IN THE EMPLOYMENT COURT
AUCKLAND

AC 15/09
ARC 35/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AIR NEW ZEALAND LTD Plaintiff
AND	V Defendant

Hearing: 2 March 2009
(Heard at Auckland)

Court: Chief Judge G L Colgan
Judge B S Travis
Judge C M Shaw
Judge A A Couch

Appearances: CH Toogood QC and Kevin Thompson, Counsel for Plaintiff
Anne-Marie McInally and Gregory Lloyd, Counsel for Defendant
Peter Cranney, Counsel for New Zealand Council of Trade Unions as Intervener
Timothy Cleary, Counsel for Business New Zealand Inc as Intervener by leave

Judgment: 3 June 2009

JUDGMENT OF THE FULL COURT

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[1] This judgment principally concerns the interpretation and application of s103A of the Employment Relations Act 2000 which defines the test of justification for the purposes of personal grievances. In its determination, the Authority applied the construction of s103A which has been adopted by individual Judges of this Court in

a number of previous cases. The plaintiff says that construction was wrong and asks the Court to adopt a different interpretation.

[2] A full Court of all four Judges was convened to hear this case for two reasons. First, the plaintiff asks the Court to differ from the views expressed by individual Judges in previous decisions[1]. Second, the test of justification lies at the heart of the large majority of personal grievances. How that test should be interpreted and applied are therefore matters of general importance.

[3] For the same reasons, we heard submissions on the interpretation of s103A from the New Zealand Council of Trade Unions and Business New Zealand as interveners. As usual in such cases, we have found those principled submissions very helpful and, although not expressly referred to in this judgment, have taken them into account in reaching our decision on the first issue.

[4] The defendant was employed by the plaintiff. In September 2006, he failed a random drugs test conducted by his employer. The Employment Relations Authority found that the defendant was guilty of serious misconduct but that the plaintiff's refusal to provide him with a rehabilitation programme rendered his summary dismissal unjustifiable.

[5] In reaching this conclusion, the Authority applied the test in s103A to all aspects of the plaintiff's decision to dismiss. This approach was consistent with the previous decisions of the Court we have referred to. In its primary challenge, the plaintiff says that the Authority erred in this approach and invites the Court to conclude that, once a finding of serious misconduct has been made, whatever consequential action an employer decides to take is not open to scrutiny by the Authority or the Court.

[6] On this basis, the plaintiff says that, having found that the defendant had engaged in serious misconduct, the Authority was wrong to embark on a consideration of the plaintiff's decision to dismiss the defendant. As a consequence, the plaintiff says

[1]These decisions include *Air New Zealand Limited v* Hudson [2006] 1 ERNZ 415, *Fuiava v Air New Zealand Limited* [2006] 1 ERNZ 806, Simpson Farms v Aberhart [2006] 1 ERNZ 825 and *X v Auckland District Health Board* [2007] ERNX 66.

that it was not open to the Authority to reach the conclusion that the dismissal was unjustifiable.

[7] In our judgment which follows, we deal first with this primary ground of challenge based on the construction of s103A. This is entirely a question of law arising out of findings of fact which are uncontested. Recognising that this aspect of the plaintiff's case involves a challenge to the manner in which individual Judges of the Court have interpreted s103A in previous decisions, we have approached this issue from first principles.

[8] The plaintiff also pursued a second and alternative ground of challenge. This was that, even on the construction of s103A applied by the Authority, the defendant's dismissal was justifiable. In advancing this part of its case, the plaintiff submitted that the Authority erred in some of its findings of fact and in its reasoning. To evaluate this aspect of the plaintiff's case, therefore, it is necessary to consider in some detail the findings of fact made by the Authority and to examine the Authority's reasons for its conclusions. We do that in the second part of this judgment.

Order for non-publication of defendant's identity

[9] The Authority ordered that the defendant's identity was not to be published because of his mother's serious illness and the potential effects on her of publicity of the case. This application was renewed before us by the defendant and was not opposed by the plaintiff. Having considered the information provided to us, we made a permanent order under clause 12 of the Schedule 3 to the Act that there be no publication of the defendant's name or other information which might lead to his identification. As we have omitted all reference to the defendant's identity in this judgment, however, it may be published without restriction.

Part 1 The interpretation of s103A

Essential facts

[10] The essential facts which form the background to the plaintiff's primary argument are simple and few:

a) The defendant was employed by the plaintiff in its cargo handling operation. This was a safety sensitive role.

b) The plaintiff operated a policy which required employees, including the defendant, to be free from the effects of alcohol and other drugs at work. As part of this policy, employees in safety sensitive areas were subject to random alcohol and drug testing.

c) In September 2006, the plaintiff was subject to a random test which was positive for cannabis.

d) In all the circumstances, the defendant's conduct in being present at work while subject to the effects of cannabis was serious misconduct.

e) The plaintiff's drug and alcohol policy included the option of rehabilitation for employees found to have breached the requirement to be drug and alcohol free at work.

f) The plaintiff declined to offer the defendant rehabilitation and summarily dismissed him.

