

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 201/08
5118387

BETWEEN WARREN BUSH
 Applicant

AND MARLBOROUGH LINES
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Brian Fletcher, Counsel for Applicant
 Luke Radich, Counsel for Respondent

Investigation Meeting: 24 and 25 June 2008 at Blenheim

Submissions received: 30 June and 2 July 2008 from Applicant
 30 June from Respondent

Determination: 23 December 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Bush says his dismissal from his position as an arborist with the respondent was unjustified. The applicant was dismissed on 7 November 2007 after a drug test confirmed the presence of an amphetamine-class substance in his system. Mr Bush claims remedies including lost wages of \$10,706 gross, compensation of \$15,000, an order requiring the respondent to provide appropriate corrections to information where inaccurate information has been supplied and confidentiality has been breached and costs.

[2] The respondent, while acknowledging it failed to record in the dismissal letter all the factors it says were taken into consideration in making the decision to dismiss Mr Bush, contends that the dismissal was justified in all the circumstances.

[3] The parties have attempted to resolve their differences but have been unable to do so.

Relevant facts

[4] The applicant, an experienced arborist, joined the respondent's workforce on 27 July 2007. He had previously worked with other lines companies in this role but in the North Island.

[5] In the course of his employment with the respondent, several incidents involving Mr Bush occurred. There were absences from work for which the applicant says he furnished the company with medical certificates, although the respondent contests this. These absences, Mr Bush explained, were due to health issues including some depression at being separated from his children.

[6] The other incident of note occurred on 28 September 2007. Mr Bush had not arrived at work that morning and Steven Bell went to the applicant's home to collect him. He noticed the applicant smelt of alcohol and Mr Bell instructed the applicant that he was not to go into the hoist bucket, nor was he to be involved in using the chipping machine. At lunchtime Mr Bell reported the matter to Mr Null, a lines supervisor, who in turn advised Mr Ken Forrest, the managing director.

[7] A meeting took place that afternoon involving Mr Bush, Mr Null and Mr Forrest, during which Mr Forrest questioned the applicant on the circumstances and strongly outlined the safety implications of working under the influence of alcohol or drugs and the company's policy in regard to these issues. The applicant explained he usually cycled to work but his bike had a flat tyre that morning. Further, he explained he had been at a function the previous evening and had consumed some 15 stubbies over some hours, maintaining this would not impact on his work performance. The applicant told Mr Forrest he enjoyed working for the company and was prepared to undertake counselling and, if necessary, give up drinking alcohol in order to keep his job.

[8] Mr Forrest made it plain that the respondent would not tolerate employees whose performance was impaired by alcohol, explained Mr Bush's situation as serious and that a repeat performance would lead to Mr Bush facing termination. Mr Forrest told the applicant to reflect on his situation and to report for work on Monday on time and unaffected by alcohol.

[9] The meeting was recorded in a file note and the applicant agreed that the note was a fair record of the meeting.

[10] On 31 October 2007, the company convened a meeting involving the applicant, Mr Stephen McLauchlan, the manager, and Mr Terry Cummock, the contracting manager. The meeting was called following an incident the previous day. Mr Bush was to take part in a first aid course. He arrived at work in casual rather than working clothes. Some time was available before the course began and the applicant was directed to do some maintenance work during this time. He refused, saying he was in good clothes and had left his work gear at home. Mr Lauchlan Wilson, the arborist supervisor, recorded (*Warren*) *sat down when he arrived at work, he didn't seem to be with it, wouldn't help with the maintenance before going to a first aid course. I advised Terry Cummock of his performance on the previous Friday and today.*

[11] In essence, the outcome of this meeting was that, in the light of the incidents involving the applicant, the respondent stood Mr Bush down by agreement on full pay while it conducted an investigation. The primary outcome, however, was Mr Bush agreeing to undertake a drug test which was *arranged ... through the company's independent health nurse*. The company also offered the applicant counselling.

