Employment Court of New Zealand

Hayllar v The Goodtime Food Company Limited [2012] NZEmpC 153 (6 September 2012)

Last Updated: 17 September 2012

IN THE EMPLOYMENT COURT WELLINGTON

[2012] NZEmpC 153

WRC 28/11

WRC 29/11

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN LEITH HAYLLAR First Plaintiff

AND ANDRE MATENE Second Plaintiff

AND THE GOODTIME FOOD COMPANY LIMITED

Defendant

Hearing: 26, 27 and 28 March 2012 (Heard at Hastings)

Appearances: Alan Cressey, counsel for the plaintiffs

Gary Tayler, advocate for the defendant

Judgment: 6 September 2012

JUDGMENT OF JUDGE A D FORD

Introduction

[1] In a determination1 dated 22 September 2011, the Employment Relations Authority (the Authority) ordered the removal of the plaintiffs' employment relationship problems in their entirety for hearing at first instance in this Court without the Authority investigating them. The Authority ordered the removal at the

request of counsel for the plaintiffs. In doing so it stated that the case involved

1 [2011] NZERA Wellington 148.

questions of law which were "very important in terms of the operation of drug and

alcohol policies".2

[2] In a minute dated 30 November 2011, Chief Judge Colgan ordered by consent that the separate personal grievances would be heard together, "because the essential issues for which they have been removed to the Court are the same in each case, although the circumstances of the individual plaintiffs differ."

[3] The first plaintiff, Mr Leigh Hayllar, claims that he was unjustifiably dismissed by the defendant on 4 August 2010 after being required to undergo a drugs test on 13 July 2010 which returned a positive result for cannabis use. The second plaintiff,

Mr Andre Matene, claims that he was unjustifiably dismissed by the defendant on 13 August 2010 after being required to undergo a drugs test on

10 August 2010 which returned a positive result for cannabis use.

[4] In each case, the drugs test resulting in the dismissal was a second test. Mr Hayllar had undergone a drugs test on 18 March 2010 which had returned a positive result for cannabis use and Mr Matene had undergone an earlier test on

30 April 2010 which had also returned a positive result for cannabinoids.

[5] In its statement of defence, the defendant denies the allegations made by the plaintiffs and pleads in relation to both claims that the plaintiffs were justifiably dismissed for breaching their rehabilitation contracts "knowing the consequences." Alternatively, it is pleaded that the plaintiffs' contributory fault disentitled them to any remedies and as a further alternative, it is pleaded that failing a finding of contributory fault, the plaintiffs "should not as a matter of equity and good conscience" be awarded any remedies.

Background

[6] The defendant company (Goodtime) is a bakery based at Napier. The majority shareholder and managing director is Mr Phil Pollett. The company which

at the date of the hearing had 50 employees has been in business for 34 years.

2 [2011] NZERA Wellington 149 at [12].

[7] Mr Hayllar, who is 30 years of age, commenced working for Goodtime on

1 November 2006 as a baker. He and his partner have two children, a boy aged seven and a girl aged four. In August 2008, Mr Hayllar was promoted to leading hand. The terms and conditions of his employment were set out in a written individual employment agreement dated 12 August 2008. It does not appear that there was any earlier written employment agreement. As leading hand, Mr Hayllar was responsible for running the pastry pie line. In that capacity he supervised approximately 10 staff.

[8] Mr Matene is 34 years of age. He commenced working for Goodtime on

3 November 2008 as a baker. He and his partner have a young son. The terms and conditions of Mr Matene's employment were set out in a written individual employment agreement dated 31 October 2008.

[9] In about March or April 2007, Goodtime introduced a drugs and alcohol policy (the drugs policy) for its workforce. The policy did not provide for random testing but testing for reasonable cause. Rather confusingly, the phrase "reasonable cause testing" appears to have two definitions. On page 1, in the introductory part of the drugs policy, which is meant to contain the manager's signature, the definition reads:

Reasonable Cause Testing

Employees may be tested for the presence of drugs or alcohol where their

actions, appearance, behaviour or conduct suggests drugs or alcohol may be impacting on their ability to work effectively and safely

Then in cl 8 of the body of the drugs policy, the definition reads:

8. REASONABLE CAUSE TESTING

An employee may be tested for drugs/alcohol where the employee's appearance, actions, or behaviour suggest that they may be affected by drugs/alcohol.

There is no explanation provided for the different definitions.

[10] At this point it is necessary for me to explain more about the pleadings and the referral by the Authority. In identifying the important questions of law which formed the basis of its decision to remove both matters to the Court for hearing and

determination, the Authority noted that the plaintiffs' application had "identified no less than 17 alleged questions of law, or factors that might give rise to removal under the public interest and urgency grounds."3 It went on to state:

[10] I agree with Mr Cressey that there are important questions of law here because the Court will be able to provide guidance to employers and employees about how drug testing should be implemented. In particular, it is an important issue as whether or not an employer such as Good Time Foods must prove, by calling direct evidence, that all aspects of the drugs policy, including all employee safeguards, were complied with and whether, if an employer fails to provide proper and

adequate training and education as specified by its policies, the policies remain valid and enforceable. Of lesser significance, but also a potentially important question of law, is whether, if an employee is requested to undergo a drugs test, the employer is required to disclose the basis for that request (including any evidence on which it is based) and provide the employee with an opportunity to comment before any such request is made. All are central issues in the determination of these cases.

