

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 196
5356653

BETWEEN DAVID HAGGER
 Applicant

AND CENTREPORT LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Peter Cranney, counsel for Applicant
 Michael Quigg, counsel for Respondent

Investigation Meeting: 11 and 14 November 2011

Determination: 29 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem lodged in the Authority on 13 September 2011, the applicant, Mr David Hagger, sought to have a personal grievance of unjustified dismissal resolved.

[2] He asked the Authority to declare his dismissal by the respondent, CentrePort Ltd, to be unjustifiable and make orders reinstating him to his former employment, reimbursing him for lost wages and compensating him for hurt feelings, humiliation and distress.

[3] The parties attended mediation but were not able to settle the claim. Mr Hagger withdrew an application for interim reinstatement after an early substantive hearing was provided by the Authority.

[4] At the investigation meeting on 11 November the Authority heard the evidence of Mr Hagger, witnesses supporting him and two managers employed by CentrePort.

[5] Mr Hagger was employed at the Port of Wellington for 19 years, 15 of those as a foreman. On Wednesday 3 August 2011, after arriving at work in the morning, he submitted to a urine test. The result was positive for THC (tetrahydrocannabinol). THC Acid is found in the body when cannabis has been taken. Mr Hagger's level was 59 ng/mL (nanograms per millilitre), which is nearly four times higher than the minimum set by CentrePort for a positive test.

[6] CentrePort's workplace is a hazardous one and employees are prohibited from being there impaired by, or under the influence of, drugs or alcohol. The widely accepted finding of experts is that the use of drugs such as cannabis affects cognitive abilities, in particular by slowing reaction times and information processing, and impairs perceptual motor co-ordination, motor performance, short-term memory and attention, and also slows perception of time.

[7] Written Drug & Alcohol Procedures are applied by CentrePort in its workplace. They have been published with a stated objective to;

- *Maintain a focus on eliminating the unacceptable risks that drug & alcohol use brings to the workplace.*

[8] A Drug & Alcohol policy is also applied across all CentrePort workplaces to improve safety and reduce the likelihood of impairment. It strictly prohibits;

- *Reporting to work, or being at work under the influence of alcohol or drugs.*

[9] As well, CentrePort has a Code of Conduct & Business Standards in which serious misconduct is defined. Included is;

Serious Misconduct which may result in Instant Dismissal

3. *Alcohol and Drugs: Consuming, possessing or supplying alcohol or drugs on Company premises, or testing positive for alcohol or drugs, ...*

[10] As Mr Hagger had tested positive for drugs, to CentrePort serious misconduct seemed at first sight to have been committed by him. A disciplinary inquiry was commenced in the course of which Mr Hagger gave an explanation, which was supported by witnesses who took part in the inquiry, that the drugs tested in him had been consumed several days before the test at a birthday party where he ate some cake which, unknown to him at the time, had been laced with marijuana.

[11] The outcome of a formal employment investigation meeting was confirmed to Mr Hagger in a letter written on 24 August by Mr Raymond Kearns, Operations Manager of CentrePort. Mr Kearns wrote:

On the basis that you tested positive for drugs, in that your urine sample obtained on 3 August 2011 produced a THC Acid level of 59 ng/mL, it appeared that you were guilty of serious misconduct. However, in accordance with the Investigation Procedure set out in CentrePort's Code of Conduct, you were, at our meeting on 17 August, provided with an opportunity to give an explanation.

[12] Mr Kearns went on in his letter to refer to the explanation given by Mr Hagger that he had eaten banana cake without knowing that it contained marijuana. Mr Kearns also referred to Mr Hagger's explanation that as he had been intoxicated by alcohol at the time, he had been able to eat several slices of the cake without realising drugs were in it.