Plaintiff's case

[11] For the plaintiff, Mr Toogood submitted that the proper meaning of s103A is that, once it can be said that a fair and reasonable employer would have concluded that an employee had engaged in serious misconduct of a sort which would justify dismissal, the enquiry by the Authority or the Court must end. Enlarging on this

proposition, Mr Toogood submitted that once this point was reached, it was entirely a matter for the employer whether or not the employee was dismissed. By reviewing the employer's decision to dismiss in this case, the Authority improperly substituted its judgment for that of the employer.

[12] These submissions were based on two propositions. First, Mr Toogood submitted that consideration of documents generated prior to and during the legislative process showed that the purpose of s103A was to return the law relating to justification to what it was prior to the decision in *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29; [2000] 2 ERNZ 448.

[13] Mr Toogood then submitted that the relevant principles of law which applied prior to Oram's case and which ought to be regarded as part of the proper construction of s103A are to be found in the following passage from *BP Oil NZ Ltd v Northern Distribution Workers etc IUOW* [1992] 3 ERNZ 483 (CA):

> *The factors the Court identified were at best mitigating factors: in the sense that they were factors an employer might take into account in deciding whether despite the conduct being such as to justify summary dismissal, the worker should nonetheless not be dismissed. But for the Court to enter upon that territory was to usurp the responsibility and the prerogative of the employer. We cannot put the position better than Judge Castle did in* Read v Air NZ Ltd *[1991] 3 ERNZ 139, 146:*
>
> The breach of trust was serious and of such a nature as to warrant a fair and reasonable employer deciding that she should be dismissed. That being so, it is not for the Court to substitute its judgment as to what penalty should or should not actually have been imposed.
>
> *With respect, we think the rather remarkable outcome of this case resulted from the Court substituting its judgment for that of the employer in a matter of which the employer was in reality the best and in law the only judge.* (p487-488)

[14] In support of his submission that the decision in this case represented the proper interpretation of s103A, Mr Toogood relied on another passage in the

judgment in which the Court of Appeal discussed what would constitute conduct justifying summary dismissal and said:

> *In the end, the question is essentially whether the decision to dismiss is one which a reasonable and fair employer would have taken in the particular circumstances*. (p487)

[15] Mr Toogood submitted that the obvious similarity between the words used by the Court of Appeal in this sentence and the wording of s103A supported the proposition that s103A was intended to reflect the propositions of law enunciated by the Court of Appeal in that case.

[16] In his analysis of the *BP* Oil case, Mr Toogood initially submitted that what was required of an employer was a two step process. The first step was said to involve a fair enquiry into the circumstances of the case and a determination of the nature of the conduct, that is whether it seriously undermined or destroyed the necessary element of trust and confidence, thus justifying dismissal. The second step was said to be the decision whether dismissal should result, having regard to any mitigating factors. Mr Toogood submitted that, in applying the test set out in s103A, the Authority or the Court could properly review the first step but that the correct construction of s103A precluded any inquiry into the second step.

[17] Mr Toogood later resiled somewhat from this rigid two step approach. He identified the steps as two separate concepts but accepted that the line between the two is at times difficult to draw. In its final form, his submission was that matters which go to the seriousness or otherwise of the conduct will be subject to examination under s103A, but once the Authority or the Court has determined that there was serious misconduct, and that this was a decision that a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred, the Authority and the Court should have no further role.

Principles of statutory interpretation

[18] It is clear from this summary that the plaintiff's case regarding the interpretation of s103A relied on extrinsic materials generated before and during the

legislative process. This became apparent before the hearing when the parties filed synopses of argument and the plaintiff provided copies of these materials to the Court. We had reservations about the use of such materials in this case but the synopses of argument contained no submissions about the admissibility of these materials or the weight to be given to them. We therefore asked the parties to provide supplementary submissions on the use of extrinsic materials to ascertain the meaning of the statute. We are grateful for their having done so.

[19] The starting point for any exercise in statutory construction must be the Interpretation Act 1999. Section 5 of that Act provides:

> ***5 Ascertaining meaning of legislation***
> *(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
> *(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
> *(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

[20] Subsection (2) of s5 refers to the items listed in subs (3) as examples of the indications of meaning which may be found in a statute. In addition to those mentioned in subs (3), some statutes also contain object sections which must be regarded as key indicators of the purpose of the enactment or the part of it to which they relate. In this case, we have regard to the specific objects set out in s3 of the Employment Relations Act 2000 which relate to the Act as a whole and those in s101 which relate to Part 9 of the Act.

[21] It is significant that s5 of the Interpretation Act does not refer to extra-statutory materials. We recognise, however, the case law which makes it clear that the inquiry may not necessarily be confined to the pages of the statute.