[11] In his submissions, Mr Cressey, counsel for the plaintiffs, elaborated on a number of allegations made in the respective statements of claim about the introduction and operation of the drugs policy. It is alleged that the drugs policy was introduced by Goodtime in April 2007 via the company's Policy Manual as a "lawful and reasonable instruction" but it had not been accepted by the plaintiffs and, therefore, had never become a contractual term of their employment. It is also alleged that in breach of its obligations under the drugs policy, the defendant failed to provide an educational programme and training in recognition of drug and alcohol misuse. Another allegation is that the drugs policy "lay unused and abandoned" between its introduction on 13 April 2007 and 18 March 2010 when Mr Hayllar was tested for the first time and that the defendant had an obligation to advise staff before its implementation. There are also allegations made about the conduct of the first drugs test each plaintiff was required to undergo and it is pleaded that the tests were "unfair and unjustified" because, inter alia, the decision to carry them out had been "pre-determined".

[12] The difficulty with the pleadings and submissions relating to these matters is that they deal with issues which are not part of the unjustified dismissal grievance

before the Court. As the Court of Appeal noted in *Waikato District Health Board v*

3 [2011] NZERA Wellington 149 at [5].

Clear,4 s 114(1) of the Employment Relations Act 2000 (the Act) provides that a personal grievance must be raised within 90 days from the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee and, without the consent of the employer or leave from the Authority or the Court, there is no jurisdiction to determine an alleged personal grievance occurring prior to the limitation cut-off date.

[13] It was not pleaded or claimed in submissions that the earlier complaints were so related to the second drugs tests and the dismissals in August 2010 that they constituted one related and continuous cause of action or course of related conduct so as to bring them within the limitation period in terms of the observations made by Chief Judge Colgan in *Premier Events Group Ltd v Beattie (No 3)*.5 In any event, I would not have upheld any such submission. The statement of problem before the Authority, which was the matter transferred to this Court pursuant to s 178 of the Employment Relations Act 2000 (the Act), related solely to the alleged unjustified

dismissals in August 2010 which in turn were based on the second drugs tests. The second drugs tests were in themselves discrete events which broke the chain of causation between the earlier alleged grievances or complaints and the dismissals. Significantly, no disadvantage grievance was raised by either plaintiff in relation to the first drugs tests. In any event, I am satisfied on the facts that the defendant's drugs policy was validly introduced and was binding on both plaintiffs. The evidence was that Mr Hayllar was on Goodtime's Health and Safety Committee in

2007 when the committee introduced the drugs policy. Although I accept that more could have been done to draw Mr Matene's attention to the drugs policy when he commenced his employment with Goodtime, for reasons I expand on later, I am satisfied that he was fully aware that the policy was in place prior to being required to undergo his first test.

[14] The Court of Appeal in *Clear*6 did appear to accept a submission from counsel that it is perfectly proper for this Court to take into account the factual

context leading up to the time at which the action alleged to comprise the personal

4 [2010] NZCA 305 at [30].

5 [2012] NZEmpC 79 at [20].

grievance occurred. This scenario was explained by Chief Judge Colgan in *Coy v*

*Commissioner of Police (No 3)*7 in these terms:8

... although the legislation places time limits on what events may be actionable by an employee bringing a personal grievance, earlier events may nevertheless inform the Court of relevant background to those which are sued on. So there is a balance to be struck between not permitting every complaint or grievance that may have occurred over sometimes very lengthy employment being litigated or relitigated, on the one hand, and, on the other, allowing the Court to understand the context in which the justiciable grievances occurred by reference to earlier events.

[15] It is in this latter context that I now pass to consider the circumstances surrounding the two drug tests. For convenience, I will deal in turn with the different circumstances relating to each plaintiff.

Mr Hayllar

The first drugs test

[16] In relation to his first drugs test, Mr Hayllar told the Court about a deterioration in the early part of 2009 in his relationship with the production supervisor, Ms Lillian Kinder. It is not necessary for me to go into the details of the specific incidents Mr Hayllar described which gave rise to his difficulties with Ms Kinder. Suffice it to say that he alleged that he complained to Mr Pollett about her conduct on a number of occasions and, in the words of the witness, "nothing was ever done about it, no doubt because she was his de-facto partner."

[17] Mr Hayllar said in evidence that on 18 March 2010 he was asked by Ms Kinder to attend a meeting with her and Mr Pollett to help him *"further [my] training into being a better Team Leader"*. He continued:

26. I attended the meeting as requested. Present were Phil, Lillian and myself. At the meeting, Phil claimed that I had *"extensive mood swings"* and asked me if I did drugs. I freely admitted that I smoked cannabis. Phil then required me to undergo a 'reasonable cause' drugs test. I asked why and Phil said that it was because of my mood swings. I said that my 'mood swings' were because of the problems I continued to have with Lillian which I had raised with him on numerous occasions in the past. I also said that it was because of the working conditions, including the unavailability of raw materials, the use of incorrect ingredients in products, the changing of daily tallies

7 [2010] NZEmpC 103, [2010] ERNZ 302.

without my knowledge, and the lack of management support. Phil and

Lillian rejected this and said that the problem was drugs.