[13] Mr Kearns advised Mr Hagger of his conclusion that serious misconduct had been proven, expressing three reasons for this: (1) the positive drug test capable of amounting to serious misconduct; (2) the safety-sensitive workplace of CentrePort, which cast onerous obligations on the company under the Health and Safety in Employment Act; and (3):

- *I have considered your statement and that of your representative that you consumed marijuana in a banana cake on the weekend of 30 July 2011 in circumstances beyond your control. However, taking everything into account, this explanation is not sufficient to cause me to find that serious misconduct did not occur.*

[14] Mr Kearns invited Mr Hagger to a further meeting at which CentrePort intended to consider immediately dismissing him from employment for three reasons;

- *Serous misconduct has been found to have occurred;*
- *You were issued with a written warning on 1 October 2010 for testing positive for alcohol or drugs, which remains current; and*
- *You were issued with a final written warning on 8 December 2010 ... which also remains current.*

[15] Mr Kearns advised that the purpose of the meeting was to give Mr Hagger an opportunity to comment on the disciplinary action proposed to be taken and allow him to raise any matters he wished to have taken into account before his punishment was finally decided upon.

[16] The meeting, which took place on 31 August, was attended by Mr Hagger's solicitor, Mr Cranney, representatives of his union and two witnesses. Although the witnesses confirmed that there had been a birthday party attended by Mr Hagger and that a marijuana laced banana cake had been eaten at the party, the finding of serious misconduct was again made. Although offered the opportunity to do so, Mr Hagger did not comment on the proposal to impose summary dismissal as the penalty for the misconduct.

[17] A contentious issue arose during the meeting when Mr Stephen Harris, General Manager of Port Operations at CentrePort who was conducting it, was asked to say whether or not he believed Mr Hagger's explanation for having the drugs tested to be in his body. Mr Harris declined to answer directly. In his evidence to the Authority, he explained his response as follows:

I didn't consider the issue was whether or not Mr Hagger was telling an outright lie. Instead it was whether Mr Hagger's explanation was plausible, and whether Mr Hagger had put himself in a position he shouldn't have been in. This was all in the context of a person in a leadership role and who was already on a written warning, a final written warning and a drug and alcohol rehabilitation contract.

[18] The meeting was again adjourned for CentrePort to consider whether summary dismissal was the appropriate penalty. When the meeting resumed Mr Harris advised Mr Hagger that he would be immediately dismissed. This was confirmed in writing on 2 September 2011. In response Mr Hagger immediately raised a personal grievance.

Test of justification

[19] In considering Mr Hagger's claim of unjustified dismissal, the starting point for the Authority must be s 103A of the Employment Relations Act 2000, which provides the test of justification in relation to dismissal or other action taken by an employer.

[20] The test applicable to the circumstances of this case, is:

(2) *... whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[21] Justification is to be determined, as required by subsection (1), on an objective basis. In applying the test the Authority is required to consider factors expressly described in subsection (3) of s 103A, and any other factors it thinks appropriate. The section also provides that a dismissal or an action must not be determined to be unjustifiable solely because of defects in the process followed by the employer, if the defects were minor and did not result in the employee being treated unfairly.

[22] A major issue in relation to justification in this case is whether the employer, in dismissing Mr Hagger for serious misconduct, had been required to state whether it believed or disbelieved the account of events he gave to explain why, despite appearances, serious misconduct had not been committed.

[23] To some extent it is an issue about the scrutiny or review during a disciplinary investigation that an employer is able to be subjected to by the employee under investigation. Was Mr Harris required to answer the question when asked whether he believed or disbelieved Mr Hagger? The employers actions, or how it acted, are its response to circumstances it has investigated in a disciplinary enquiry. One important circumstance is the explanation the employee has given for his involvement in the matter being investigated. The circumstances may leave it open to a fair and reasonable employer to reject an explanation, without any requirement for the employer to identify who or what it believes or disbelieves. In this case it is quite clear that CentrePort did in fact reach a conclusion about Mr Hagger's conduct.

[24] Overall the issue for the Authority remains whether CentrePort's actions and how CentrePort acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This is not to be answered by the Authority deciding what conclusion it could come to on the evidence given during its investigation, but is to be answered by considering whether the conclusion reached by CentrePort was one an employer acting fairly and reasonably was able to reach.

