raised with him prior to his dismissal and, therefore, he had been given no opportunity to defend himself. He said that the windows to his car were down because it was a hot day and he and Mr Ziegler were smoking cigarettes at the time. He explained that when the car pulled up, Mr Kelly and Ms Dunbier "got out almost immediately and approached our car" and then Mr Kelly introduced Ms Dunbier to them through the passenger window.

(vi) One of the points Mr Carrie confirmed in his evidence was that marijuana smoke has a "very strong distinctive smell". I am satisfied on the evidence that had either employee been smoking marijuana in the vehicle then the smell would have been obvious to Ms Dunbier and Mr Kelly when they spoke to the men through the passenger window.

(vii) I also record that I did not accept the evidence that Ms Dunbier and Mr Kelly saw the occupants of the vehicle passing the "item" they were smoking between them. I did not find that aspect of their evidence convincing and it did not fit in with Mr Hooper's description of the incident, which I accept, when he indicated that after the other vehicle pulled up, Mr Kelly and Ms Dunbier got out "almost immediately" and approached his car.

(viii) Nor did it sit comfortably with Ms Dunbier's own statement in re-examination that the occupants stopped smoking when she and Mr Kelly approached. While on this point I should record that the private investigator said in evidence that when he was at Mary Duncan Park on 20 July 2009, both men in the car "shared the item and passed it between them". I did not accept that part of Mr Carrie's evidence. If that had been the case, then it was an important observation and I would have expected it to have been specifically recorded in his report made at the time but it was not. I did not find that particular part of his evidence convincing.

b) Crew and team meetings

(i) Mr Kelly gave evidence in relation to this matter. He was referring to the surveillance period between 17 July 2009 and 5 November 2009:

> 30. During a team meeting late in 2009, I recall looking at Mr Hooper's Team Leader (Mark Sterling) who had a look of panic on his face while Mr Hooper was talking. I cannot recall what Mr Hooper was talking about but I can recall my impression at the time, namely, that the Team Leader wanted Mr Hooper to stop talking. I did not discuss this incident or other behaviours I had noticed with Mr Sterling at the time because the investigation was ongoing and I wanted to keep it confidential as between myself and our Human Resources team.

(ii) In cross-examination, Mr Kelly admitted that he had never raised this matter before Mr Hooper's dismissal and he had never mentioned it at any stage as a reasonable cause for requiring the drug test. Commenting on the alleged incident in his evidence, Mr Hooper said, "Nobody, including Peter and my Team Leader, has ever said that my behaviour in team meetings was inappropriate. This was never raised with me before my dismissal."

c) The non-smoking area incident

(i) This is another matter which Mr Kelly talked about in his evidence but again this had never been raised with Mr Hooper prior to his dismissal:

> 32. The investigation also made me think back to an earlier event. In early 2009, I came into the factory on a Saturday (which is not my normal working day). I happened to see Mr Hooper by the boundary fence. He was smoking outside the Sugar Bay, which is a non-designated smoking area. He appeared to be smoking a "roll your own" cigarette. I understood that Mr Hooper smoked normal cigarettes as opposed to roll your own cigarettes. When I walked up to Keith, he appeared evasive. He put his hands down by his sides and tucked the cigarette behind his cupped hand.

(ii) In cross-examination, Mr Kelly confirmed that he walked up to Mr Hooper and he did not smell marijuana. Mr Oldfield put it to the witness that the reason Mr Hooper was being evasive was that he had been caught smoking a cigarette in a non-smoking area. Mr Kelly answered, "You'd have to ask Keith that."

(iii) Referring to the incident in his evidence in reply, Mr Hooper said:

> 4. I reply to paragraph 32 of Peter Kelly's evidence – I remember this. It was about 8am on a Saturday, I was having a tailored ciggie on the fence because I had a spare 5 minutes, when he came out he saw me

> smoking and told me it was a non-smoking area so I threw it through the fence. I didn't tuck it up behind my hand. Why would I tuck a lit cigarette behind my hand? This was never raised with me before my dismissal.

d) The whistleblower's statement

(i) Ms Dunbier told the Court that on 8 February 2010, she was in Christchurch and she arranged through Mr Kelly to interview the whistleblower about the information he had given to Mr Kelly back on 1 July 2009. She made notes of her conversation with the whistleblower and they were produced. As noted in [28] above, the information the whistleblower passed on was double hearsay and the Court never heard from either the whistleblower or his informant. In all events, according to Ms Dunbier's notes, the informant did not say that Mr Hooper had smoked marijuana on the day in question.