[18] Immediately after the meeting, Mr Hayllar was required to accompany Mr Pollett to the Carlyle Medical Centre to undergo a drugs test. He told the Court that, after undergoing his drugs test, he returned to work and continued working as normal. He said that he was given a copy of pages 8 and 9 of the drugs policy. In evidence that was not challenged, Mr Hayllar described what happened next:

37. When I got home that night, I read pages 8 & 9 and noted that it stated at clause 7.3 f that, after undergoing a drugs test, I was to be *"remove[ed] ... From the employment site on full pay until the test results [were] available."* Prior to work the next day, I phoned Lillian and queried her about this. She advised that it didn't apply because I was *"not a health and safety risk"* and that she *"did not think that I was coming to work under the influence of marijuana or any other drugs"*. She told me to report for work. I found this confusing and asked for Phil's number so I could query this with him. I subsequently phoned Phil and he gave me the same response - that I was "not a health and safety risk" and that I was required to report for work as normal.

38. I therefore reported for work and continued working as normal until my test results came through.

[19] Mr Hayllar was informed of the drugs test results by Mr Pollett at a meeting on 29 April 2010. Mr Pollett showed him a "Urine Drug Test Report" from the ESR. The report recorded that the urine sample taken on 18 March 2010 had been analysed and returned a positive result for cannabis use at a THC-Acid level of >300 nanograms per millilitre. The report stated that the relevant cut-off level was "at or above 15 nanograms THC-Acid per millilitre." Minutes taken of the meeting on

29 April record that Mr Hayllar said that he knew he was going to fail the drugs test because he had been a long time casual smoker (12 years) but the minutes state: "He's never come to work under the influence".

[20] After the meeting, Mr Pollett sent Mr Hayllar a final written warning dated

5 May 2010 which stated in part:

This warning will be effective for 12 months from the date of this letter and we remind you that if we have cause for disciplinary sanction for any reason, not just a repetition of this matter, we may decide to terminate your employment.

We trust you will take this matter seriously and remind you that in the meeting we offered you a Drug Rehabilitation program which we sincerely hope you will take the opportunity to attend.

The rehabilitation programme

[21] Mr Hayllar told the Court how the drug rehabilitation programme had been raised at the meeting on 29 April 2010:

43. Phil then told me that, as per the Policy, I had to undergo drug rehabilitation and that if I refused to do so, I would be disciplined and would most likely would (sic) lose my job. He told me that I would have to attend Wellesley Medical Centre's Drug and Alcohol Rehabilitation program, but that it could take a while for the paper work to be processed. Phil also said that Goodtime had never been through the process before. Under threat of losing my job, I agreed to attend rehabilitation.

[22] Mr Hayllar said that there was a delay in his commencing the rehabilitation programme because Ms Kinder refused to grant him leave to attend due to staff shortages. Ms Kinder was not called as a witness to refute that statement and I therefore accept what Mr Hayllar said. At that point in his evidence, Mr Hayllar referred to a document which assumed significant importance as the hearing progressed. It was a document attached as Schedule D to the defendant's drugs policy headed, "Drug & Alcohol Rehabilitation Contract Goodtime" (the rehabilitation contract). The rehabilitation contract was made between Goodtime and Mr Hayllar and is dated 26 May 2010. As it was relied on by both counsel in their final submissions, I set the contents out in full:

Drug & Alcohol Rehabilitation Contract

Goodtime

Employee Name *Leith Hayllar*

I *Leith Hayllar* acknowledge that I have been entered in the Goodtime health rehabilitation plan and my continued employment with Goodtime is subject to the following:

I am committed to full participation in the Plan with the service provider(s)

specified by Goodtime.

I authorise the service provider to release the following information to

Goodtime:

Whether I have kept appointments

Whether the service provider has recommended a course of treatment

Whether I am following that course

Whether a return to work is appropriate and within what timeframe

Whether I have completed the required treatment

Whether return to work is to full or alternative duties

I authorise Goodtime to permit the service provider to discuss results of drug and/or alcohol tests, undertaken during rehabilitation, with the accredited laboratory and medical advisor (if available).

I agree to take this course outside work hours or use leave entitlements if required to participate during work hours.

I agree to take 6 subsequent drug/alcohol tests per year in the 24 months following treatment and agree that the results are to be released to my employer.

I accept that if:

I do not attend or complete the required course

Or on any future occasion, including the subsequent tests above, I return a positive drug/alcohol test

☐ Or I refuse to take any of the subsequent tests

the consequence may be dismissal without notice.

I accept the terms of this contract, which I acknowledge may be in addition to the terms of my current contract and agree to be bound by both contracts.

I acknowledge that I have been advised to seek legal or qualified independent advice before signing this document.

signed (signature) Employee signed (signature) Manager signed (signature) Witness

print (name) Witness name

26.5.10 Date

[23] Mr Hayllar first reported to the rehabilitation centre on 9 June 2010. He said that his "rehabilitation proper" was scheduled to commence on 23 June 2010 but had to be postponed a week because of a sick dependent. In the meantime, he was not suspended but continued working although he voluntarily surrendered his leading hand position and accepted a pay decrease from $16 to $15 per hour.

[24] Mr Hayllar's counsellor was Ms Jennifer Watson, a qualified nurse who had been employed by the Hawkes Bay District Health Board for some 20 years. Ms Watson was called as a witness on behalf of the plaintiffs. She is a trained Alcohol and Drug Counsellor and has worked in the area of mental health and

addiction for 10 years. Ms Watson explained in evidence how the addiction service provides a recovery plan for the client to manage his or her addiction. She outlined the various treatment models that are available and she explained how treatments are tailored to suit the individual. Significantly, in the context of the present case, Ms Watson told the Court:

10. Most treatment plans for cannabis addiction involved a tapering or weaning off approach to cannabis use with the ultimate goal being total abstinence. Some patients do try to be totally abstinent from the start of their treatment plan. However, relapses are common. Moving a client through the cycle of change, we do not make a judgment that abstinence is the best or only goal. Addiction to any substance is often a chronic relapsing disease and clients may return to our service several times.