[25] For CentrePort, counsel Mr Quigg made extensive submissions about the nature and scope of an employer's disciplinary investigation and also the test of justification, particularly having regard to the amendment made from 1 April 2011 when the word "could" was substituted for "would". The refocused test is now a less constraining one, allowing employers greater leeway to lawfully dismiss or take other action against employees.

[26] The Employment Court in its recent *Angus and McKean* decisions ([2011] NZEmpC 125 and 128) has viewed the intention of the amendment as being to make it easier for employers to justify dismissals.

[27] As Mr Quigg pointed out, it is well established law that where an employer believes serious misconduct may have occurred it must fully and fairly investigate its concerns but it does not need to prove that serious misconduct occurred. He quoted the following from the decision in *W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448 at 457:

[32] *The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.*

[28] Similar observations were made by the Court in *Whanganui College Board of Trustees v. Lewis* [2000] 1 ERNZ 397 at 403:

[20] *The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a Court or Tribunal that the dismissal was justified. The first does not involve any standard of proof, the second does.*

[29] Also in the judgment is an observation by the Court that, in ascertaining the facts, the employer may be presented with conflicting accounts in respect of which, acting reasonably, the employer will be entitled to accept some in preference to others. When required to justify a dismissal, an employer will need to show “that both the course taken to ascertain the facts and the determination that they warranted dismissal were reasonable”. That is to be shown on the standard of proof of the balance of probabilities flexibly applied according to the gravity of the dismissal in the circumstances.

[30] Mr Quigg also referred to the well known Court of Appeal decision in *Airline Stewards and Hostesses of New Zealand IUOW v. Air New Zealand Ltd* (1990) ERNZ Sel Cas 985. The following passage in particular is relevant to the issue in this case:

The employer must have more than mere suspicion but need not have proof beyond reasonable doubt of an actual offence by the employee. Good working relations depend on loyalty and confidence, both ways as between employer and employee ... What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer

could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault. Obviously, the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.

[31] I find that a fair and reasonable employer relying on a testing regime provided by an agency such as ESR, which gave a result that was not disputed by Mr Hagger in any event, could at first sight regard the 3 August test as providing proof that serious misconduct had occurred. A final conclusion about that was not reached however, until after Mr Hagger had been given a full opportunity to explain why THC Acid had been present in his body at the level tested.

[32] I find that Mr Hagger was provided by CentrePort with an unrestricted opportunity to answer the complaint of serious misconduct made against him. This is amply demonstrated by the preparedness CentrePort showed to take a step back on 31 August at a meeting intended for him to be heard about summary dismissal as the punishment for his conduct. He was allowed to present further information going to his explanation that he was innocent of serious misconduct. The employer, I find, did set aside its conclusion of serious misconduct and listened to the witnesses who attended in support of Mr Hagger to confirm his explanation that a marijuana-laced cake had been provided for guests to eat at the birthday party.

[33] After hearing and considering the explanations, Mr Harris, as Mr Kearns had done previously, remained strongly sceptical of the claim by Mr Hagger that he had not realised he was consuming drugs when eating the marijuana-laced cake. The implausibility he considered that lay in the explanation arose from a combination of circumstances, including the claim by Mr Hagger that he was not aware, from his senses or reactions, that he was consuming cannabis when eating the cake. It was a relevant circumstance in this case that Mr Hagger had previously been a habitual user of cannabis, a fact known to CentrePort which had placed him on a rehabilitation programme at the end of 2010 after he had tested positive following a serious accident at work.

[34] The rehabilitation that Mr Hagger had been undergoing for drug taking and previously for alcohol consumption was also part of the surrounding circumstances

from which CentrePort was entitled to assess the plausibility of Mr Hagger's explanation.

[35] CentrePort considered that if Mr Hagger had eaten, as he said, three or four slices of the cake, then he had probably consumed enough to experience the cannabis in it and to become aware that he was affected by it. Presumably the baker of the cake had intended it to be enjoyed for the unusual ingredient added to it.