(ii) In cross-examination, Ms Dunbier said that when she interviewed the whistleblower she told him that she would keep his name confidential as much as possible but no specific reference was made to the contents of her notes of the interview. She admitted that her notes of the interview were not made available to Mr Hooper in any form prior to the dismissal.

(iii) In cross-examination Ms Dunbier accepted that the notes should have been made available to Mr Hooper as part of the disciplinary process. Mr Kelly conceded that, "there wasn't a lot of difference" between what the whistleblower had relayed to him back in July 2009 and what he (the whistleblower) had told Ms Dunbier in February 2010.

The law

[31] Counsel were in agreement that any consideration of the justification of the dismissal must be judged against the test of justification prescribed in s 103A of the Employment Relations Act 2000 (the Act), as that provision stood at the time of the dismissal, vis:

> **103A Test of justification**
>
> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 would have done in all the circumstances at the time the dismissal or action occurred.

[32] In the recent decision of *Angus v Ports of Auckland Ltd*[3] the full Court referred to the long established guidelines for determining whether an employer in any given circumstances has followed a fair and reasonable procedure. Those guidelines were explained by the Labour Court in *New Zealand (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*,[4] in these terms:

> ... Where there is no agreed procedure the law implies into the employment relationship a requirement to follow a procedure which is, in the circumstances, fair and reasonable. Again, a good and conscientious employer will follow such a procedure. What the procedure should be in any particular case is a question of fact and degree depending on the circumstances of the case, the kind and length of the employment, its history and the nature of the allegation of misconduct relied on including the gravity of the consequences which may flow from it, if established.
>
> The minimum requirements can be said to be:
> (1) notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;
> (2) an opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and
> (3) an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.
>
> Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not overindulgent person.

[33] In the present case, both counsel referred to the obligations of good faith under s 4 of the Act including the duty of being "responsive and communicative" under s 4(1A)(b) and to the employer's duty to provide information relevant to continuation of employment and to allow employees to comment on that information

---

[3] [2011] NZEmpC 160 at [47].
[4] (1990) ERNZ Sel Cas 582; [1990] 1 NZILR 35 at 594-5 and 46.

before making a decision (s 4(1A)(c)). Mr Oldfield also referred to the obligation under s 4(1)(b) of the Act not to do anything misleading or deceptive or likely to mislead or deceive.

Discussion

[34] Mr Oldfield stressed that the collective agreement and policy do not allow for random drug testing and, therefore, it was "critical" for the company to be able to establish reasonable cause for the test carried out on Mr Hooper. As counsel expressed it:

> It is a "reasonable cause" testing scheme. This means that before a test occurs, the defendant must have a reasonable cause to test. There must be some nexus between the reasonable cause and the test, as the test is seen as corroborative of the reasonable cause. The reasonable cause is critical to the decision to dismiss. Here, the test cannot be seen as corroborative of conduct that allegedly occurred some 7 months previously.

[35] I agree with that submission. While employers face an array of health and safety obligations and are to be commended for taking any initiatives through employment agreements or policy statements to meet such obligations, their managerial prerogatives in any given case may well be constrained by relevant statutory obligations or the provisions of relevant employment agreements. In such circumstances, the employer is required to observe the legal restraints. The collective agreement in the present case did not provide for random drug testing but only testing for cause. The company's managerial prerogative in relation to drug testing, in other words, was subject to that express requirement in the collective agreement. The test results cannot be relied on by the employer to retrospectively validate the testing process if that process was fundamentally flawed through the absence of a prior reasonable cause to test.

[36] As noted above, Mr Kelly freely acknowledged that he did not have reasonable cause as at the end of July 2009 to require Mr Hooper to undergo a drug test. Ms Dunbier made a similar concession in cross-examination. I have outlined at [30] above, under the heading "Additional evidence", other matters the company purportedly now relies upon to establish both reasonable cause for the drug test and serious misconduct. I find it difficult to accept, however, that a fair and reasonable

employer would regard those incidents as sufficient, either individually or collectively, to establish reasonable suspicion for requiring an employee to undergo a drug test or serious misconduct warranting dismissal. In this regard, the visit to the park, incident (a), disclosed no reliable evidence; Ms Dunbier was not even aware of incidents (b) and (c) prior to the dismissal and the fourth matter, (d), contained nothing that the company had not already been informed about seven months earlier. But the alleged incidents mentioned in para [30] are only one aspect of the matter. The s 103A test requires the Court to take into account all the circumstances at the time of the dismissal and to determine what a fair and reasonable employer would have done and how such an employer would have done it.