[12] The drug test result was positive for an amphetamine-class drug and the company, through Mr McLauchlan, says *considering this against the background of the previous warnings that Mr Bush had had and the report of his being not "with it" mentally on 30 October 2007, we made the decision to dismiss him.*

[13] At the 7 November 2007 meeting, the results of the tests were put to Mr Bush. Ms Hook, the applicant's partner, attended as a support person and she asked for a copy of the test report. She says Mr McLauchlan said it was not available but he had had a phone call from the laboratory telling him of the result. She goes on in her evidence:

He said that the lab result had come back as showing positive for methamphetamine. Warren asked me what this was and he said it was P. Warren appeared shocked and horrified. Warren said that he had never taken P in his life. I raised with Steve that Warren had been taking Sinutab. I asked if that might have an effect. Steve said "no it would not have an effect because the level detected in Warren's system was very high". He said that there was no doubt. Warren said that he was not taking P and that he would take another test.

Steve said that a second test was unlikely to be anything different as the level was so high. Steve said however that if there was a second negative test then they would be happy to discuss the matter with a view to giving his job back.

Immediately after this meeting, Warren contacted Ray Alexander, the nurse who had taken the first urine sample. I asked as to how we could go as to getting a second test. Mr Alexander said we should contact MedLab in Blenheim. This is the lab that takes and analyses tests for the doctors and hospitals in Blenheim.

Because of the positive test result, Steve said he had to dismiss Warren from Marlborough Lines.

[14] Her evidence goes on to state that a second urine sample was tested and the result returned was negative in all respects. She said that Mr Bush then wanted to meet with the company to discuss regaining his employment but that the company was unwilling to do so.

Issues

[15] To resolve this matter the Authority needs to make findings on the following issues:

- Was the dismissal substantively justified; and
- Was the procedure adopted by the respondent fair and reasonable; and
- In the event of the dismissal being unjustified, what remedies, if any, in all the circumstances are due to the applicant
- Did the applicant's conduct contribute to the circumstances giving rise to the dismissal?

The investigation meeting

[16] The Authority heard from Mr Bush and his partner, Linda Hook, on behalf of the applicant. The evidence of Dr Roderick Bird in Mr Bush's support was very helpful in isolating the technical issues surrounding this case.

[17] For the company, evidence was presented by Mr Forrest, Mr McLauchlan, Mr Wilson and Mr Cummock.

[18] All witnesses were open and answered questions put to them honestly, although at times Mr Bush adjusted his responses when pressured, suggesting his recall of detail was occasionally imprecise.

Discussion and analysis

[19] The drug testing policy applying is set out in the employment agreement between the parties. The relevant section reads:

- (iii) *The company may require an employee to undertake drug and alcohol testing but in all cases the company must act reasonably and accord with the principles of natural justice and provide the opportunity for the employee and his/her representative to state their position prior to a blood test being required.*
- (iv) *Testing may be required in the following circumstances:*
 - *Where Marlborough Lines believes, on reasonable grounds, that an employee is exhibiting the types of behaviour which indicate that he or she may be influenced by drugs or alcohol; and/or*
 - *Following a workplace accident; and/or*
 - *As part of a programme recommended by a registered medical practitioner to monitor an employee whose previous tests have indicated the presence of drugs or alcohol.*
- (v) *Drug and alcohol testing will be carried out by a registered medical practitioner appointed by the company.*
- (vi) *Testing will be at Marlborough Lines' expense.*
- (vii) *If an employee's test indicates the presence of drugs or alcohol, Marlborough Lines may:*
 - *Suspend the employee with or without pay until such time as it is satisfied that the employee can work safely; and/or*
 - *Require the employee to undertake an assessment by a doctor nominated by Marlborough Lines to identify the extent of any problem; and/or*
 - *If appropriate require the employee to participate in a drug and alcohol rehabilitation programme as recommended by the doctor undertaking the assessment.*
- (viii) *If further tests undertaken continue to indicate the presence of drugs or alcohol, Marlborough Lines may take disciplinary action against the employee, including dismissal.*

[20] The evidence is clear that the respondent genuinely believed that a drug test was warranted and secured the agreement of the applicant. It failed, however, to have the test undertaken by a registered medical practitioner.

[21] On its own evidence, it was an industrial nurse who took the sample. The problem was compounded by the nurse later telling the company that the amphetamine reading was *high*. It is also clear from the evidence that the steps taken by the company following the return of the positive test did not include those outlined in the employment agreement but moved fairly promptly toward dismissal.

[22] Dr Bird's evidence was clear – that Sinutab contains pseudoephedrine hydrochloride, an amphetamine-class substance, and this would likely show in a urine sample taken at the time of using Sinutab. His evidence also indicated that as the dose of pseudoephedrine was relatively low, its presence in urine would disappear *reasonably quickly*. His evidence also indicated that someone taking this drug would show some signs of dizziness, would need to take care around machinery and ought to use alcohol sparingly when ingesting this medicine.

