

she was denied the right to benefit from the company's bonus scheme for the duration of the warning (six months).

[3] To remedy her alleged grievance the applicant seeks a determination that the warning given was unjustified and of no effect and she seeks the removal of the warning from her file. She also seeks \$12,000 net pursuant to s.123 (1) (c) (i) to compensate her for humiliation, loss of dignity and injury to feelings.

[4] The company submits it acted justifiably when it gave the applicant a final written warning and denies the remedies sought.

Background

[5] Ms Bailey has been employed with Inex for approximately 5 years. She is employed as a crane operator. She is also a Union delegate.

[6] The documentation reveals that Inex is a leader in the aluminium extrusion industry, supplying extruded aluminium to manufacturing and fabrication industries throughout New Zealand and Australia. The business calls for the operation of heavy industrial machinery, hydraulic rams with high pressures, hot steel extrusion dies at around 420° C with hot extrusion exiting presses at temperatures in excess of 529°C.

[7] In 2002 it came to the company's attention that some employees were using drugs during shift breaks and returning to work with the appearance of being "stoned". The company is cognisant of its responsibility to be compliant with OSH legislation, which requires the company to take all practicable steps to eliminate hazards in the workplace, including hazards that might arise from someone coming to work, impaired by drugs or alcohol. The company took action to warn its employees at the time, and in 2005, with its knowledge of the potential of harm arising from drug and alcohol use in the workplace and its commitment to providing a safe place of work for its employees, the company embarked on the development and implementation of a comprehensive drug and alcohol policy. That policy was rolled out in 2006 with detailed across-the-board training for all staff, managers and supervisors.

[8] For the purposes of this determination it is necessary to note that the company's drug and alcohol policy strictly prohibits the use, sale, transfer or possession of drugs and alcohol while on company property or a company worksite (excluding alcohol at controlled functions with management approval). The drug and alcohol policy

provides that breaches of this rule will be dealt with in accordance with the company's serious misconduct procedures (which may result in summary dismissal).

[9] The prohibition is supported by a testing regime, which applies in particular circumstances (pre-employment, post accident/incident, reasonable cause and random site checks with drug detection dogs). The testing procedure is documented. If a worker returns a positive test that worker *may* be offered the opportunity to take part in a company supported rehabilitation programme. It is an onerous programme that requires the worker to enter a contract with the company whereby they commit to counselling and to remaining drug free (monitored by random testing). The programme is 24 for months.

[10] Where a worker returns a negative test no disciplinary action will be taken on that matter. However, if there has been an apparent breach of the drug and alcohol policy in itself this will lead to a disciplinary investigation.

[11] The events that led to Ms Bailey receiving a final written warning occurred on 22 February 2008. At 11pm that night a company that contracts to carry out random dog searches conducted a search at the company's premises.

[12] Ms Bailey says that she was standing outside the packinghouse door talking with four other employees when a dog handler (Mr White) and his dog approached the group. It is the evidence of the dog handler and company witnesses that when they approached the area in question there were only two employees standing outside the packinghouse – one of which was Ms Bailey. The other was a male employee named W.

[13] The evidence reveals that the dog showed interest in both employees, first W and then Ms Bailey. W returned to the factory and the handler dealt with Ms Bailey first. Ms Bailey says she was asked to turn out her pockets, which she did. She said they were standing out in the open where anyone could have walked by and seen them and could wrongly have concluded she was a drug user.

[14] It was Mr White's evidence that when he spoke to Ms Bailey he asked her to stand to one side of the packinghouse door so they had some privacy and were out of view of employees inside the plant. He denies he asked Ms Bailey to empty her pockets and she did not do so. He was clear that he has no powers to require a person to turn out their pockets and he had no need to do so in this case because while the dog showed an interest in Ms Bailey it did not sit so he was 99% sure that she was not

in possession of drugs¹. He also said that he is very careful with respect to the procedure he adopts particularly with females he is interacting with.

[15] Because of the interest shown by the dog Mr White said he asked Ms Bailey if it was possible that she had come into contact with drugs recently. She advised she had no drugs in her possession and she had not smoked cannabis for years. She said however, that she lives with people who grow cannabis and it was around the house.