[37] The question arises, why was the test carried out on Mr Hooper on 22 February 2010? What is the significance of that date in the narrative of events I have described? The evidence was that in January 2010 two other company employees had come forward to raise concerns about employee drug use. They were referred to in the evidence as employees/whistleblowers "B" and "C" to distinguish them from the whistleblower who had come forward in July 2009 and who was referred to as whistleblower "A". On 8 February 2010, Ms Dunbier visited Christchurch to meet and interview whistleblowers B and C. She took statements from them which did not relate to or implicate Mr Hooper in any way. At the same time, she arranged through Mr Kelly to meet whistleblower A and obtain a statement from him confirming what he had told Mr Kelly on 1 July 2009.

[38] Armed with the statements she had obtained from whistleblowers B and C, Ms Dunbier proceeded to arrange for the staff members implicated in those statements to undergo drug tests. At the same time, she decided to include Mr Hooper in the drug test exercise even though whistleblowers B and C had made no reference to him. Ms Dunbier told the Court that her decision to drug test Mr Hooper was based on the information received from whistleblower A and Mr Carrie and her own observations when she visited the park with Mr Kelly in December 2009. Ms Dunbier admitted in cross-examination that Mr Kelly had never mentioned to her the incidents referred to in [30](b) and (c) above so they were not an issue with her.

[39] The difficulty with this whole scenario, however, is that the information provided by whistleblower A and Mr Carrie related to events that had occurred seven months earlier and both Ms Dunbier and Mr Kelly freely admitted that they did not consider at the time that the information they had received from whistleblower A and Mr Carrie was sufficient to require Mr Hooper to undergo a drug test. The only additional evidence Ms Dunbier was reliant upon was her visit to the park in December 2009 but if that incident had provided evidence implicating Mr Hooper then the accused should have been required to undergo a drug test at that stage. Instead, the visit to the park incident was not raised with Mr Hooper either when it happened or at any stage during the disciplinary process. If the employer had reasonable suspicions back in July 2009 then, consistently with its obligations of good faith, it should have required Mr Hooper to undergo a drug test at that stage rather than seven months later. By including him in the group of employees to be tested following the disclosures by whistleblowers B and C, which did not implicate Mr Hooper in any way, the company was effectively, as Mr Hodgetts suspected, carrying out a random drug test by stealth.

[40] Perhaps the most forceful submission made on behalf of the plaintiff was that, in breach of its good faith obligation under s 4(1A)(c) of the Act, the company had failed to share information with the plaintiff relevant to the decision to dismiss or to allow him to comment on that information before the decision to dismiss was made. Reliance in this regard was made on the recent decision of the full Court in *Vice-Chancellor of Massey University v Wrigley*,[5] and the statement at [55] that the opportunity under s 4(1A)(c) "must be real and not limited by the extent of the information made available by the employer." In counsel's words:

> 26. The defendant was required to act as a fair and reasonable employer. It is the polar opposite of "fair" to make a decision adverse to a long-serving employee without even allowing him to know what the allegations against him were or allowing him the opportunity to defend himself. These are long-standing and fundamental procedural obligations, and it is remarkable that even though a phalanx of lawyers, HR managers and private investigators were involved in the dismissal nobody thought to tell the plaintiff what he had allegedly done wrong or get his comment on that.

[5] [2011] NZEmpC 37, (2011) 9 NZELC 93, 782.

[41] I have already, in para [30] under the heading "Additional evidence", dealt with the company's failure to provide the plaintiff prior to his dismissal with any information whatsoever relating to the incidents described. The result of that failure was that the plaintiff was unable to respond or defend himself against matters which, unbeknown to him, were factors that apparently influenced the company in its decision to dismiss. In addition, the defendant failed to share any information whatsoever about the evidence of the whistleblower and the private investigator. I will deal with each in turn.

