

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 316
3188519

BETWEEN RIPEKA BAKER
 Applicant

AND EASTPACK LIMITED
 Respondent

Member of Authority: Claire English

Representatives: Dave Cain, advocate for the Applicant
 Rob McStay, counsel for the Respondent

Investigation Meeting: 28 March and 14 April 2023 at Tauranga

Submissions received: 13 and 14 April 2023 from Applicant
 13 and 14 April 2023 from Respondent

Determination: 16 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Ripeka Baker was employed as an Assistant Cool Store Manager by the respondent Eastpack Limited (Eastpack). Her employment agreement provided for her to undergo random drug tests, and that avoiding or refusing to undergo a drug test would constitute serious misconduct, which could lead to dismissal.

[2] On Monday 9 August 2021, Ms Baker was selected for random drug testing. Her manager called her and advised her of this. Ms Baker left site and did not return to work until after the drug testing van had left.

[3] After speaking with her manager, Ms Baker agreed to undertake her drug test the next time the van was on site. The van returned to site the next day. When asked by her manager to take a drug test, Ms Baker refused.

[4] She was later dismissed for serious misconduct, namely failing to undergo a drug test.

[5] Ms Baker raises a claim of unjustified dismissal and seeks remedies accordingly. Eastpack denies her claims, and says that her dismissal was justified as she avoided or refused to take the drug test she was required to undergo on two occasions.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Ms Ripeka Baker, and on behalf of Eastpack by Ms Penelope Gibson, Ms Adele Robertson, and Mr Tai Shepherd. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave written and oral closing submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

- (a) Was Ms Baker unjustifiably dismissed?
- (b) If Eastpack's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act;
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Baker that contributed to the situation giving rise to her grievance?

- (d) Should either party contribute to the costs of representation of the other party?

Background

[9] Ms Baker was employed as the Assistant Cool Store Manager at Eastpack's Opotiki site. She was effectively the second in command of the coolstore, and was considered to be in a leadership position by Eastpack.

[10] She had specific training in health and safety matters, and was one of only 10 people at Eastpack's Opotiki site trained and authorised to enter its zero-oxygen cool stores, which required the use of breathing apparatus. There were also naturally other hazards on the site, including forklifts, heavy vehicles, and heavy loads.

[11] Eastpack was aware of these hazards. All staff, including Ms Baker, had provisions in their employment agreement requiring them to submit to random drug testing, and providing that avoiding or refusing to take a drug test would be considered to be serious misconduct, and could result in dismissal.

[12] On Monday 9 August 2021, Ms Baker reported for work at around 7.30 am, and then left to visit another Eastpack site. The drug detection van arrived on site in her absence at 8.04 am, and Ms Baker was selected for random drug testing.

[13] The security cameras on site record Ms Baker returning to site around 9.14 am, driving past the drug detection van to the staff car park. At 9.14 am, Ms Baker rang reception, saying she was at the local service station (when she was actually in the staff car park), and asked for assistance with the work fuel card. At 9.17 am, Ms Baker drove off site again.

[14] At 9.24 am, Ms Baker drove back to site, again driving past the drug detection van.

[15] At between 9.25 and 9.27 am, Ms Baker's manager telephoned her, advising her that she had been selected to undergo a random drug test, and that she should report to the drug detection van for testing.

[16] At 9.27 am, Ms Baker left site again. She says she went to the local café to have breakfast.

[17] Ms Baker had managerial access to the security cameras on site. While off site, she logged in to the camera feed, and viewed the cameras showing the drug detection van.

[18] At 9.41 am, Ms Baker's manager called her to ask when she would be returning to work to take the drug test. She advised that she would not be coming in as she was having breakfast, and was feeling harassed.

[19] The drug detection van left site at 10.01 am. Ms Baker then returned to work, arriving at 10.10 am. She was unable to explain why she took between 43 and 45 minutes off for breakfast in the middle of the morning, or why she returned to site at 9.14, left at 9.17, and then returned again at 9.24 before leaving at 9.27, immediately after being advised by her manager that she needed to report for a random drug test.

[20] In relation to her repeatedly accessing the security cameras, and viewing these for a considerable period of time while off site, Ms Baker said that she was keeping an eye on some contractors, who had come to site that day to perform a job. Mr Shepherd gave evidence that this was not usual procedure, or usually required, and that the job performed by the contractors was a brief one that did not require extensive off-site monitoring.

[21] Ms Baker's manager spoke with her about her missing the random drug test. She agreed with her manager that she would take the required drug test the next time the van was on site.