[16] Mr White said that he was reasonably satisfied with her explanation. However, where there is an interest shown by the dog it is routine to then check that person's bag, locker and car (only if they are on company premises). He advised Ms Bailey of this and she responded that she did not have a bag or locker and that her car was parked in the car park. She did not object to her car being searched.

[17] Ms Bailey says she was not asked about her locker. She said she does have one and had she been asked she would have said so.

[18] In the event Ms Bailey and Mr White went to search her car. It is not in dispute that prior to that search Ms Bailey told Mr White that her nieces and nephews had borrowed her car the previous weekend to go to the Ragamuffin concert in Rotorua and if he found anything the car it was not hers. This struck him as an odd comment reminding him, he said, of occasions he has experienced where workers set the scene with an excuse, where (for instance) drugs are found in a bag "*I was just holding that bag for a mate*". It was his evidence that this comment from Ms Bailey suggested she had knowledge that drugs might be found in her vehicle.

[19] In the event the dog found a piece of tinfoil which when unwrapped revealed a small amount of cannabis leaf (64mgs).

[20] This find was reported to the company and Ms Bailey underwent a drug test. She was suspended on pay to await the results of the test.

[21] Ms Bailey submits Brian Tindale (Works Manager) told her, that if she returned a negative drug test that would be the end of the matter. Mr Tindale denies this. He says he told Ms Bailey that if the drug test was negative *and* if she convinced the company that the drugs found were not hers there would be no action.

[22] On 26 February 2008 Ms Bailey's drug test results were advised to the company. The result was negative. Ms Bailey was not immediately informed of this,

¹ Generally speaking dogs show interest if they detect that a person has been in contact with drugs but it sits if it detects the presence of drugs.

as the company prefers to give such advice face to face. However, the company still had to deal with the matter that an amount of cannabis had been found in her car. On 29 February the company contacted Ms Bailey to advise a letter was being sent to her advising her of a disciplinary meeting set for 4 March to deal with the possession of cannabis issue. As a result of this communication Ms Bailey contacted her Union representative (Myles Leeson) and he contacted Ms Ware (HR Projects Manager). He asked what was happening and the situation was explained including the fact that Ms Bailey's drug test had been negative but the company had to address the possession issue. Mr Leeson asked that the company advise its proposed action by phone as Ms Bailey was leaving the country on holiday on 4 March. Ms Ware advised this was not possible and that the process would have to be followed. However, the company did amend the date for the disciplinary meeting. The date was revised to 3 March and Mr Leeson was advised of this and the company wrote to Ms Bailey. In that letter the allegations against her were set out (possession of cannabis on company property). Ms Bailey was invited to a disciplinary meeting on 3 March to discuss her failure to abide by the company's drug and alcohol policy. She was advised of her right to representation and it was also explained that the company viewed the matter as "*most serious*" the outcome of which could be her dismissal.

[23] Ms Bailey denies receiving this letter. It was copied to the Union, which did receive it.

[24] Ms Bailey attended the meeting on 3 March. She was represented by Mr Leeson and an accurate record of the meeting was taken by a company secretary and made available to the Authority. At that meeting Ms Bailey gave an explanation for the cannabis found in her car on 22 February. She explained that her nieces and nephews had borrowed her car on the weekend of 2 February and had used it to travel to the Ragamuffins concert. She presumed they had left the drugs in the car. She said she had no knowledge of them being in her car.

[25] The outcome of that meeting was that Ms Bailey was issued with a final written warning for six months. A consequence of receiving the warning is that Ms Bailey was not entitled to work special overtime for the duration of the warning and neither was she entitled to participate in the company bonus scheme/receive a bonus for the duration of the warning.

Position of the Parties

[26] Neither the applicant nor the Union that represents Ms Bailey (EMPU) takes any issue with the application of the company's drug and alcohol policy or the procedures adopted in relation to the search and subsequent testing regime that Ms Bailey underwent. Nor was there any complaint about the manner in which the company dealt with Ms Bailey including the suspension that followed the drugs test while awaiting the test results.