[42] In relation to the private investigator's evidence, Mr Lawlor, quite responsibly, accepted in his closing submissions that that information ought to have been provided to the plaintiff prior to the disciplinary meeting. Counsel submitted, however, that the failure "was effectively remedied by the information being put to Mr Hodgetts and Mr Hooper" at the disciplinary meeting. With respect, that is the type of ambush situation which the good faith provisions in the Act and the principles of natural justice are designed to avoid. The private investigator information should have been provided to Mr Hooper prior to the disciplinary meeting so that he and his advisers had a real opportunity, as opposed to a nominal one, to consider the evidence and his response.

[43] In relation to the evidence from whistleblower A, the situation is more complex. Ms Fletcher, counsel for the defendant, submitted that the disclosure by the whistleblower was made pursuant to the Protected Disclosures Act 2000 and the defendant was justified, therefore, in not providing information about the whistleblower to the plaintiff. Section 6 of the Protected Disclosures Act 2000 describes the type of disclosure to which the Act applies and subsection (1)(d) includes a requirement that, "the employee wishes the disclosure to be protected". There is no compelling evidence before the Court in this case to indicate that the whistleblower wished his disclosure to be protected. The only evidence on the issue of disclosure was from Mr Kelly who said that the whistleblower did not want his name disclosed. Mr Kelly did not make any statement to that effect, however, in his email of 13 July 2009 when he reported to Ms Dunbier on his conversation with the whistleblower. In her own evidence, Ms Dunbier did not say anything about the whistleblower wishing to have the contents of his statement protected. Nor is there

anything to that effect in her notes of her interview with the whistleblower on 8 February 2010. I do not accept, therefore, that the defendant was required under the Protected Disclosures Act 2000 to keep the whistleblower's information confidential.

[44] If the company considered that it had perhaps a moral obligation not to disclose the whistleblower's identity, his statement could have been redacted to protect his identity and a summary of its contents could have been provided to Mr Hooper prior to the disciplinary meeting. The company needed to balance the fact that the plaintiff was a long-serving employee with 18 years of service against the inherent unreliability of the information from the whistleblower (it being double hearsay). It seems to me that a fair and reasonable employer, in discharge of its statutory good faith obligations, would have made every effort to disclose the thrust of the whistleblower's statement to Mr Hooper prior to the disciplinary meeting so as to provide him with a real opportunity to consider the allegations and respond.

[45] Mr Oldfield was highly critical of the delay on the defendant's part in investigating the allegations that had first been raised by the whistleblower on 1 July 2009. He submitted that the duty of good faith required the defendant to be "responsive and communicative" and it should have raised the allegations against the plaintiff at the time they were made instead of waiting until February 2010. Counsel referred to the decision of this Court in *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson*,[6] where there had been a delay by the employer in raising the issues of concern and counsel noted that Chief Judge Goddard had held that the employer should have dealt with complaints about the employee as they arose rather than store them up to confront the employee with them later. He cited the following passage of the judgment:[7]

> To store them up and then to smite the employee with them, hip and thigh, in one giant instalment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined.

[46] A further submission made on behalf of the plaintiff in relation to the defendant's good faith obligations was that, contrary to s 4(1)(b) of the Act it,

---

[6] [1994] 1 ERNZ 920.
[7] At 928.

"misled or deceived the plaintiff or did something likely to mislead or deceive him" by presenting "totally misleading information" about what the private investigator had seen. In developing this submission, Mr Oldfield made the point that, at the disciplinary hearing, Mr Kelly had said that the private investigator had seen the plaintiff smoke marijuana in the park and that he had smelled marijuana whereas, in fact, that information was incorrect and was acknowledged by the private investigator in his evidence to be incorrect. Mr Oldfield submitted: "This was a very serious breach of good faith that renders the dismissal unjustified."

[47] Although couched in strong language, I accept counsel's submission. Mr Kelly claimed in evidence that it was a "mistake" but in the context of a disciplinary hearing resulting in dismissal, it was a serious mistake in that the information presented to Mr Hooper was both inaccurate and misleading. The "mistake" was repeated in the dismissal letter itself. It was that same inaccurate and misleading information which Mr Kelly had purported to rely upon to establish reasonable suspicion for carrying out the drug test after Mr Hodgetts had challenged the company's right to carry out, what he assumed to be, random testing.

[48] Not unsurprisingly, perhaps, counsel for the defendant had few answers to the plaintiff's forceful attack on the litany of procedural defects in the defendant's dismissal process. The defects which I have highlighted in this judgment are not minor matters that can be brushed to one side: they are issues of substance which, in Mr Oldfield's words, "strike right at the heart of the justification for dismissal". In terms of the s 103A test of justification, the defendant has failed to persuade me that on an objective basis, its actions and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. The plaintiff, therefore, succeeds in his challenge and I find that his dismissal was unjustified. In terms of s 183(2) of the Act, this judgment now stands in place of the Authority's determination.