[22] The latest and most authoritative statement of the New Zealand position is in the judgment of the Supreme Court in *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] 3 NZLR 767. At paragraph 22 of the Court's judgment, Tipping J said:

> *It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.*

[23] In a foot note to this paragraph, the Supreme Court expressly approved the general statement at page 4 of the decision of the decision in *Auckland City Council v Glucina* [1997] 2 NZLR 1 where, giving the judgment of the Court of Appeal, Blanchard J said:

> *It is only if the Court is left unclear about the legislative intent after reading the provision in question or if, notwithstanding its apparent clarity, a literal application would lead to a result seemingly in conflict with the policies of the Act, that the Court need go further.*

[24] Having regard to these authorities, the approach we take is that, where the text used in part of an statute is clear, unambiguous and does not conflict with the purpose of the enactment, the Court need not go outside the statute itself when interpreting that part of it.

The meaning of the text of s103A

[25] Section 103A provides:

> ***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.*

[26] This is a statutory codification of the test of justification which, until December 2004, had been defined only by the courts. It was enacted as a response to the decision of the Court of Appeal in *WH Newspapers v Oram* [2000] 2 ERNZ 448. As the words of the statutory test incorporate elements of the previous common law tests, their meaning is informed by those decisions.

[27] We later discuss the influence of those decisions on the deliberations of Parliament when enacting s103A but, apart from that, the decisions are helpful in assessing the plain meaning of the words of the section because the section echoes in some respects those earlier judgments.

[28] This exercise has previously been undertaken in detail by individual Judges of this Court in the decisions referred to in paragraph [8] and many others now followed by the Employment Relations Authority. We do not repeat that analysis but have revisited the origins of each element of s103A.

[29] First, the section requires the Court to determine the question of justification on an objective basis and in all the circumstances at the relevant time.

[30] This wording echoes that of Williamson J in *Wellington Road Transport Industrial Union of Workers v Fletcher Construction* [1983] ACJ 653 where, at page 666, he said:

> *In each case the Court considers all of the circumstances. In a list not meant to be exhaustive … the Court considers: the conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract (express, incorporated and implied); the terms of any other relevant agreements; and the circumstances of the dismissal. The Court also has regard to good industrial practice which includes some consideration of the social and moral attitudes of the community.*

[31] In later decisions of the Court of Appeal, such as *Airline Stewards and Hostesses of NZ IOUW v Air New Zealand* [1990] 3 NZLR 549 and *Telecom South v Post Office Union* [1992] 1 NZLR 275, this approach was reiterated. The obligation to justify a decision to dismiss or disadvantage an employee was on the employer who had to show that the decision was fair and reasonable in the circumstances prevailing at the time it was made.

[32] Next, the standard required of the employer by s103A is "*what a fair and reasonable employer would have done in all the circumstances*". The use of the word "*would*" had the effect of changing the following test formulated in *Oram* at paragraph [31]:

> *The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of 'could' rather than 'would', used in the formulation expressed in the second* BP Oil *case.*

[33] By reverting to the use of the word "*would*" s103A imposes on the Authority or Court an obligation to judge the actions of the employer against the objective standard of a fair and reasonable employer. It is not the standards that the Authority or the Court might apply had they been in the employer's position but rather what these bodies conclude a fair and reasonable employer in the circumstances of the actual employer would have decided and how those decisions would have been made.

[34] The last aspect of s103A, and the most important one in this particular case, is the use of the words "in all the circumstances at the time the dismissal or action occurred."

[35] In these words is the answer to Mr Toogood's submission that, once a finding of serious misconduct has been made, the Authority or Court can not review the employer's decision to dismiss.

[36] The requirement that the assessment of the employer's actions be conducted in light of the circumstances "at the time the dismissal or action occurred" necessarily includes the dismissal or disadvantageous action itself. This is consistent with the opening words of the section which focus the test of justification of the dismissal or action said to be unjustifiable. To adopt the plaintiff's submissions would be to exclude from the ambit of s103A the very thing to which the section must apply in a case such as this, that is the decision to dismiss. We conclude that the plain meaning of the words of s103A encompasses not just the employer's inquiry and decision about whether misconduct has occurred and its seriousness, but also an inquiry into the employer's ultimate decision in the light of that finding.

[37] The meaning of the text of s103A is clear on its face and in the light of its common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the

Court to objectively review all the actions of an employer up to and including the decision to dismiss. The same test applies to justification in disadvantage grievances. Those actions are to be assessed against the test of what a fair and reasonable employer would have done in all the circumstances.

[38] Applying the principles discussed earlier, we now consider whether that meaning is consistent with the purpose of s103A and with the purpose of the Employment Relations Act 2000 as a whole.

The purpose of the Act

[39] The immediate purpose of s103A is apparent from its heading "Test of justification". The plain meaning of the text provides a clear and workable test for justification in the context of personal grievances. That meaning is therefore consistent with the purpose suggested by its heading.

[40] Section 103A was inserted into the Employment Relations Act 2000 by the Employment Relations Amendment Act (No 2) 2004. That amendment included specific objects in s3 and specific purposes in s4 but the contents of neither section suggests any particular purpose for the enactment of s103A.

[41] Turning to the Employment Relations Act 2000 as a whole, there is a clear scheme to the legislation apparent from the objects expressly stated in s3 which is in Part 1, headed *"Key provisions"*.

