

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 590
3143302

BETWEEN MATHEW GOULSTONE
Applicant

AND No. 1 BLINDS LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Kirsten Westwood, advocate for the Applicant
Suzannah Eagles and Todd Eagles representing the
Respondent

Investigation Meeting: 11 October 2022

Submissions and/or further 11 October 2022 from the Applicant
evidence None from the Respondent

Determination: 14 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Mathew Goulstone, claims that he was unjustifiably dismissed by the Respondent, No 1 Blinds Limited (No 1 Blinds), after he failed a drugs test.

[2] Mr Goulstone also claims that he was unjustifiably disadvantaged by being suspended from employment.

[3] No 1 Blinds denies that Mr Goulstone was unjustifiably dismissed and claims that he was justifiably dismissed following a positive drugs test.

The Authority's investigation

[4] The Authority received oral and written evidence from Mr Goulstone and from his father, Mr Roger Goulstone.

[5] The Authority received no written witness statements from No 1 Blinds, however Ms Eagles and Mr Eagles provided oral evidence.

[6] The start of the investigation was delayed due to Mr Eagles' offensive and aggressive comments and had to be adjourned whilst security was called. Following the adjournment, Mr Eagles agreed to act more appropriately and the meeting was able to continue.

[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.

Issues

[8] The issues requiring investigation are whether or not Mr Goulstone was:

- dismissed by No 1 Blinds?
- unjustifiably disadvantaged by No 1 Blinds suspending him without consultation?

Background

[9] No 1 Blinds supplies and installs residential and commercial blinds. It is a family run business with approximately 20 employees, some of which are long serving. It has two directors, Ms and Mr Eagles, with Ms Eagles dealing with the daily operation of the company.

[10] Mr Goulstone applied for a position at No 1 Blinds after being advised of a possible opening by another employee. He was interviewed by Mr and Ms Eagles and offered a position as a Blinds Manufacturer, although the possibility of him taking on a supervisory role at a later stage in his employment was discussed.

[11] Mr Goulstone was provided with a written employment agreement prior to his employment commencing which he said he had read and signed (the Employment Agreement). The Employment Agreement contained clauses addressing health and safety and drug and alcohol which read;

HEALTH AND SAFETY

General Health and Safety Obligations

- a) Both the Employer and the Employee shall comply with their obligations under current Health & Safety legislation....

- b) The Employee shall immediately notify the Employer:
- Of any occurrence of physical injury to any person (including the Employee) which occurs in the work place or to any other Employee of the Employer elsewhere in the course of employment; and
 - Of any work place hazards of which the Employee becomes aware; and
 - If the Employee is for any reason unable to perform normal duties to a satisfactory and usual standard

Health and Safety Policies

- c)

Client Health & Safety Policies and Requests

- d) ...

Drug and or Alcohol Testing

- e) Where the Employee works on a client site and that client requires anyone working onsite to undertake drug and/or alcohol testing, the Employee is required to comply with the clients request and policy on drug and/or alcohol testing.
- f) Where the Employee works in a safety sensitive zone, the Employer may conduct a random drug and/or alcohol non-intrusive drug test (a urine test) which will be conducted by a suitably qualified agency. The testing process followed will be such as to ensure a safe and accurate test.
- g) Where the Employer has reasonable grounds for suspecting that the Employee is under the influence of illegal drugs and/or alcohol while at work, the Employer may require the Employee to undergo a non-intrusive drug test (a urine test) which will be conducted by a drug testing agency. The testing process followed will be such as to ensure a safe and accurate test.
- h) In deciding whether to conduct a test the Employer shall have regard for any comment by the Employee. On receipt of a non-negative result test the Employer shall discuss the results with the Employee and take into consideration any explanation received before any outcome is decided upon.
- i) Due to the nature of work undertaken by the Employer however, and the importance placed on Health and Safety, being under the influence of drugs while at work will be regarded as serious misconduct and may result in instant dismissal.

[12] There was also a clause addressing suspension which stated:

- h) In the event the Employer wishes to investigate any alleged misconduct, it may, after discussing the proposal of suspension with the employee, and considering the Employee's views, suspend the Employee on pay while the investigation is carried out.

[13] Mr Goulstone commenced employment at No 1 Blinds on 1 November 2020 as a Blinds Manufacturer. This involved him cutting fabric and metal to be used in the blinds, and using a drop saw which was fitted with big safe-guarding bars, and other blades. He confirmed when questioned that the equipment could be hazardous if not used properly.