[27] In respect of the disciplinary process there are only two complaints cited by and for Ms Bailey.

- It is Ms Bailey's position that company representatives demonstrated closed minds at the disciplinary meeting on 3 March - that they were just "going through the motions". Both Ms Bailey and Mr Leeson submitted the company made frequent references to the fact that Ms Bailey had to be dealt with in a way that sent a strong message to other employees.
- It is also their position that there has been disparity of treatment in that the other worker W, who underwent a similar search and testing procedure on 22 February, was invited to enter into the drug rehabilitation programme run by the company and he did not receive a warning.

[27] Company witnesses vigorously reject these submissions. It is their position given that given illegal drugs had been found in Ms Bailey's car in the company's car park, that the fact of possession was not in question. However, the company needed to hear Ms Bailey's explanation for their presence there before making any decision in respect to disciplinary action. It is also the company's position that it was Mr Leeson that made repeated references to the company "needing to deal with Ms Bailey".

[28] The company witnesses outlined for the Authority the decision making process it adopted. Having heard Ms Bailey's explanation the company's managers took an adjournment and considered the fact that possession was established. It was also a concern to the company that Ms Bailey had advised the handler, prior to the search of her vehicle, that if drugs were found they were not hers. This indicated she may have had knowledge that drugs were in her car and together with her statement that she believed her nieces and nephews might have left them there after they borrowed the car on the weekend of 2 February it suggested that she knew of the presence of an illegal and prohibited substance in her vehicle and had continued to

bring her car to the work site. Against this the company weighed Ms Bailey's explanation and decided it could not be sure that the drugs were Ms Bailey's. Therefore, while the company believed (and advised Ms Bailey) that disciplinary action was required, it decided to exercise leniency in the matter and it issued Ms Bailey with a final written warning instead of dismissing her.

[29] On the disparity of treatment claim the company denies that W has been treated more leniently. It is the company's evidence (supported by documentation²) that employee W tested positive for drugs that night. He was also invited to a disciplinary meeting and was unable to work until his drug tests became negative. As a result of the disciplinary meeting he was invited to join the company sponsored drug rehabilitation programme. Had he not done so he would have been dismissed. The rehabilitation programme is onerous – the worker must commit to a contract that exists alongside his or her employment contract and share the cost of counselling and is required to undergo random drugs tests for a period of 24 months. W must remain drug free and if at any time he returns a positive test he will be dismissed and required to reimburse the company for its share of the costs of his rehabilitation programme. It is also the company's position that if an employee who is invited to enter its drug and alcohol programme does so, then no additional disciplinary action is taken. It is believed that to do so would be counterproductive to the primary intention of rehabilitation.

Issues for Determination

- Has Ms Bailey suffered disadvantage in her employment; and
- If she has what remedies are available to her.

Discussion and Findings

[30] Ms Bailey's evidence was marked by confusion and contradiction and I prefer the evidence of company witnesses where there are disputes over factual matters.

[31] In the main, however, there are few findings of fact that must be made because the Union raises only two challenges in the matter and they call for an assessment of the company's actions against the objective test of justification set out in S. 103A of the Act.

² The worker in question has given permission for the company to make documentation relating to his case available to the Authority.

For the purposes of s.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 determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those *of a fair and reasonable employer... in all the circumstances.... at the time....*

[33] The Employment Court examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06) and stated that the objects of the Act including the object of good faith must inform any objective assessment of what a fair and reasonable employer would do in all the circumstances.

Findings

[34] I am satisfied that the presence of cannabis (which I find was of a sufficient quantity for use) in Ms Bailey's vehicle on company property amounted to possession for the purposes of the company's drug and alcohol policy.

[35] I am satisfied that Ms Bailey was aware of the policy that the possession of drugs on site was prohibited and that breaches of the company's drug and alcohol policy amounted to serious misconduct under the company's disciplinary procedures which could lead to dismissal. Further, she stated at the disciplinary meeting that she did not condone having drugs in her vehicle on company property.