[22] She was also issued with a letter requiring her to attend a disciplinary meeting to explain her responses to "the allegation that you did not make yourself available for a random drug test", and reminding her that a "failure to attend the appointment" for random testing was a type of serious misconduct as defined in her employment agreement.

[23] The following day, Tuesday 10 August, Ms Baker attended work. There was some discussion about whether she was scheduled to be at work that day, but her evidence is that her manager asked her to come in, and she agreed, with Wednesday being her usual rostered day off.

[24] The drug detection van attended site at 12.30 that day, for reasons unrelated to Ms Baker. Ms Baker's manager asked her to attend the van to complete her random drug test. Ms Baker refused.

[25] At the investigation meeting, there was some discussion about this request. Ms Baker accepts that she did refuse to take the test when asked, on the grounds that she should not have been at work that day, and therefore she did not believe she could have been selected to undergo a random drug test that day.

[26] When questioned, she accepted that she had agreed with her manager less than 24 hours before that she would undergo the random drug test she had been selected for on Monday the next time the drug detection van was on site. However, Ms Baker suggested that this was not then a "random" test, and she had been confused and upset by her manager asking her to undergo a "random" test, which this was not.

[27] Eastpack then commenced a disciplinary process, on the grounds that she had avoided taking a drug test on Monday 9 August, and had refused to take a drug test on Tuesday 10 August. Ms Baker refuted these allegations, saying that she had not been given sufficient time to return to work on the Monday, and that on Tuesday, she could not have been selected for a random test, as she was not supposed to be at work that day.

[28] Ms Baker took a drug test on 23 August, and the results were negative. She points to this in support of her position, despite the intervening time obviously having the potential to influence the results. She acknowledged, both during the disciplinary process and at the investigation meeting, that she should have stayed and taken the drug test on Tuesday 10 August.

[29] In the end, Ms Baker was dismissed for serious misconduct on 30 August 2021. She raises a claim of unjustified dismissal. Ms Baker accepts that Eastpack was entitled in theory to ask her to take a random drug test. However, she says that she did not "avoid" taking a test on Monday 9 August, because she had insufficient time to return to work to take the test when Eastpack's own policy required her to be given 1 hour to complete the test, and she had a reasonable explanation for her accessing of the security cameras over this time period. As for Tuesday 10 August, she accepts that she refused to take the test, but says that this was not a lawful and reasonable instruction, because

she was asked to take a random test, and a random test could not have been scheduled for her day off.

Analysis

[30] Ms Baker accepts that she was employed in a “safety critical” role, and I find that this was in fact the case, after hearing details of Eastpack’s operations and Ms Baker’s duties and responsibilities in particular.

[31] Ms Baker also accepts that her employment agreement accordingly requires her to undergo both random drug testing, and drug testing on a “reasonable cause” basis, and that she consented to this as set out in clause 26 of her employment agreement.

[32] In addition, Eastpack operated a drug and alcohol policy, setting out the details of how such drug testing would occur. The relevant policy is titled the “Drug and Alcohol Management (Procedure)”, (the policy) although I note for the record that Ms Baker was not asked to undergo a test for alcohol, only a drug test.

[33] Relevantly, clause 8.8 of the policy is headed “Serious Misconduct”. It provides:

Where an employee refuses to undergo an alcohol/drug test where their employment agreement provides for this, or they have returned a confirmed positive drug test, or they have failed to provide a sample with the timeframes set out in section 8.11 and 8.12, the refusal, delay and positive result shall be treated as serious misconduct as outlined in the Company Rules.

[34] Clause 8.12 of the policy is headed “Drug Testing Procedure” and provides that:

The Employee shall provide his/her specimen for drug testing within 1 hour from the time the request has been made by the authorised collector. Failure to comply with such timeframes may result in disciplinary action up to and including dismissal (with or without notice).

[35] Ms Baker was fired on the basis that on 9 August, she avoided or delayed undergoing a drug test when it was properly required this of her, and further on 10 August, she refused to undergo a drug test when it was properly required of her.

[36] Looking first at Ms Baker’s actions on 9 August, Eastpack’s position is that she avoided or delayed undergoing a drug test. Ms Baker says that she did not “avoid” a drug test, because she intended to take it, as shown by her telling her manager when he called her that she would take the test after she had had her breakfast, and by her

agreement later that afternoon to undergo the test the next time the drug van was on site.

[37] She also says that she did not delay, because (although she immediately left site when her manager told her that she had been selected for a drug test and did not return until some 43 minutes later once she already knew the drug van had left site) in fact, the policy allowed her 1 hour to take the test, so by returning to site within the allowed hour, she was complying with policy and it was not her fault that the van had already gone.