[14] Mr Goulstone said he enjoyed his job initially and received positive feedback. There had been no performance issues raised with him.

[15] He said on one occasion he had been asked by Ms Eagles to make a complaint against another employee. Ms Eagles confirmed this, explaining that there had been verbal complaints about an employee, and she had said she could not take any action unless a formal complaint was made.

[16] Mr Goulstone said that at the beginning of December 2020 he and his work partner were having some issues with job sheets, some of which were incomplete, and they had requested a meeting with Ms and Mr Eagles.

Meeting 10 December 2020

[17] Ms Eagles said that the meeting held at 7.00 a.m. on 10 December 2020 was an informal one. It was held because she and Mr Eagles had been concerned at a significant delay in manufacturing caused by Mr Goulstone and his partner not carrying out, as instructed, some necessary preparation work connected with a factory move.

[18] She and Mr Eagles had earlier met with Mr Goulstone and his work partner to discuss an impending factory move and the necessity of preparing some blind parts in advance of the move to maintain orders; however the work had not been undertaken despite the instruction and agreement. This delay had cost the business significant loss.

[19] It had been decided to meet with Mr Goulstone and his work partner separately to discuss the situation. The meeting with Mr Goulstone had been held on 10 December 2020.

[20] During the meeting Mr Goulstone said Mr Eagles started swearing and yelling at him, telling him his work performance was not acceptable. He said Mr Eagles had asked him if he was in the right job. A letter recording the meeting dated 15 December 2020 stated:

...

3. Todd Eagles asked if you considered if this was the right job for you as this failure with point 2. above was a significant failure, and as we had been hoping to move you into a more supervisory role within the factory (as per discussions prior to starting your employment with us), we have concerns around how you will manage. When asked what you would do if you were in Todd & Suzie's position your response was "I would probably fire me".

4. Todd Eagles suggested in that case perhaps it would be better for both parties if you looked for a role doing something that you were more interested in. Due to it being so close the Christmas shutdown we did not want you to find yourself without a job so we would continue status quo until such time as you find an alternative job in the New Year. You agreed with this.

5. Suzie Eagles also suggested that if you did want to stay that you go away and think about what you could bring to the role and how you could see things working in the future, what help you might need to get you there and some ideas how we could make this work.

[21] When questioned at the Investigation Meeting, Mr Goulstone confirmed that he probably had responded to Mr Eagles “I would probably fire me” when asked what he would do in their position, and agreed it was possible Ms Eagles had suggested that he give some thought to what No 1 Blinds could do to help him improve his performance.

[22] However, he said he had been too shocked at the concerns raised with his performance and the fact that he might no longer have a position at No 1 Blinds to concentrate on the further discussion.

[23] Mr Eagles and Ms Eagles denied that Mr Eagles had sworn or yelled at Mr Goulstone during the meeting on 10 December 2020. Given Mr Eagles’ behaviour at the commencement of the Investigation Meeting, I accept Mr Goulstone’s evidence on that point as being the more credible and to have explained his inability to concentrate on what was being discussed during the meeting.

[24] After the meeting Mr Goulstone returned to work. Mr Roger Goulstone said that Mr Goulstone had been confused when he returned home that evening about whether or not he still had a job at No 1 Blinds. He advised Mr Goulstone to request minutes of the meeting and to attend for work the following day since he had not been told he had been dismissed.

Events 11 December 2020

[25] Ms Eagles said that in a separate meeting with Mr Goulstone’s work partner on the morning of 11 December 2020, she had assigned the blame for the preparatory work not being carried as being Mr Goulstone’s responsibility. The work partner also told Ms Eagles that she did not like working with Mr Goulstone because he appeared “lost in thought” and “lacked focus” on the job.

[26] What had been said about Mr Goulstone’s behaviour concerned Ms Eagles due to the potential for injury in his work area, and she therefore decided it would be prudent to conduct a random drug test. She consequently arranged for Mr Goulstone to have a drug test as soon as he arrived at work.

[27] Mr Goulstone said Ms Eagles asked him to go with her to have a drugs test when he arrived at work, which he agreed to do. Mr Goulstone said he knew it would be positive.

[28] The urine sample taken had been inconclusive and needed to be sent away for further testing.

[29] Mr Goulstone said Ms Eagles had told him to go home on full pay until the test result was received, which he did. Ms Eagles said she believed sending Mr Goulstone home on full pay had been the appropriate action since she needed to ensure a safe work place for all the employees, including Mr Goulstone.