[42] Two primary objects are set out in s3, the first of which, in s3(a), is:

> *to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship …*

[43] Section 3(a) goes on to provide that this object is to be achieved:

> *(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and*
>
> *(ii) by acknowledging and addressing the inherent inequality of power in employment relationships; …*

[44] The plain meaning of the text of s103A is undoubtedly consistent with addressing the imbalance of power in employment relationships. This is because it permits all aspects of an employer's conduct which adversely affect an employee to be subject to objective scrutiny and review if challenged.

[45] Section 4 addresses the requirements of parties to an employment relationship to deal with each other in good faith. Under subs (1A), an aspect of this duty of good faith is that:

> *[it] requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative …*

and, without limiting that provision:

> *… requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

[46] The circumstances in which the obligation of good faith is to be observed include employment investigations leading potentially to dismissal or disadvantage in employment: *X v Auckland District Health Board* [2007] 1 ERNZ 66, 93.

[47] Personal grievances are provided for in Part 9 of the Employment Relations Act. The objects of that part are set out in s101 and include:

> *… to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; …*

[48] These provisions reflect the Act's general emphasis upon open exchanges of relevant information and appropriate participation in decision making by offering opportunities to add to or contradict relevant information before decisions are made affecting employment relationships.

[49] The plain meaning of the text of s103A is consistent with these objects and the means by which they are said to be achieved. In particular, providing for objective scrutiny of all of an employer's actions which may adversely affect an employee must assist in motivating the employer to observe the obligation of good faith in all aspects of the employment relationship and to promote open communication.

[50] We conclude that giving the text of s103A its plain meaning is consistent with the purpose of the enactment.

Extrinsic materials

[51] During their submissions we invited counsel for the plaintiff and for Business New Zealand to identify any deficiency of meaning or ambiguity in s103A. They were unable to do so and we agree that there is none. In such circumstances, recourse to extrinsic legislative materials cannot be used to create a deficiency or an ambiguity which the same materials are then used to resolve.

[52] In light of our conclusion that the plain meaning of the text of s103A is sensible and consistent with the purpose of the Employment Relations Act 2000, there is no need to consider the various extrinsic materials relied on by the plaintiff.

[53] However, in deference to the carefully researched and presented submissions of counsel for the parties and for the interveners, we have done so and now briefly set out our conclusions.

[54] The Cabinet papers presented by the Minister of the Labour before the first draft Bill was introduced into the House indicate that the Minister considered that the judgment of the Court of Appeal in *Oram* failed to adequately balance issues of fairness to both the employer and the employee. The Minister referred with approval to the earlier formulation of the test of justification in *BP Oil NZ Limited v Northern etc Distribution Workers Industrial Union of Workers* [1992] 3 NZLR 580 (CA) and *Lang v Eagle Airways Ltd* [1998] 1 ERNZ 574 (CA). The Minister proposed codifying the test of justification to better promote the objects of the Act, in particular that of addressing the inherent inequality of power in employment

relationships. The Minister sought to do this by enacting a test which ensured that employers' actions and how they were carried out were to be just and reasonable to both parties in all the circumstances.

[55] The Bill introduced to the House contained a requirement for the employer to have considered and balanced the legitimate interests of the employee and of the employer: clause 37(2).

[56] The Select Committee's report to the House recommended changes to what was then clause 37 of the Bill, later to become s103A. The Committee's report stated that the changes recommended were intended to achieve the same results as had been intended for sub clause (2) although it proposed omitting the words *"by considering and balancing the legitimate interests of the employee and the employer"*. The Select Committee's report recommended that the employer's subjective view which had been promoted in cases such as *Oram* and *BP Oil* be replaced by a review which balanced the interests of the employer and the employee.

[57] In summary:

- The Minister's objective was to address the inherent inequality of power in employment relationships by introducing a more balanced approach to the determination of justification for dismissals and disadvantages in employment.

- The Bill was intended to address what were described as *"perceptions"* of the legal position established by the Court of Appeal in *Oram* under the Employment Contracts Act 1991 but which appeared to also have been applied in similar decisions made under the Employment Relations Act 2000.

- *Oram* was not considered to be a new formulation of the test which the Minister considered had been applied at least as from the first *BP Oil case* in 1989 and reiterated by the Court of Appeal in *Lang*.

- The Minister considered that the test stated by the Court of Appeal in *Oram* failed to give express weight to the employee's perspective and so did not balance adequately issues of fairness to both parties.

- The codification of the test in what became s103A was intended to better promote the Act's objectives of addressing the inherent inequality of power in employment relationships and, in particular, to require an employer to consider and balance fairness to both parties and to judge both the employer's action and how it was done by a standard of justness and reasonableness to both parties in all the circumstances.

- The Select Committee's recommendation that clause 37(2) be deleted was not intended to signal a departure from considering and balancing the parties' respective employment relationship interests.

[58] The Select Committee expressed its objective to be to *"overturn the Oram decision"* and to return to case law established in the Court of Appeal before that judgment, being what was said to be a more balanced approach.