[38] Eastpack faces the difficulty that they did not comply with their own policy, in that they did not provide Ms Baker with the 1 hour required by the policy within which she could have completed her drug test and fulfilled her own obligations under the policy. Ms Baker was advised by her manager that she had been selected to undergo a random drug test between 9.25 and 9.27 am on 9 August. Therefore, she should have been given until 10.27 to complete the test, before being charged with a breach of her obligations under that policy.

[39] Eastpack witnesses all gave evidence that the drug van left the Eastpack site at 10.01 and that it could not wait for Ms Baker's return. To put it another way, Eastpack chose not to require the van to wait out the 1-hour time period allowed to Ms Baker by Eastpack's own policy. Ms Baker returned to site at 10.10, before her allowed time was up. Eastpack cannot then complain that as a result of its own decision to let the van leave site prior, Ms Baker was not able to take the drug test.

[40] At this point, I pause to note that Eastpack witnesses made no reference to the 1-hour time limit at clause 8.12 of the policy, and seemed surprised by it. They made it clear that Eastpack had no practice of asking the drug van to wait on any absent staff, rather the opposite, that staff were expected to make themselves available promptly so as not to delay the drug van. It is not clear how this practice accords with Eastpack's own policy.

[41] It is also not clear what the policy means when it refers to a "request being made by the authorised collector". The evidence given to me suggested that the authorised collector was, properly viewed, one of the staff members from TTDA who had the responsibility of selecting which Eastpack staff members would be subject to a random test, but in the case of Ms Baker, she was informed that she had been selected for a

random drug test, not by the TTDA staff member who selected her name, but by her manager, and it appears, 1 and a half hours after the drug van had arrived on site. Again, it is far from clear how Ms Baker being informed she had been selected for a random drug test by her manager 1 and a half hours after the van had arrived on site (and therefore, some time after the authorised collector had requested her attend the drug van) complies with this policy.

[42] The court has stated that:

Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their application meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the employer, these should be interpreted and applied strictly¹.

[43] In respect of the events of 9 August 2021, Eastpack did not comply with its own policy, which required Ms Baker to be given 1 hour to complete any required drug test. The TTDA van arrived on site at 8.04 am. It left site at 10.01 am. It was on site for almost 2 hours. This provided ample time for Ms Baker to be notified that she had been selected to undergo a random test. Eastpack chose not to advise her of this until 9.27 am. Eastpack cannot explain why it chose not to either notify Ms Baker earlier or to require the van to wait until the required hour had elapsed, either of which would have ensured compliance with its own policy. Eastpack cannot hold Ms Baker responsible for a breach of policy which it did not allow her to fulfil.

[44] My view is that the events of 9 August 2021 were not sufficient to justify Ms Baker's dismissal in light of Eastpack's failures to fulfil its own obligations.

[45] I must now consider the impact of the events of 10 August 2021.

[46] Ms Baker refused to undergo a drug test on this day. She says that this was because her manager asked her to undergo a "random" drug test, and she did not believe that she could properly be asked to undergo a random test on a day when she was not scheduled to be at work. She says that because her manager used the word "random" she did not connect this request to her agreement with her manager that she would undertake the random drug test she had missed the previous day the next time the drug van visited site.

¹ *Parker v Silver Fern Farms Ltd (No 1)*, [2009] ERNZ 301, at [26].

[47] Ms Baker's advocate supported her position by saying that this was not in fact a random drug test, it was a request that Ms Baker undergo a drug test pursuant to the agreement she had reached with her manager the previous afternoon, that she would take a drug test the next time the drug van visited the site. So, by using the word "random", this was so inaccurate and misleading that Ms Baker was entitled to reject the request, as it was not a lawful and reasonable order.

[48] Ms Baker was not able to give any explanation as to how or why she had somehow forgotten that she had agreed with her manager only the previous afternoon that she would undergo a drug test the next time the drug van visited site, especially in light of the fact that she had also been given a written letter reminding her of her obligations to undergo drug testing, and that refusing or avoiding the test could amount to serious misconduct.

[49] Her evidence that she had not connected her agreement to undergo a (replacement) random drug test with her manager's request that she undergo a random drug test the very next day is not credible, and nor is it credible that she found the use of the word "random" so confusing and misleading that she was entitled to refuse to undergo the test altogether, despite the clear obligations in her employment agreement.

[50] In terms of whether or not Ms Baker was scheduled to be at work that day, there was confusing evidence about whether Ms Baker was supposed to be having either Tuesday or Wednesday of that week off work. However, both parties agreed that Ms Baker's manager had asked her to come to work on Tuesday 10 August, as he was concerned that they might be short-handed, and Ms Baker had agreed to come to work that morning. Accordingly, nothing flows from this.