11. The emphasis is on 'progress and not perfection' and so we remind patients who are trying to be totally abstinent that they should not regard themselves as having failed and give up simply because they relapse. Instead, they need to put the relapse behind them and remain focused on their end goal of total abstinence.

[25] Ms Watson explained that the treatment model selected for Mr Hayllar was what is known as the "Harm Reduction/Minimisation Model" which she described as "behavioural self-management training and involves strategic planning, promotion of self efficacy/self responsibility and support to reduce amounts with abstinence as the preferred outcome." Ms Watson described what happened when Mr Hayllar first attended the addiction service on 9 June 2010:

... At this appointment he had a Brief Intervention, the aim of which is screening, detecting and intervening with clients before substance dependence develops. He completed a Readiness to Change Questionnaire (which he scored highly) indicating his willingness to work towards change.

Ms Watson went on to tell the Court that by the time Mr Hayllar began counselling on 2 July 2010, "He stated that he had already significantly reduced his Cannabis intake. He engaged well in the treatment process of assessment, counselling/support and relapse prevention education. He worked from a clear recovery plan and appeared motivated to make life-style changes to support a drug-free style."

[26] For his part, Mr Hayllar described his introduction to the rehabilitation programme in these terms:

54. Jennifer also explained to me that the 'cold turkey' approach could be difficult and perhaps even unrealistic for me due to the length of time that I have been smoking cannabis, that I was a habitual smoker, and that I was still associating with friends who smoked cannabis. She encouraged me to try weaning myself off cannabis instead. I told her that I accepted what she was saying, but that I would try and go 'cold turkey' regardless.

55. She told me that the end goal was to be completely clean, and that it was the end goal that really mattered. She said that if I relapsed that it was not the end of the world, and that I should not consider myself a failure and use it as an excuse to give up my efforts. Instead, I should remain focused at all times on the end goal to get clean and keep progressing towards that goal.

Mr Hayllar's second drugs test

[27] On 7 July 2010, Mr Hayllar suffered a workplace injury. While carrying a bin full of onions, he tripped over a loose tile sticking up on the bakery floor and injured his back. He visited his doctor who put him off work until 12 July 2010 on an Accident Compensation Corporation benefit. Mr Hayllar claimed that the loose tile had been reported to Goodtime as a safety hazard on numerous occasions over a lengthy period of time but nothing had been done to fix it. This allegation was denied by Mr Pollett. The defendant pleaded in its statement of defence that the loose tile was "a new event" which was repaired immediately.

[28] Mr Hayllar said that when he returned to work on 13 July 2010 he was approached by Mr Pollett and told that he was required to undergo another drugs test. When he inquired as to the reason, Mr Pollett told him that it was necessary because he had been involved in a workplace accident. Mr Hayllar explained, in evidence which I accept, that at that stage he had still not been provided with a full copy of the drugs policy. All he had in his possession were pages 8 and 9 which had been given to him earlier and he was unaware of the specified procedure. It was not until sometime after his dismissal that his lawyer was able to provide him with a full copy of the drugs policy.

[29] In reference to the requirement for a second drugs test, Mr Pollett told the

Court:

... I did say I wanted to retest him as he had suffered an accident over a loose tile. After my engineer and I checked the tile I concluded that it was unlikely to be the cause of him falling. I also noted that the

witnesses to the fall said that he fell backwards while the box of onions he was carrying went forward.

45. Given the confusing reports and noting that he was already under rehab I elected to retest him. I did not tell him that if he refused I would dismiss him. He already knew that from earlier discussions.

[30] In cross-examination, Mr Pollett agreed that the engineer was his brother. He was asked about the significance of the witnesses' statements that the box of onions went forward while Mr Hayllar fell backwards. He replied:

A. Well I guess you should try it. It's difficult and I know it's - we all tried to do it and it's like that going forward and you going backwards it like how does that work.

[31] In the same section of cross-examination, it was put to Mr Pollett that

Mr Hayllar had had no input into the investigation as to the cause of the accident:

Q. He was completely unaware that you were carrying out an

investigation though wasn't he?

A. He was off to five days, if it was a problem we needed to fix it. We had a look at it and decided well it's a bit weird that he tripped over that, but there is a hole there along with a few other holes and so we repaired several holes that weekend. If somebody has an accident you've got to do something about it, under OSH we did that.

Q. So when he returned to work, other than his initial report he had no input into your investigation as to the cause of the accident did he?

A. There was no need, it was pretty simple and by that time, Mr Hayllar's

own words, we'd fixed it.

Q. So was your conclusions as a result of the investigation that the floor tile was the cause or not a cause of the accident?

A. I'd guess we'd have to say that it was a possibility but a remote one.

Q. And that was never a conclusion that you put to Mr Hayllar for his comment, was it?

A. There was no need, we'd fixed it.

Q. You never showed him any of the witness statements about the accident did you?

A. No.

[32] Mr Hayllar's second drug test was carried out on 13 July 2010. The evidence was that, at that stage, he had had only the one counselling session on 2 July 2010. His second counselling session was to be held on 22 July 2010. Mr Hayllar said, in evidence which I accept, that he was not advised of his right to consult a lawyer or representative prior to undergoing his second drugs test, nor was he given an

opportunity to do so. Again, as with his first test, he was not suspended from work but carried on with his regular duties. On 28 July 2010 he was handed a letter from Mr Pollett requiring him to attend a meeting on 4 August 2010 to discuss the results. There is a conflict in the evidence about whether the ESR Urine Drug Test Report result was disclosed to Mr Hayllar prior to the meeting but the meeting was recorded and it is clear from the transcript that Mr Hayllar was aware of the test results prior to the meeting. The report showed that the sample taken on 13 July 2010 had returned a positive result for cannabis use. The level of THC-Acid was

47 nanograms per millilitre. As in the case of the first ESR Urine Drug Test Report, there is a statement confirming, "THC-Acid levels do not indicate impairment or when and how much cannabis was used."