[36] To begin with Mr Hagger explained he had been intoxicated at the party and was not able to distinguish his experience of the cannabis as different or additional to experiencing the alcohol he drank. CentrePort considered Mr Hagger had subsequently changed that story by suggesting that he had only had a small quantity of beer to drink, or just a few beers.

[37] It is not necessary for the Authority to draw any inference that CentrePort disbelieved the two witnesses who attended in support of Mr Hagger. Their information tended to confirm that there had been a marijuana-laced cake at the birthday party and that Mr Hagger had consumed some of it. The issue seemed to be whether Mr Hagger knew that he was consuming cannabis at the same time as he was eating the cake, so that at a certain point when he continued eating it the conclusion could be drawn that he had intended to consume the drug it contained.

[38] I accept that CentrePort did have reasons for its rejection of Mr Hagger's explanation and that it told him what those were. Mr Harris gave evidence of observations he had made to Mr Hagger and his representative Mr Cranney at the meeting on 31 August. I accept that in the same or similar words he expressed the following which was set out at para. 52 of Mr Harris' witness statement;

Originally Mr Hagger said that he had no knowledge of the cannabis in the cake, and only after the failed drug test on 3 August 2011 did he do any research. Only then did he find out about there being cannabis in the cake which he had eaten several slices of.

Ms Hagger had originally said that he was intoxicated. He was now saying that he had only had a couple of beers.

Mr Hagger's witnesses said that people were talking about the "infamous cake", and Ms Lyttle said she drove several people home who were affected by the cake, yet Mr Hagger apparently knew nothing of this until 3 August 2011.

Although some of his witnesses were immediately affected by the cake despite having only one slice and having been drinking, and although Mr Hagger was

a former regular cannabis user, he had several slices but said that he noticed no effects.

As well as these issues which went to the plausibility of Mr Hagger's account, I was also concerned about his responsibility and accountability given that he worked in a safety-sensitive area, given that CentrePort has drug policies, given he was in a leadership role, and given that that he was under a drug rehabilitation contract. I noted that Mr Hagger had initially advised that he was too intoxicated to know he was eating laced cake. In doing so, he was putting himself in a situation where he was at risk. Mr Hagger had a responsibility not to put himself in harm's way.

[39] It is clear that safety was and had to be paramount to CentrePort in the operation run by it. The disciplinary investigation must also be looked at against the particular circumstances that the nature of the misconduct alleged against Mr Hagger raised the employer's concerns about safety in its workplace. Mr Hagger was in a leadership role as a foreman and worked in a safety-sensitive area, at times with heavy machinery.

[40] The employer needed to have confidence in its employees that they would observe all safety requirements, including the prohibition against presenting for work while impaired or influenced by drugs or alcohol. In turn CentrePort could not be seen to in any way condone breaches of safety and could take disciplinary action justifiably to demonstrate its intolerance of lapses in safety requirements.

[41] Although CentrePort had offered Mr Hagger an opportunity to address the dismissal action proposed, and although Mr Hagger did not take up the opportunity, CentrePort nevertheless, I find, considered relevant matters such as his long service, along with adverse matters such as his previous positive test, breach of safety requirements and the warnings he had been given, in concluding that summary dismissal was a response open to it for the misconduct. The 1 April amendment to the Employment Relations Act at s 103A recognises that there is a range of fair and reasonable responses open to an employer to make in any situation where it has reasonable grounds for believing, and it does believe, that serious misconduct has taken place.

Determination

[42] CentrePort made it clear to Mr Hagger that his explanation was not regarded as reasonable or probable. I find that CentrePort's assessment of Mr Hagger's conduct was one that in the circumstances a fair and reasonable employer was able to

make. It is not for the Authority to weigh up all the information again and make a decision that was the employer's to make justifiably.

[43] Applying the test of s 103A, the Authority is satisfied that the summary dismissal of Mr Hagger was justified.

Costs

[44] Costs are reserved. If the parties, through their representatives, cannot settle costs, CentrePort may apply for an order within 14 days of the date of this determination, and Mr Hagger shall have a further 14 days in which to reply.

A Dumbleton
Member of the Employment Relations Authority