[51] Eastpack was entitled to require Ms Baker to undertake a random drug test on Monday 9 August 2021. I have found that Eastpack did not give Ms Baker sufficient time to take that test in accordance with its own policy, and therefore her failure to take the test at that time should not be held against her.

[52] Eastpack then quite properly offered Ms Baker the opportunity to take the test at another time. They agreed with her that she could take the required test the next time the opportunity became available to her, that is, the next time the drug testing van visited the work site. Ms Baker was also reminded of her obligations under her employment

agreement by way of a written letter, which included a reference to the possibility of termination of employment.

[53] When Ms Baker was asked to take a drug test the very next day, she then refused to do so. She was given a second chance to take the drug test, agreed that she would do so, and then instead of abiding by her agreement, she actively refused to take the test. She had no good reason for refusal.

[54] Considering Ms Baker's dismissal overall, I find that Eastpack's actions, and how Eastpack acted, were actions that a fair and reasonable employer could have taken in all the circumstances. There was no confusion as to what Eastpack's concerns were – Ms Baker understood that the allegations against her were two-fold, relating to an allegation that she had avoided or delayed taking a drug test on Monday 9 August, and that she had refused to take a drug test on Monday 10 August. She actively engaged with Eastpack, and provided her explanations to both events. Eastpack understood her responses, and found that it did not accept them. Nevertheless, it gave her a final opportunity to provide any further responses before dismissing.

[55] Although I have found that the allegation that Ms Baker avoided or delayed taking a drug test cannot stand when viewed in the context of Eastpack's own policy requirements, I have also found that her refusal to undergo the replacement drug test as she had agreed to do, less than 24 hours later, was a breach of her obligations. Eastpack was entitled to consider her surprising and vehement refusal to be a type of serious misconduct that warranted the ending of the employment relationship, as set out in her employment agreement. The situation was exacerbated as Ms Baker had been reminded of her obligation to make herself available for drug testing both verbally and in writing only the day before, and had agreed that she would do so. In these circumstances, it was open to Eastpack to find her explanation that she had found the reference to a "random" drug test so confusing that she believed she was entitled to refuse to take the test, lacking in credibility and to reject it and end the employment relationship on the basis that it could no longer have trust and confidence in Ms Baker.

Suspension

[56] In her statement of problem, Ms Baker raised a personal grievance claim for unjustified disadvantage in respect of her suspension, which she says was imposed without consultation.

[57] Eastpack states that this claim was raised well outside the 90-day period for raising personal grievance claims set out in section 114 of the Employment Relations Act 2000, as Ms Baker was suspended on pay on 10 August 2021, and suspension was first mentioned in her statement of problem dated 9 September 2022.

[58] Ms Baker raised a personal grievance claim by way of letter on 8 September 2021. Although the letter referred to both “unjustified dismissal and unjustified disadvantage” in the opening paragraph, it then went on to describe only what was said to be a “clear unjustified dismissal claim on both a substantive and procedural basis²”. There was no mention of Ms Baker’s suspension, or even that she had been suspended. Paragraph 9 of the letter stated (it appears incorrectly) that “Ms Baker continued to work”. In light of this, I find that the single reference to an “unjustified disadvantage” without any mention of suspension is insufficient to raise a personal grievance relating to Ms Baker’s suspension. Accordingly, the raising of this as an issue in the Statement of Problem was the first time this matter was raised, and was clearly out of time. No further orders are made.

Other Matters

[59] In legal submissions filed following the investigation meeting, it was suggested that another reason Ms Baker’s dismissal was unjustified was because Mr Shepherd, who conducted the disciplinary process that led to Ms Baker’s dismissal, was not the ultimate decision maker. This was based on verbal evidence from Mr Shepherd that he had consulted with his own boss before arriving at the decision to dismiss Ms Baker.

[60] It was submitted for Ms Baker that, because Mr Shepherd’s own boss could have “over-riden” him, Mr Shepherd was not the true decision-maker, his boss was, and Ms Baker had no opportunity to address this person.

[61] I do not find that this argument is made out. Mr Shepherd conducted the disciplinary process throughout. He gave evidence that he was the person who decided to dismiss Ms Baker, and was present at the investigation meeting to explain his decision. His evidence was that he took advice from his own boss but that the decision was his, and that he took ownership of it. I find nothing improper in these events.

² At paragraph 11 of that letter.

Orders

[62] Ms Baker's claim of unjustified dismissal is not made out. Accordingly, no orders for remedies are made.

Costs

[63] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[64] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[65] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Claire English
Member of the Employment Relations Authority

³ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>