[33] I accept Mr Hayllar's evidence that the letter of 28 July 2010 did not make any allegation of misconduct or warn him that his employment was in jeopardy. Mr Hayllar said, "It did not occur to me at all that my employment was at risk, and I thought I was about to be congratulated for doing well at rehabilitation."

Mr Hayllar's dismissal

[34] The meeting on 4 August 2010 was attended by Mr Hayllar, Mr Pollett and Ms Susan Woolhouse from Goodtime. With one exception, there was no dispute as to the evidence Mr Hayllar gave about the meeting:

74. By way of summary, Mr Pollett advised me that my drug test showed a result of 47 ng/ml. He then claimed that the test should have returned a negative result. He asserted that I was not keeping to my rehabilitation plan and had been continuing to smoke cannabis.

75. I denied this allegation and said that I had been complying with my rehabilitation plan. I pointed out that cannabis takes a long time to be completely eradicated from a person's body. Mr Pollett disputed this and claimed that he had spoken to someone from the Drug & Alcohol Rehab National Council who had said that I should have been completely clean by now.

76. I continued to dispute this and invited Mr Pollett to speak to my Rehabilitation [Counsellor]. Mr Pollett refused to do this and insisted that his information was correct and my information was wrong.

77. I felt ambushed that I had been called to a meeting without being told that it could have disciplinary consequences. I therefore requested that the meeting be adjourned. I wanted to seek legal advice. Mr Pollett refused to do so and carried on with the meeting regardless.

78. The meeting adjourned and when Mr Pollett returned a short time later he summarily dismissed me for allegedly being in breach of the Rehabilitation Contract that I had signed.

[35] Responding to this passage of evidence, Mr Pollett said:

... Mr Hayllar wanted to stop the meeting because he said I was "bumming [him] out". He never mentioned wanting to stop the meeting to get legal advice. He said he wanted to stop the meeting because I was saying he was still smoking but he knew he was not. On that basis he did not want to sit there listening to me saying he was smoking. ...

[36] In order to better understand the context of Mr Pollett's evidence on this point, I refer to the relevant passage in the transcript of the meeting. It followed on from an admission by Mr Hayllar that he had stopped smoking after the first test apart from one relapse when he was intoxicated and had been passed a joint. The transcript continues as follows:

LH: No because now you're giving me a downer Phil... as far as I'm concerned I haven't smoked in four & half, five weeks and I'm thinking I'm doing OK and now you're telling me I'm smoking still and that's a complete lie... I'm not smoking at all... I've slipped up once and that was after you tested me so that 47 nanograms that I had was because I have not smoked since the first test!!

PP: No that's not how it works

LH: But that is how it works!!... that's exactly what my Rehab has told me

PP: That's not how it works; the foremost experts in this country have told me

LH: Well you're going to have to check them again because my Rehab has told me that I'm doing great, the levels that I was at should have taken a month and a half to clear my system out

PP: I've talked to the boss of the Napier Rehab, Bob Pearce and Bob said to me that what they do is encourage you all the time to keep up the good work and to continue not...

LH: Well as far as I'm concerned my levels have dropped substantially since you first tested me and for you to sit there and tell me that I'm still smoking is just bumming me out because I know I haven't smoked since doing it so don't sit there and tell me that I'm smoking because I am not smoking!!

PP: Well Leith I'm going to have to tell you that I think you're telling me

lies because the results

LH: I want to stop this meeting right now then Susan because I'm not sitting here and putting up with this because I know I'm not smoking and I'm not sitting here and being told that I'm smoking

The transcript carried on for a little longer in this vein and then, following a short adjournment, Mr Pollett advised Mr Hayllar that he was dismissed without notice.

Mr Matene

The first drugs test

[37] As in the case of Mr Hayllar, Mr Matene described ongoing problems he allegedly had with the production supervisor, Ms Kinder, in the period leading up to May 2010. On 12 April 2010, Mr Matene received a letter from Mr Pollett requiring him to attend a "formal investigation meeting" on 21 April 2010 regarding allegations of "insubordinate behaviour" towards Ms Kinder on 8 April 2010. The letter recorded that if misconduct was established then disciplinary action may be taken and his employment "may be in jeopardy".

[38] Mr Matene told the Court that the meeting on 21 April 2010 was attended by himself, Mr Pollett and Mr Pollett's sister, Ms Susan Woolhouse. His account of the meeting was not disputed. He stated:

21. During the 'formal meeting' Phil asked me if I did drugs. I replied

that it was none of his business. He then required me to undergo a

'reasonable cause' drugs test. He did not explain why, in his opinion,

he had *"reason to believe that my performance may be affected by drugs"* - clause 8.1 of the Policy.

22. I initially refused to have the drugs test as I had never seen the Policy.

I requested a copy and was subsequently given one. Mr Pollett

threatened me with dismissal if I didn't comply with his request.

23. I requested an adjournment of the meeting to obtain legal advice and stood up to leave. Susan told me that I would not be paid for my time away seeking that advice.