[59] In their totality, the extrinsic statutory materials to which we were referred do not support the plaintiff's interpretation on which it relied so significantly. To the contrary, they suggest more strongly the correctness of the defendant's interpretation based on the plain meaning of the words used in the context of the Act.

[60] So, although there are references to an intention to return the law to its state pre-*Oram*, the materials do not make clear what that was considered to be, and continue to emphasise principles consistent with what we consider to be the plain and obvious meaning of s103A. Insofar as a legislative intention can be drawn from those materials, it is not to promote the two step approach discussed in the second *BP Oil* case and in *Oram* but, rather, to subject all of the employer's relevant actions to objective assessment against the standard of what a fair and reasonable employer would have done in all the circumstances. That is consistent with the Court of Appeal decisions after the second *BP Oil* case and before *Oram.* These included

Aoraki Corporation Ltd v McGavin [1998] 1 ERNZ 601 where, in delivering the judgment of the majority, Richardson P stated at page 618:

> *Justifiability is directed at considerations of moral justice. It is not tied to common law rights. Conduct is unjustifiable if it is not capable of being shown to be just in all the circumstances. It is a matter of considering and balancing the interests of employee and employer. It is whether what is done and how it was done is just to both parties in all the circumstances.*

[61] In *Lang*, at page 582 the Court of Appeal said:

> [62] *We agree with the Employment Court Judge that the other test to be applied is whether the decision to dismiss was one to which a reasonable and fair employer could come as at the time when it became effective. The question was not whether the Tribunal or the Court would have made the same decision but whether it was a decision which a reasonable and fair employer could make.*

Conclusion of Part 1

[62] What we have found to be the proper interpretation of s103A is consistent with the previous decisions of individual Judges of the Court referred to earlier. The Authority was therefore correct to follow those decisions. This part of the challenge must fail.

Part 2 Application of s103A to the facts

[63] The second ground of the plaintiff's challenge was that, if the Authority did adopt the correct interpretation of s103A, it erred in its application of the test to the facts.

[64] To understand and deal with this argument, it is necessary to record a fuller summary of the facts. This comprises findings of fact made by the Authority and extracts from the minutes of key meetings during the investigation process. Both parties accepted that those minutes were accurate.

Factual background

[65] The defendant was employed by the plaintiff as a warehouse agent in its international cargo division. This is a safety sensitive area where the operation of heavy machinery poses safety risks. The defendant had worked for the plaintiff for many years and had an unblemished employment record.

[66] In December 2005, following a decision of the full Court in *NZEPMU v Air New Zealand Ltd* [2004] 1 ERNZ 614, the plaintiff introduced an alcohol and other drugs programme, the terms of which were contained in a comprehensive manual ("the Policy"). The policy requires all employees to maintain a zero blood alcohol level and to remain drug free at all times while at work.

[67] The policy also strongly encourages employees to declare their possible alcohol or other drug abuse, a process called "*self referral*". Such employees may be given rehabilitation support through a Medical Review Officer (MRO). The policy provides that it is not self referral when an employee declares alcohol or other drug use immediately before or after testing. Employees are warned that tests which have been verified positive by an MRO can lead to an investigation and disciplinary action, including dismissal.

[68] Where there is a positive test, the Policy provides that the employer may:

- *Advise the employee that the Company may initiate an investigation of the positive result depending upon the circumstances of the testing. Any investigation will sensitively take into account contributing factors and whether there was self disclosure of alcohol or drug use, abuse or dependence, specifically prior to random testing.* ***Such an investigation could result in a finding of misconduct or serious misconduct.*** (Emphasis added)

- *Following the outcome of an investigation,* ***in the event that the employee's employment is not terminated,*** *a range of options may be considered. These may include the company attempting to find*

> *suitable alternative employment in a Non-Safety Sensitive role, depending upon availability.* (Emphasis added)

[69] The policy also includes a range of options "*in the event that the employee's employment is not terminated*". These options include adopting a recommendation of the MRO, advising the employee that random breath and/or urine testing for 24 months may be required, and consideration of allowing the employee to return to a safety sensitive role on a case by case basis.

[70] The policy then deals with the options for rehabilitation and provides:

> *A Rehabilitation Agreement may be established between the Company and the employee following a recommendation from a [sic] MRO, if* ***employment is not terminated following an investigation***. (Emphasis added)

[71] Clause 3.1.3 of the Policy provides that where, as in the present case, an employee has had a positive alcohol or other drugs test, the offer of a rehabilitation agreement to an employee will be at the discretion of the company.

[72] The defendant had read the Policy. He understood that it had been introduced to ensure the safety of staff and passengers of Air New Zealand. He was fully aware of the requirement for all employees to maintain a zero blood alcohol level and to remain drug free at all times while at work. He was also aware of the provisions concerning random drug testing**.**

[73] Before his positive drug test, the defendant had regularly smoked cannabis. At times, he did so every evening, including evenings before beginning work on a morning shift at 4 am. He said that this helped him deal with domestic problems including the chronic illness of his mother for whom he cared. He also said that he considered cannabis harmless and believed that his use of it was not jeopardising his own safety or that of his colleagues. Reflecting these views, the defendant continued to use cannabis after the Policy came into effect.