[36] I find the question then was for the company to investigate the circumstances of that possession which it did. Ms Bailey was appropriately put on notice of the allegations against her, advised of the seriousness with which the company viewed those allegations (that dismissal might be a consequence), advised of her right to representation and provided with the opportunity to give an explanation.

Has Ms Bailey suffered disadvantage in her employment?

[37] There are two issues to be considered under this head.

Did the employer appropriately consider and weigh Ms Bailey's explanation in arriving at its decision in the matter?

[38] I find, contrary to the representations for Ms Bailey, that the company did not adopt a closed mind to Ms Bailey's explanation. The notes of the disciplinary meeting

together with the evidence show the company weighed a number of factors in arriving at a decision in the matter:

- Its commitment to workplace safety and to that end maintaining a drug free workplace;
- The residue on her clothes that resulted in the dog's interest;
- The comment that she made to Mr White prior to the search that if he found drugs they weren't hers, suggesting she may have known drugs would be found in her car.
- The drugs test that was negative;
- Ms Bailey's explanation that she had lent her car to her nieces and nephews on the weekend of 2 February to travel to a concert and she assumed they had left the drugs in her car and she had no knowledge of their presence.

[39] I also find it is not the case that the company placed undue emphasis on the need to send a serious message to other workers about the possession of drugs in the workplace. Certainly Mr Tindale did say (in the context that he was leaning towards leniency in the matter) that disciplinary action was required because safety "*is a concern of mine*". He was, I find, focussing on the question of safety and not on making an example of Ms Bailey as an individual or as a Union delegate.

[40] Finally on this point I note there was only one other reference of a similar nature in the interview notes and that was made by Mr Leeson (Ms Bailey's representative).

[41] The resulting decision, made by Mr Tindale, was consistent with the advice he gave to Ms Bailey on the night of 22 February³. That fact is that Mr Tindale was not completely satisfied the drugs were not Ms Bailey's but her explanation led to her being given the benefit of the doubt to the extent that the company pulled back from the ultimate sanction of dismissal. Nevertheless it was decided that some disciplinary action was required to confirm the seriousness of the breach of company rules and to maintain the integrity of the company's commitment to a drug and alcohol free workplace. To that end Ms Bailey was given a final written warning.

³ That if her test was negative *and* she could convince him the drugs were not hers that no further action would be taken.

[42] I find, having considered all of the employer's actions in this matter - including those matters raised by the Union on Ms Bailey's behalf - that the employer's actions were consistent with the actions that a fair and reasonable employer would have taken in all the circumstances at the time.

[43] I find further that the consequences of receiving a final written warning⁴ are part and parcel of the company's disciplinary procedures and are well known to Ms Bailey. Those consequences do not in themselves found a disadvantage grievance.

Has Ms Bailey suffered disparity of treatment vis a vis worker W?

[44] The answer to this question is 'no'.

[45] The fundamental question was there a difference in treatment taken in respect of workers in the same set of circumstances. The circumstances here were quite different for Ms Bailey and W. Ms Bailey's test results were negative but she was found to be in possession of an illegal and prohibited substance. Mr W returned a positive drugs test but was not found to be in possession of drugs. Both workers were treated entirely in accordance with the company's drug and alcohol policy that the Union supports. Certainly the workers in question have been treated differently but no disparity of treatment exists such that Ms Bailey has been subjected to treatment that is unfair in relation to the contractual regime that has been entered into between W and the company. The company is to be congratulated for its commitment to drug and alcohol rehabilitation for its workforce.

Conclusion

[46] The company's actions towards Ms Bailey were, when measured against the actions of a fair and reasonable employer in all the circumstances at the time, entirely

[47] consistent what a fair and reasonable employer would have done in these circumstances, at that time.

Determination

[48] Ms Bailey's claim must be declined. She does not have an unjustified disadvantage grievance against her employer.

⁴ Denial of the opportunity to work special overtime and to participate in the company's bonus scheme.

Costs

[49] I have considered the submissions of the parties on costs. Costs must follow the event and having regard to the submissions, relevant case law and the circumstances of the case I direct the applicant to pay the respondent \$2500 as a contribution towards the costs it has incurred in defending this matter.

Janet Scott

Member of the Employment Relations Authority