[30] Ms Eagles sent Mr Goulstone a text message on Monday 14 December 2020 stating:

Hi Mat as we need to give you 24 hours notice for the meeting it will need to be Wednesday morning, unless you prefer to meet sooner. The drug test did come back positive so we need to discuss that. You are welcome to bring a support person to the meeting with you if you wish?

I propose 8.30 am. Wednesday morning if that time suits? Please let me know and I will confirm it with Sarah.

Meeting 16 December 2020

[31] Mr Goulstone attended the meeting with Ms Eagles held on 16 December 2020. Mr Goulstone said that during the meeting he was told that his work partner had made a complaint about him, which was the reason for the drug test.

[32] Ms Eagles showed him the test result and explained that due to the high level of cannabis THC in the test result, the conclusion was that he had been under the influence of drugs at work.

[33] She had asked him for his response and Mr Goulstone said he had told her that while he did use cannabis, he did not use it in the workplace.

[34] He said during the Investigation Meeting that he realised the drug test result was high due to his being a long term user of cannabis but did not think it would affect his performance at work.

[35] Following the meeting Ms Eagles said she met with Mr Eagles to discuss it and it was decided that continuing to employ Mr Goulstone was irresponsible due to the health and safety risks. As a result she wrote to Mr Goulstone confirming the summary termination of his employment in a letter dated 17 December 2020 which stated:

It was brought to my attention last Friday morning (11/12/2020) by another member of staff (...) that they had concerns around your ability to focus and they had on a number of occasions, observed you “lost in thought” and “not fully with it”.

In your role as Blinds Manufacturer, you are expected to operate equipment such as an upcut saw (for cutting metal tubes) and a rollerblade (for cutting fabrics), equipment that if not operated safely and correctly and with due care taken, could cause severe bodily harm to you and others around you. For this reason, I asked you to immediately accompany me to the nearest registered drug testing facility (...) and undergo a drug test without delay, by way of providing a urine sample under the supervision of a registered nurse.

....

When we met 8.30am Wednesday morning (16/12/2020) at 9A Lady Ruby Drive, East Tamaki, I supplied you with a copy of the report outlining that the result was positive for cannabis THC and that the level detected in the sample you provided was 1230 ug/L. The report indicated that there was a cut-off limit for a non-user of 15 ug/L and with a result of over 83 times the upper limit allowable, it would be reasonable to conclude you are a very heavy user of the cannabis drug. You were asked for your response to this test result and you told me that you do use cannabis from time to time but not in the workplace. You had nothing else to add to this.

...

I refer to section 15 (i) of your employment contract:

Drug and Alcohol Testing

- i) **Due to the nature of work undertaken by the Employer however, and the importance placed on Health & Safety, being under the influence of drugs while at work will be regarded as serious misconduct and may result in instant dismissal.**

The nature of your role requires you to operate machinery that has the potential to cause serious harm. With that in mind and the excessively high level of cannabis THC detected in your urine sample, a drug known to impede mental sharpness, it would be irresponsible of me, as your employer, to allow you to continue in this role. I am therefore terminating your employment for gross misconduct as of today Thursday 17th December 2020 under the above provision. ...

[36] On 24 December 2020 Mr Goulstone raised a personal grievance.

Was Mr Goulstone unjustifiably dismissed by No 1 Blinds?

[37] Mr Goulstone was dismissed by No 1 Blinds on 17 December 2020.

[38] Justification for dismissal is set out in s 103A of the Act. The Test of justification as set out in s 103A of the Act states:

- (3) In applying the test, the Authority must consider-
- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
 - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
- (a) minor; and
 - (b) did not result in the employee being treated unfairly.

[39] A dismissal must be justifiable on both substantive and procedural grounds.

[40] Mr Goulstone had received a copy of the Employment Agreement before the commencement of his employment. He confirmed that he had read and understood it. Mr Goulstone worked in an area where he was required to use cutting blades and saws. There is no dispute that this was a safety sensitive area with the employees receiving training on how to operate the equipment safely.

[41] In accordance with the Health and Safety and Drug and Alcohol Testing provisions in the Employment Agreement, No 1 Blinds was entitled to conduct random drug tests when the employee worked in a safety sensitive area. The Employment Agreement also stated that being under the influence of drugs at work would be regarded as serious misconduct and could result in summary dismissal.

[42] The result of the drug test indicated an extremely high level of cannabis at the time Mr Goulstone was tested. Mr Goulstone confirmed he worked in a safety sensitive zone using potentially hazardous equipment. I find that No 1 Blinds had substantive justification for terminating his employment.