[74] On 28 September 2006, the defendant was informed by his manager, Don Ward, that he was required to take a random drugs test. He agreed but told Mr Ward that he would have a problem with the test, implying that he would fail it. In terms of the Policy, this did not amount to self disclosure. After the positive test, the defendant told his manager that he believed that if he did fail a test he would need to discuss his situation with the plaintiff and might, at that time, need to stop using cannabis in order to continue his employment. The defendant took the test and was later told by Mr Ward that it had produced a positive result for cannabis which was 20 times the threshold level for the test.

[75] As a result, the defendant was stood down from work on full pay and the plaintiff undertook an investigation into his conduct. This included the defendant meeting with Dr Sara Souter, an Aviation Medical Officer, who verified the positive test result. The defendant then attended a meeting with Mr Ward on 9 October 2006. His suspension on full pay was continued pending the completion of the investigation and agreed to co-operate with the investigation. He was warned by Mr Ward that, depending on its outcome, he could be dismissed.

[76] The following day, 10 October 2006, the defendant met with Dr David Powell, the company's Chief Medical Officer. The consultation complied with the Policy which required medical intervention to ensure that the plaintiff's managers were appropriately informed of any medical or other factors relevant to the positive test result. This included the need for, and the willingness of the employee to accept, a rehabilitation agreement.

[77] After that meeting Dr Powell told Mr Ward that the defendant had been very open and co-operative. The defendant had admitted his regular use of cannabis in the past but said that he had not used it since the positive test. He conceded that he had a problem but was committed to permanent abstinence from cannabis and was willing to comply with ongoing monitoring, follow-up, and medically directed testing as required. The defendant did not believe he was substance dependent and saw no reason to give up alcohol.

[78] That same day the defendant met with Roger Green, an alcohol and drug counsellor. In his report Mr Green diagnosed the defendant as having a high probability of being both alcohol and cannabis dependent with physiological symptoms. He recommended that the defendant abstain from all mood altering chemicals, particularly alcohol and cannabis. He referred to the defendant's lack of insight into his condition and his reluctance to abstain from alcohol use altogether, "*coupled with his alibi of a need to use cannabis to relax in his home situation means he needs to take positive action to remain chemically free"*. He considered the defendant had a significant problem with cannabis and predicted that, if he abstained only from cannabis, his alcohol use would increase.

[79] The defendant met with Dr Powell again on 20 October 2006 and they discussed Mr Green's report. The defendant told Dr Powell that he did not believe he had a dependence problem and, although he had decided to remain cannabis free for his own wellbeing, he saw no reason to be alcohol free. Dr Powell concluded subsequently: *"Myself, I am unsure whether he is chemically dependent and I believe that only time will tell"*.

[80] The defendant met with Mr Ward and Martha Gibbons, the plaintiff's human resources consultant, on 24 October 2006. At this and subsequent meetings with company management, the defendant had a union representative to assist him. The defendant said he was not happy with some of Mr Green's conclusions. He confirmed his knowledge of the Policy, accepted that he worked in a safety sensitive area and that he was aware of random drugs and alcohol testing in such areas. He said he had smoked a *"joint"* of cannabis at approximately 7 pm, the night before he was tested and had started work at 4 am. He said he had used it every night for the last two years, and off and on during all of his adult life. He said that he continued to use cannabis after the Policy was introduced because his mother was very ill.

[81] The employer acknowledged the defendant had a strong and positive employment record but told him his difficulty was that he had been randomly tested and had not self-referred. He was told there would be a full and fair investigation and that a range of actions would be considered.

[82] The same participants met again on 26 October 2006 and the defendant again disputed Mr Green's conclusions about his alcohol consumption. He was told the plaintiff would be making further enquiries of Dr Powell before any final decision was made and, whether or not the defendant's employment was terminated, they would look at supporting him to remain drug free.

[83] The plaintiff's managers sought more medical information. A series of questions were directed to Dr Powell. These questions were answered by Dr Souter in a joint email response on 3 November 2006. Their report confirmed that, given the defendant's test result and his stated history and frequency of use, there was potential impairment of his ability to work safely and effectively in a safety sensitive area with a consequent increase in accident risk. A rehabilitation programme was recommended to treat the defendant's chemical dependence and this required him to abstain from all mood altering substances. In the meantime, they considered the defendant was not fit to return to a safety sensitive role.

[84] At the next meeting on 17 November 2006, with the same participants as on 26 October, Mr Ward read a statement which recorded his view that the defendant's actions amounted to serious misconduct and that he was considering dismissal. Mr Ward referred to the following factors he said he had taken into account in reaching that conclusion:

> *1. Your level of awareness of the Air NZ Alcohol and other Drug Policy and your understanding of its purpose and your responsibility as an employee under the policy.*
>
> *2. Your level of awareness of the requirement under the policy for all employees to maintain a zero blood alcohol level and remain drug free at all times while at work.*
>
> *3. The level of risk that you chose to place yourself, your work mates and the organisation in on a daily basis and your failure to recognise the risk.*

4. Your decision to continue to use cannabis over a long period of time after the introduction of the policy and not taking the opportunity to seek assistance from the company via the self referral procedure.