[39] Mr Matene said that he went to see his local union organiser for advice and as he was feeling "really stressed" he also went to see his doctor who put him off work until 27 April 2010. On 26 April 2010, while he was still off work on sick leave, he received a letter from Mr Pollett advising him to attend a further meeting on

28 April 2010 about his refusal to take a drugs test. The letter confirmed that he was suspended on full pay until the matter could be resolved. Mr Matene attended the meeting on 30 April 2010 and agreed to take a drugs test. Despite the reference in Mr Pollett's letter to suspension, it appears that Mr Matene was never, in fact,

suspended from his normal duties. This is admitted in the pleadings. Mr Matene's test was taken on 3 May 2010 and the ESR Urine Drug Test Report subsequently sent to Goodtime confirmed that the sample had returned a positive result for cannabis use. The level of THC-Acid was confirmed at >300 nanograms per millilitre and again the report confirmed that the cut-off level was "at or above

15 nanograms per millilitre."

The rehabilitation programme

[40] The test results were discussed with Mr Matene at a meeting he had with Mr Pollett and Ms Woolhouse on 21 May 2010 and Mr Matene was offered rehabilitation in terms of the Goodtime policy. He was handed a copy of the standard rehabilitation contract in the terms set out in [22] above which he was told he would need to sign and he was given a telephone number for him to make contact with the rehabilitation service provider. Mr Matene's rehabilitation contract was dated 28 May 2010. He continued in his normal work with Goodtime.

[41] Mr Matene commenced his drug rehabilitation programme on 9 July 2010. He had been wait-listed for the programme and that was the earliest date available. He told the Court in evidence which was not disputed:

35. Except for 30 July 2010 when my [counsellor] was away sick and another on 6 August 2010 which I was unable to attend, I did not miss any days and Goodtime's Service Provider was, and still is, very happy with my attendance, participation, and progress. The 30 July

2010 session was rescheduled to another day.

[42] Ms Watson explained to the Court that her role in relation to Mr Matene's rehabilitation programme was limited to clinical oversight for a third year psychotherapy student, Ms Gabrielle Edgecombe, on placement with the addiction service at the District Health Board. Ms Watson held meetings with Ms Edgecombe prior to and following each consultation with Mr Matene. Ms Watson described Mr Matene's introduction to the programme in these terms:

22. He presented as self-directed and punctual with appointments. He chose to work from a time-bound reduction plan. The goal of this plan is to reduce cannabis to zero over a specified period of time. The emphasis was on relapse prevention, education and practical strategies with the goal of remaining drug-free.

Mr Matene's second drugs test

[43] Mr Matene described, in evidence which I accept, how he was required to undergo a second drugs test:

36. On 9 August 2010, Mr Pollett approached me during my lunch break and claimed that he had smelt cannabis on me during a staff social function held two weeks earlier on 24 July 2010. He gave me no other details about when, or where, he had apparently smelt the cannabis on me other than that it was at the social function, nor of any of the surrounding

circumstances.

37. This was the first time that Mr Pollett had raised this with me. He did not raise this matter with me at the function on 24 July 2010 or at any time during the intervening two week period.

38. I denied, and continue to deny, that I smoked cannabis at the function.

39. Mr Pollett required me to undergo another drugs test the next morning. He said that this was to see how I was going at rehabilitation.

40. On 10 August 2010, I underwent a drugs test as per Mr Pollett's

instruction.

41. On 12 August 2010, Pollett wrote requesting I attend a *"formal meeting"* on 17 August 2010 to *"discuss the results of [my] drug test."* Attached to the letter was a report from ESR recording the results of my drug test as being 66 ng/ml.

[44] In his evidence, Mr Pollett agreed that Mr Matene had denied using drugs at the function but he went on to say:

... However I believed I had reasonable cause to suspect ongoing drug use. He had consistently told me that he had cut down and later that he had totally given up cannabis and if that had been true, I understand he would have returned a negative result.

Mr Pollett denied asking for another drugs test to see how Mr Matene "was going at rehabilitation" but Mr Matene was not cross-examined about his evidence on that issue.

Mr Matene's dismissal

[45] The meeting scheduled for 17 August 2010 was brought forward to

13 August 2010 at Mr Matene's request. He told the Court that even though

Mr Pollett's letter had not warned him that his employment was in jeopardy, he was

aware that Mr Hayllar had been dismissed. Mr Matene decided to attend the meeting alone. The company was represented by Mr Pollett and Ms Woolhouse. The meeting was recorded and later transcribed.

[46] Mr Matene's evidence about the meeting is a reasonable summation of what

appears in the transcript:

43. At the meeting on 13 August 2010, Mr Pollett asserted that I should have returned a negative result. I disagreed and replied that his Rehabilitation Counsellor (the one engaged by Goodtime) said that it can take up to 3 months for a long-term cannabis user to rid cannabinoids from his or her system.

44. Mr Pollett disagreed, and claimed that anything over 15 ng/ml presented a health and safety concern. I thought this was a somewhat strange thing to claim given that he had originally put me back in the workplace with a level of >300 ng/ml.

45. The meeting adjourned and when Pollett returned a short time later he claimed that I was not serious about my rehabilitation and that I should have been completely clean by now.

46. I replied that there had been a delay in getting on the rehabilitation program, that I had only started rehabilitation a month before, and that my rehabilitation program was only part way through and therefore incomplete.