[23] I am satisfied with the evidence from Ms Hook who says she purchased the medication at the Wairau Pharmacy to assist her partner when he was suffering from a heavy cold. She says she purchased the drug on 30 October 2007 and so it is at the relevant time. I am also satisfied that the presence of the amphetamine-class substance in the urine sample provided by Mr Bush is explained by this medication. The lack of this substance in the second sample taken on the initiative of Mr Bush and Ms Hook confirms the evidence of Dr Bird that the dosage was relatively low and passed from the system reasonably quickly.

[24] In passing, it seems odd that the respondent did not take heed of the statement printed on the test results, although I accept it is possible that at the time the dismissal took place the company did not have the actual test results in its hands. The statement on the results reads:

These drug assays provide unconfirmed results. They are intended for screening and clinical interpretation and are not suitable for medico/legal purposes.

[25] In short, the company's representatives misunderstood the test results and failed to take qualified professional advice on their significance in a disciplinary setting before moving to dismiss the applicant.

[26] In analysing the evidence as a whole, it is also important to take into account the warnings given to the applicant in respect of absences and in particular, Mr Forrest's blunt warning to Mr Bush in the context of alcohol use. The clear

evidence was that previous warnings over other incidents formed the basis of the decision-maker's reasoning when considering the drug test results. Mr McLauchlan told the Authority as much.

[27] Without wanting to labour the point, the respondent had well-grounded concerns over the capacity of Mr Bush to safely perform the tasks required of him in the course of his employment. It was certainly entitled to require that Mr Bush undergo drug testing, but it needed to carry out that process in accordance with the terms set out in the agreement. It is clear from the evidence that it overreacted to the test result, moved to dismiss Mr Bush without considering the other alternatives available to it and, when the second drug test proved clear, declined to reconsider its position.

[28] While I accept the evidence of the company that members of the arborists team were unwilling to work with Mr Bush, had the company chosen the alternative of a rehabilitation programme and the applicant responded positively, that course of action may well have alleviated the concern of his workmates.

[29] That said, Mr Bush by his previous actions affecting his performance prior to the issue of the drug test arising, must take some responsibility for the circumstances leading up to his dismissal.

[30] To be clear, his taking of Sinutab to alleviate a genuine medical condition does not constitute serious misconduct. However, but for his previous record during his relatively short tenure with the respondent, the outcome would likely have been considerably different.

Determination

[31] Returning to the issues set out above earlier in this determination:

- I find the dismissal of Mr Bush was substantively unjustified.
- I find the process undertaken by the respondent to have been inadequate and unduly hasty.

- I find that Mr Bush, through his earlier transgressions in an employment setting, contributed to the circumstances which gave rise to his dismissal.

[32] Having found the dismissal of the applicant unjustified, I turn below to the matter of remedies.

Remedies

Lost remuneration

[33] There was no evidence before the Authority indicating that the claim of \$10,706 gross was disputed between the parties. I therefore order the respondent to pay the applicant that sum net of taxation.

Compensation

[34] In considering the compensation claim of the applicant, I have borne in mind the evidence of Ms Hook but also the relatively short span of the employment relationship between the parties. I think, in all the circumstances, it is just to award the applicant the sum of \$5,000 without deduction as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Declaration

[35] The Authority is in no position to do more than direct the respondent to ensure that, where it lies within its power, accurate information surrounding the termination of Mr Bush from its employment is provided to those who inquire. The issuing of this determination, which is a public document, should assure any interested parties that there was no evidence before the Authority that Mr Bush has used methamphetamine (P) and was certainly not taking it during the course of his employment with the respondent.

Contribution

[36] I have found the applicant's conduct contributed in some measure to the preliminary elements which led to his unjustified dismissal. As a result the Authority is obliged to apply s124 in assessing any remedies. In this case, weighing the issues I set the reduction to apply to the above remedies at twenty per cent (20%).

Costs

Costs are reserved. Counsel are to attempt to resolve the matter of costs between them. If this cannot be achieved, Mr Fletcher is to lodge and serve his memorandum and Mr Radich is to lodge and serve his memorandum in reply fourteen days after the receipt of the applicant's memorandum.

Paul Montgomery
Member of the Employment Relations Authority