[85] A discussion then followed in which the defendant disputed he had ever put anyone at risk at work and claimed no-one had ever suspected that he was under the influence of drugs. He contended that, because no one had been put at risk, his actions could not have been serious misconduct. He wanted to know what alternatives had been considered. After the discussion Mr Ward adjourned the meeting until 20 November 2006 to consider the final outcome.

[86] At this final meeting Mr Ward stressed the potential danger of the defendant attending work over a long period with cannabis in his system and that the defendant did not accept this risk. Mr Ward said he had considered the mitigating circumstances and the alternatives but had concluded that the defendant's employment would be terminated, effective immediately.

[87] The defendant asked when rehabilitation would be considered and why it had not been offered. Ms Gibbons responded that rehabilitation had been considered as one of the company's options but that he was not medically fit to return to work in a safety sensitive environment and no alternative work was available.

The Authority's determination

[88] The Authority found that the defendant's actions amounted to serious misconduct that might have justified dismissal. The plaintiff accepts that finding. The Authority then went on to find that, in all the circumstances, a fair and reasonable employer would not have dismissed the defendant. The plaintiff's challenge relates to this second conclusion.

[89] The reasons for this part of the Authority's determination were based first on its analysis of the plaintiff's drug and alcohol policy. It found that, as the plaintiff relied on the defendant's breach of the Policy as justification for the dismissal, it had to demonstrate compliance with its own policies. The Authority concluded that rehabilitation was a more prominent feature of the Policy than summary dismissal

and that dismissal and rehabilitation were mutually exclusive. It noted that the Policy did not require that a role which was not safety sensitive be available as a prerequisite to an offer of rehabilitation.

[90] In its analysis of the reasons for the decision to dismiss, the Authority found that Mr Ward had concluded that a rehabilitation programme was not appropriate for the following reasons:

(i) The defendant did not genuinely believe in the need for rehabilitation and was signalling a willingness to participate in it only to save his employment.

(ii) The defendant refused to accept that anything he had done had put him or others at any level of increased risk.

(iii) The risk to which the defendant had exposed himself and others over a sustained period was significant and his test result was more than a "slight" positive.

(iv) The defendant had had every opportunity to disclose the situation to Mr Ward or to the plaintiff's medical team before the test but had chosen not to do so. He was only prepared to involve himself in the rehabilitation programme after the plaintiff had discovered his issues.

(v) The medical advice was that the defendant was not fit to return to his job and that there were no non-safety sensitive roles available or appropriate for the defendant.

(vi) The defendant was not prepared to give up alcohol use despite the medical team's statement that this would have to be a requirement. The defendant's own view was that he did not need to give up his use of alcohol.

[91] Of these reasons the Authority accepted that Mr Ward was entitled to consider the risk to which the defendant had exposed himself and others, the fact that he had

used the drug for a sustained period of time, that the result was more than a slight positive and that he had had every opportunity to self-disclose before being detected.

[92] On the other hand, the Authority found that there was no foundation for Mr Ward's view that the defendant did not genuinely believe in the need for a rehabilitation programme and it was unfair that this opinion had never been put to him for his response.

[93] The Authority appears also to have rejected Mr Ward's belief that the defendant did not accept that he had put himself or others at risk and from this concluded that it was unfair to the defendant that this adverse finding had not been put to him.

[94] The Authority concluded that Mr Ward was wrong to have relied on there being no non-safety sensitive role available because that was not a prerequisite for rehabilitation under the Policy. It also found that management's discussion with the defendant about rehabilitation was seriously deficient because it had not included matters that Mr Ward had considered, particularly the defendant's wish to continue to use alcohol. Finally it found that the plaintiff had not given proper consideration to other alternatives to rehabilitation such as standing the defendant down.

[95] In the Authority's view these failures were not minor technicalities but breaches of natural justice and the duty of good faith. It found that the decision by the plaintiff that the defendant was not a suitable candidate for rehabilitation was not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. It also found that, had the defendant been offered rehabilitation, he could not have been dismissed.

Discussion

[96] We do not agree with the Authority's reasons for rejecting Mr Ward's explanation for not offering a rehabilitation agreement.

[97] Contrary to the Authority's view, we find that there was information provided to Mr Ward on which he could conclude that the defendant rejected the need for him to abstain from alcohol. We find also that the defendant had the opportunity to comment on Mr Green's report which expressed the view that the defendant needed to abstain from alcohol as well as cannabis. The defendant having had that opportunity, there was no need for Mr Ward to seek further comment on the issue from the defendant before reaching a conclusion.