47. I also told Mr Pollett that my Rehabilitation Counsellor (the one engaged by Goodtime) had recommended a 'weaning off' approach to my cannabis use to avoid the need for prescription drugs as substitutes as these could become addictive. In short, going 'cold turkey' was not the preferred treatment method used by Goodtime's Service Provider as part of my tailored rehabilitation plan.

48. I said that I had been progressing well on my rehabilitation plan, that I had rehabilitation later that day, and that I would get a letter from my counsellor to this effect. Phil said I had given him something to think about and that he wished to ring someone (he didn't say who) to seek advice. He told me to go outside for a smoke while he did this, which I did.

49. When the meeting resumed, Phil told me that I was dismissed because, according to him, I had signed the rehabilitation Contract which stated that I would be dismissed if I tested positive in the future. I tried to point out that the rehabilitation Contract provided for drug testing after, and not during rehabilitation but Mr Pollett interrupted me and reaffirmed my dismissal. He gave me no opportunity whatsoever to get a letter from my counsellor.

50. Phil also did not tell me who he had telephoned for advice, what that advice was, or give me any opportunity to comment

(or obtain comment from experts) on that advice.

[47] Commenting upon this evidence, Mr Pollett made the point that, "the rehab centre is not "Goodtime Foods Service Provider." It is a government funded division of the HBDHB. It is a public service to people who wish to get off drugs."

[48] In her evidence, Ms Watson also confirmed that the Addiction Service provides the recovery plan for the client to manage his or her addiction and their relationship is directly with the client, not the employer. Ms Watson explained that they are part of the hospital run by the District Health Board and they run the Addiction Service free of charge.

[49] In reference to Mr Matene's second drug test, Ms Watson said in evidence:

23. The results of Mr Matene's second drug test carried out by Goodtime Food Company Limited indicated that he was making good progress. Mr Matene's drug test results were checked with our Medical Officer, Dr Tim Bevin. His GP was informed of the results by letter. His level of Tetrahydrocannabinol (THC) had markedly decreased from the level first recorded on 3 May 2010 of >300 down to 66 nanograms per [millilitre] recorded on 10 August 2010.

Evidence of Susan Nolan

[50] The defendant called evidence from Ms Susan Nolan and presented her as an "expert witness". For her part, Ms Nolan acknowledged that as an expert witness she had read the code of conduct set out in the High Court Rules and agreed to comply with it. Ms Nolan told the Court that since November 2007 she has been director of her own consultancy company, Susan Nolan & Associates Ltd, also known as DrugFree Sites NZ (DFS). She described the primary focus of DFS as being, "to provide companies, who are developing and implementing Workplace Drug and Alcohol Programmes, with policy advice, training modules for managers and staff and testing systems which will meet the legal requirements of International Standards." Prior to establishing her own business, Ms Nolan had been employed since 1971 by ESR (and its predecessor DSIR Chemistry). She holds a Master of Science degree, majoring in Biochemistry, from Victoria University, Wellington. She is a member of the joint Australian/New Zealand Standards Technical Committee which is the committee responsible for preparing the joint standard "AS/NZS 4308:2008" procedures for specimen collection and the detection and

concentration of drugs of abuse in urine. The joint standard AS/NZS 4308:2008 is

the testing standard provided for in Goodtime's drug policy.

[51] Ms Nolan told the Court that during late 2006 and in early 2007, when she was employed by ESR, she assisted Goodtime in developing "a legally robust drug and alcohol policy and procedures which includes pre-employment, post accident or incident, for reasonable cause and both during and after rehabilitation (follow-up) testing." The thrust of her evidence in relation to Mr Hayllar was:

12. If Mr Hayllar had ceased use after his test on 18 March, he should have been testing negative (i.e. below the cut-off concentration) for THC-Acid by early April (and that is if he'd been previously a heavy user) and by mid-April (if he was a chronic user).

The thrust of Ms Nolan's evidence in relation to Mr Matene was:

19. As in the case of Hayllar, if Matene had ceased use of cannabis soon after his first test on 3 May, he would have tested negative early in June.

20. Matene's second test conducted on 10 August was 66 ng per millilitre which indicates, whilst there may have been reduction in use, there had been ongoing use since 3 May.

[52] I will refer again to Ms Nolan's evidence when I deal with the parties' submissions but at this stage I simply record that, despite her impressive credentials and undoubted expertise on the topic of drugs and alcohol in workplaces, I am not satisfied that she had the degree of objectivity and impartiality necessary to give opinion evidence as an expert witness on the matters referred to in the previous paragraph. In this regard, the evidence was that in addition to her extensive involvement in the development of Goodtime's drug policy, Ms Nolan was contacted by Mr Pollett on a number of occasions for advice in relation to the drug testing and follow-up action involving the two plaintiffs. Mr Pollett admitted in cross-examination that he did not obtain legal advice regarding his dealings with Mr Hayllar and Mr Matene but he did obtain advice from Ms Nolan who, he agreed, was the only person with a copy of Goodtime's drug policy. In his closing submissions on behalf of the defendant, Mr Tayler confirmed that Mr Pollett had consulted with Ms Nolan about what Mr Matene's drug level reading should have been at the time of his dismissal. The full extent of Ms Nolan's involvement in the two plaintiffs' cases should have been disclosed by Ms Nolan in her evidence.