[43] What Ms Eagles had been told by Mr Goulstone's work partner gave her cause for concern that there might be a risk associated with Mr Goulstone working in a safety sensitive zone and she took him for a random drug test. The Employment Agreement provisions gave No 1 Blinds the right to conduct a random drug test on these grounds.

[44] As set out in the provisions in the Employment Agreement, I find that Mr Goulstone was aware that No 1 Blinds had the right to conduct random drug tests where the employee worked in a safety sensitive zone.

[45] In accordance with the provisions in the Employment Agreement, No 1 Blinds was required to have regard to any comment made by Mr Goulstone about whether to conduct a test. There is no evidence that this occurred, however I note that Mr Goulstone raised no objection to having the drug test despite his evidence that he suspected it would be positive.

[46] The drug test ensuing result was positive, and at such a level as to indicate that at the time of the test, Mr Goulstone had been a significant level above the upper level permissible.

[47] On that basis I find that the conclusion reached by No 1 Blinds that Mr Goulstone had been under the influence of illegal drugs while at work was reasonable.

[48] The text message sent to Mr Goulstone on 14 December 2020 did not refer specifically to dismissal being a possible outcome of the proposed meeting. I consider that this was a flaw in the process. I note that No 1 Blinds is a small employer, and having regard to the resources of the employer, I find this was a minor flaw which did not result in any unfairness to Mr Goulstone.

[49] This is because the text message advised that the drug test was positive and Mr Goulstone was aware from the Employment Agreement that being found to be under the influence of drugs at work was considered to be serious misconduct, which could result in summary termination for serious misconduct.

[50] Pursuant to the Drug and Alcohol Testing provisions in the Employment Agreement, No 1 Blinds was required to discuss the results with Mr Goulstone and take his explanation into account before confirming the outcome. This took place at the meeting held on 16 December 2020 when Mr Goulstone confirmed he did use cannabis, but not in the workplace.

[51] No 1 Blinds considered that in view of the test result and Mr Goulstone's confirmation that he used cannabis, this constituted serious misconduct and could result in summary dismissal. I find this was a view it was entitled to take.

[52] No 1 Blinds is a small employer with no human resources advice available to it. I find that although there were flaws in the process, I consider these were minor and did not result in any unfairness to Mr Goulstone.

[53] I determine that Mr Goulstone was not unjustifiably dismissed by No 1 Blinds.

Was Mr Goulstone unjustifiably disadvantaged by No 1 Blinds suspending him?

[54] Mr Goulstone was suspended on 11 December 2020 by No 1 Blinds after the drug test. At the time the positive result had not been received and the test was inconclusive.

[55] In accordance with the Employment Agreement, Ms Eagles was required to discuss the proposed suspension with Mr Goulstone and consider his views prior to suspending him.

[56] Mr Goulstone said there was no discussion, Ms Eagles just told him to go home until the test result was received. Ms Eagles confirmed that she did not ask Mr Goulstone for his view about whether or not he should be sent home because she believed it was the safe thing to do.

[57] I find that Ms Eagles' failure to discuss the proposal of suspension prior to implementing it was a breach of the Employment Agreement and disadvantaged Mr Goulstone.

[58] Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[59] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which....
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[60] Not acting in accordance with the provisions of the Employment Agreement and discussing the proposal of suspension with Mr Goulstone prior to implementation was an unjustifiable act by No 1 Blinds.

[61] Mr Goulstone was sent home on full pay, so there was no remuneration loss. However, Mr Roger Goulstone's evidence was that the whole process from the initial meeting on 10 December 2020 onwards had affected Mr Goulstone's well-being resulting in a level of distress.

[62] I find that the suspension without consultation added to Mr Goulstone's level of distress and as such, affected Mr Goulstone terms and conditions of employment to his disadvantage.

[63] I determine that Mr Goulstone was unjustifiably disadvantaged by No 1 Blinds.

Remedies

[64] Mr Goulstone was unjustifiably disadvantaged by being suspended without consultation by No 1 Blinds.

[65] Although the period of time was short, I find that Mr Goulstone suffered hurt and humiliation in respect of the failure to consult with him prior to the suspension.

[66] **No 1 Blinds is ordered to pay Mr Goulstone the sum of \$500.00 as compensation pursuant to s 123(1)(c)(i) of the Act.**

Costs

[67] I consider this an appropriate case for costs to lie where they fall.

[68] However should costs be sought the Applicant 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 Respondent 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.

[69] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[70] 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.¹

Eleanor Robinson
Member of the Employment Relations Authority

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].