[98] The Authority rejected Mr Ward's conclusion that the defendant had refused to accept he had done anything to put himself or others at risk. In doing so, it appears the Authority overlooked the minutes of the meeting of 17 November 2006 which show that the defendant expressed this view at that meeting. The defendant therefore had the opportunity to address this issue and did address it in a way consistent with Mr Ward's conclusion. We also find that Mr Ward was entitled to take this factor into account in assessing whether it was appropriate to offer rehabilitation to the defendant.

[99] In reaching our view that Mr Ward did not need to put his conclusions about these issues to the defendant before acting on them, we have had regard to the decision of the Court of Appeal in *Oram.* Commenting on the view expressed by this Court that the employer was unfair in taking an adverse view of Mr Oram casting blame on others, because he had not been given the opportunity to comment on these adverse views, the Court of Appeal said:

> *[39] … We see no denial of natural justice in this. Mr Oram was given full opportunity to provide his explanation for the mistake. He knew his explanation would be taken into account by his employer in the discipline process. It would be to extend the right to be heard and to answer allegations too far to impose an obligation requiring employers to invite comment upon the assessment of the employee's explanation or attitude to what had occurred. To do that could lead to an interminable process. …*

[100] The Authority was critical of Mr Ward's reliance on the medical advice that the defendant was not fit to return to work and that in any event there were no appropriate non-safety sensitive roles available. That criticism was based on the

Authority's perception that this issue was not dealt with in the Policy. In fact the Policy did refer to such matters in clause 3.4.5.

[101] That clause specifically provides that a rehabilitation agreement may be established between the company and the employee on the recommendation of an MRO if employment is not terminated.

[102] On the facts of this case the MRO did recommend rehabilitation but, because Mr Ward had no confidence in the plaintiff adhering to such a programme, it was not offered. Clause 3.4.5 is not mandatory, it is discretionary and importantly depends on continuing employment.

[103] In his report, the MRO found that the defendant was not fit to return to his job and there were no suitable alternatives. Other relevant circumstances were the employer's justifiable concern to reduce risk in a safety sensitive area and the defendant's conscious decision to run the risk of dismissal by continuing to use cannabis before he began his shift.

[104] In the light of those circumstances, we find that the defendant acted as a fair and reasonable employer in considering the range of options open to it, whether disciplinary action was appropriate, or whether rehabilitation was appropriate, or whether there should be a combination of both. Mr Ward's actions were in accordance with both the Policy and the plaintiff's published disciplinary procedures. Mr Ward decided that dismissal was the appropriate option and under clause 3.4.5 of the Policy rehabilitation was no longer available.

[105] There is a more fundamental problem, however, and that is the way in which the Policy was construed by the Authority. The Policy provides that the investigation of the positive test result is to take into account the contributing factors and medical advice, but states that the investigation can result in a finding of misconduct or serious misconduct. It then states that following the outcome of an investigation, in the event that the employee's employment is not terminated, the range of options may be considered. Those options include the possibility of offering a rehabilitation agreement. However, as can be seen from the wording of the Policy, it is only in the

event that the employee's employment is not terminated that the range of options comes to be considered.

[106] This is repeated in the section of the Policy dealing with rehabilitation agreements. These may be established if there is a recommendation from an MRO, in the event of the employment not being terminated following the investigation. Even then the offer of a rehabilitation agreement, if the employment is not terminated, is at the discretion of the plaintiff.

[107] In terms of the Policy, Mr Ward, having reached a conclusion that there was serious misconduct, was entitled at that point to consider whether the employment of the defendant should be terminated. The Authority appears to be critical of Mr Ward continuing to consider the possibility of rehabilitation after having reached the conclusion, with which it agreed, that there was serious misconduct. The plaintiff, as the Authority found, considered whether disciplinary action was appropriate or whether the rehabilitation programme was appropriate or, whether there should be a combination of both. We find that was in accordance with both the Policy and the plaintiff's published disciplinary procedures.

[108] We accept Mr Toogood's submission that in merging the discretion to offer a rehabilitation agreement, which is outside the disciplinary investigation, with the disciplinary investigation itself, the Authority erred and did not consider, at least sufficiently, the employee's actions in all the circumstances. The foundations for the Authority's finding that dismissal was unjustified are therefore wrong.

[109] We conclude, contrary to the Authority's determination, that the decision to dismiss summarily and not to continue the employment with a rehabilitation agreement, was a decision that a fair and reasonable employer would have taken in all the circumstances. There is really no argument that the process used to reach that conclusion was how a fair and reasonable employer would have so decided in all the circumstances. Both elements of the s103A test (the "what" and "how" of justification) have been established by the employer. The defendant was dismissed justifiably.

[110] In view of these conclusions there is no need to consider the issues of remedies.

Conclusions

[111] In summary, our conclusions are:

a. The challenge fails on the first ground.

b. The challenge succeeds on the second ground.

c. The defendant's personal grievance claim is dismissed.

d. The Authority's determination is set aside and this judgment stands in its place

Costs

[112] Costs are reserved. If they cannot be agreed, the counsel for the plaintiff are to file and serve a memorandum within 30 days. Counsel for the defendant are then to have a further 21 days to file a memorandum in response.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 4.45 pm on Wednesday 3 June 2009