Remedies

[49] Originally, the plaintiff sought reinstatement but he was able to obtain other employment and that remedy was not pursued. His claim is confined to lost wages

and compensation for non-economic loss. In his closing submissions, Mr Oldfield explained the claim for loss of earnings in these terms:

> 55. Under s 128 ERA, where the Court finds that an employee has lost wages as a result of a grievance, it must, whether it provides for any other remedy, award three months-ordinary time remuneration. The plaintiff found a new job at a lower rate of pay, so the figure of 3 months' ordinary time remuneration applies.
>
> 56. None of this evidence was challenged by the defendant in cross-examination.

[50] The relevant part of s 128 of the Act is s 128(2) which provides:

> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

[51] The evidence from the plaintiff relating to his loss of earnings was remarkably brief. In his written brief of evidence he simply stated:

> 28. I found temporary work after I was dismissed at Coverstaff. I earned $14.50 per hour, which was less than what I was earning at Coca-Cola.

There was earlier evidence that his hourly rate at Coca-Cola was $18.31 ("the skilled rate"). In answer to some supplementary questions from his counsel, Mr Hooper said that he was currently working at "Tegel" and he had started with that company in September 2010. He said that his wage for the last six months had been "$19.96".

[52] It is correct, as Mr Oldfield submitted, that none of this evidence was challenged by the defendant in cross-examination but it is for the plaintiff to establish his claim for loss of wages as a result of his personal grievance. Section 128(2) requires the Court to award the employee the lesser sum of his actual loss of earnings or three months' ordinary time remuneration. That is a different proposition from the submission Mr Oldfield advanced which appeared to be that once a loss is established then the Court is obliged to award three months' ordinary time remuneration. I am satisfied that Mr Hooper has established that he did suffer a loss of remuneration. A payslip was produced confirming his hourly rate with Coverstaff. I anticipate that counsel will be able to reach agreement as to the exact

amount of the loss for the purpose of determining the award under s 128(2) but, if necessary, leave is reserved to come back to the Court on the matter.

[53] The plaintiff has also claimed compensation under s 123(1)(c)(i) of the Act for non-economic loss. There was evidence about the hurt feelings and humiliation the plaintiff suffered as a result of his unjustified dismissal. The plaintiff was a long-serving employee and I accept the evidence that he was shocked at being told he was dismissed. On the other hand, there was no evidence of any long term medical or other consequences to the plaintiff of his dismissal. At the same time, the reality is that he was aware that if the company ever had genuine cause to require him to undergo a drug test then he was likely to fail the test because of what he referred to as his "recreational use" of cannabis outside of work. He admitted as much at the time the test was carried out. In other words, he knew that he was taking a risk and so the impact on him of the dismissal would not have been as serious as it might otherwise have been. Taking that factor into account, the amount I award for non-economic loss under s 123(1)(c)(i) of the Act is $4,000.

[54] On the issue of contribution pursuant to s 124 of the Act, Mr Lawlor invited the Court to assess the plaintiff's contribution as "very substantial" principally because of his decision, "to continue his cannabis use despite the implementation of the Policy, his failure to self refer, and the high positive test result". Mr Oldfield on the other hand submitted that, "The plaintiff did not contribute in any way to the grossly unfair way the defendant went about dismissing the plaintiff and the process it adopted to do that."

[55] I agree with Mr Oldfield. In assessing contribution, the Court must be satisfied that the employee contributed in a blameworthy fashion to the situation that gave rise to the personal grievance. Section 124 must be considered broadly and requires evaluation of the whole history of the dispute. In this case, I have already found at [36] that the defendant did not have reasonable suspicion to drug test the plaintiff. The drug test was therefore carried out in breach of the employment agreement. Without that breach, the positive test would not have occurred. In these circumstances, I am not prepared to find that the plaintiff's continued use of cannabis outside of work contributed to the situation leading to his grievance.

[56] The plaintiff is entitled to an award of costs. If agreement cannot be reached on this issue then Mr Oldfield is to file and serve submissions within 21 days and Mr Lawlor is to have a like period at which to respond.

A D Ford

Judge

Judgment signed at 1.00 pm on 2 February 2012