[53] Clause 2 of sch 4 to the High Court Rules states: "An expert witness is not an advocate for the party who engages the witness." And cl 1 states that an "expert witness has an overriding duty to assist the court impartially". With respect, I am not satisfied that Ms Nolan was not an advocate for the defendant in this case or that her opinion evidence in relation to the matters referred to in [51] is sufficiently impartial to satisfy the expert witness criteria. For these reasons, I propose to treat

Ms Nolan's evidence in relation to the particular matters identified in the same way as the evidence of other witnesses in the case and I will give it the weight which I consider it deserves having regard, in particular, to her involvement with the defendant's

case.9

Submissions

[54] The principal submission advanced by Mr Cressey was that drug testing policies needed to be interpreted and applied strictly and in this case the defendant had failed in a number of respects to comply with the provisions in its own drug policy and rehabilitation contract. Mr Cressey highlighted cl 3.4 b. of the drugs policy which provides that the policy strictly prohibits, "Reporting to work with risk levels of drugs in the system". He then referred to cl 7.3 f. which required the defendant to immediately suspend employees who have undergone a drugs test until the test results become available and said that in this case for some "completely inexplicable" reason the plaintiffs were instructed to return to work immediately.

[55] Mr Cressey noted that in relation to that particular evidence, Mr Pollett stated:

... *"I don't understand what Mr Hayllar's complaint is. He never at any stage asked to be suspended, instead continuing to work as usual. He suffered no disadvantage at all as a result of that part of the policy not being strictly followed."*

[56] Mr Cressey's submission in response was forceful and unequivocal:

... Well both Hayllar and Matene each suffered a huge disadvantage by being instructed by Pollett to return to work immediately because Pollett's decision meant that the 'return to work' provisions of clause 11.5 of the Policy were not followed either. This led to both plaintiffs being returned to the workplace with drug levels well in excess of the cut-off level. They were

9 *ANZ National Bank Ltd v Commissioner of Inland Revenue* [2005] NZHC 152; (2005) 18 PRNZ 114 (HC) at [24].

both drug tested a second time while still undergoing rehabilitation (which it will be submitted was also in breach of the Policy), and then dismissed. It is difficult to imagine a greater 'disadvantage' than that.

[57] Apart from his principal submission that the defendant's drugs policy and rehabilitation contract did not permit dismissal resulting from a second positive drugs test whilst an employee was still undergoing rehabilitation, Mr Cressey submitted that the defendant's requirement that Mr Hayllar and Mr Matene undergo a second drugs test was "unfair and unjustified". In this regard counsel highlighted the fact, in relation to Mr Hayllar, that Mr Pollett had not given him any opportunity to comment on the evidence and the conclusions reached relating to his investigation into the accident involving the loose tile nor had he advised Mr Hayllar in terms of cl 7.3 d. of the drugs policy that he had the right to consult a representative. In relation to Mr Matene, Mr Cressey submitted that it was unfair for Mr Pollett to wait for more than two weeks before confronting him with the allegation that he had smelt cannabis on him at a social function and then requiring him to undergo a second drugs test. The social function was described in evidence as a social club "casino night" held at "the West Shore pub".

[58] In relation to Ms Nolan's evidence, Mr Cressey submitted that it was "irrelevant" in that her analysis of the reduction in drug levels was based on a "cold turkey" approach to reduction whereas the rehabilitation plan for both plaintiffs provided for a "weaning off" approach leading to total abstinence from cannabis.

[59] Mr Tayler's submissions, on behalf of the defendant, relied significantly on the evidence of Ms Nolan. He correctly pointed out that Ms Watson had conceded in cross-examination that she did not have the expertise to challenge what Ms Nolan had said. Mr Tayler submitted:

5. Both plaintiffs accept that pursuant to the policy, they signed rehabilitation contracts that required them to reduce their drug use to a level that when tested in the future would not return a positive result.

6. Those contracts allowed for further testing and agreement that further drug use returning a positive result may result in dismissal. Neither plaintiff addresses the fact that despite the contracts they signed, sounding the consequences of a continued unacceptable level of drug use, they both returned positive readings indicating continued excessive use.

[60] Mr Tayler drew attention to alleged inconsistencies in Mr Hayllar's evidence about his use of drugs after the first test. He stressed that Mr Hayllar had agreed to enter into rehabilitation and had signed the rehabilitation contract which stated inter alia:

- *"I authorise Goodtime to permit the service provider to discuss results of drug... tests, undertaken during rehabilitation with an accredited laboratory....."*

- *"If..on any future occasion...I return a positive drug.. test....the consequences may be dismissal without notice"* (emphasis added).

[61] Mr Tayler went on to submit:

54. Mr Hayllar continued to use drugs following the signing of that agreement, was tested again, was given his right to respond to the test results over 3 times above the cut off level, that he was fully aware of the final meeting, gave contradictory answers in terms of his ongoing drug use and was dismissed accordingly. ...

[62] In relation to Mr Matene, Mr Tayler submitted that the drug rehabilitation contract, "allows for testing during rehabilitation as well as subsequent tests and sounds the consequences of returning a further positive test. It also advises him of his legal right to take legal advice which Mr Matene had already done."

[63] Mr Tayler submitted in relation to both plaintiffs that if it was found that the dismissals were unjustified then, "either by the plaintiff's contributory conduct or by the Court applying its equity and good conscience jurisdiction, the facts of the case must operate against the granting of any remedies by a reduction of 100%."

Discussion

[64] The parties were in agreement that the test for determining whether the dismissals were justified was the test of justification prescribed in s 103A of the Act as that provision stood at the time of the dismissal, namely:

103A Test of justification

For the purposes of section 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.

[65] A helpful starting point for any consideration of the operation of a drugs testing regime is the oft quoted statement of Chief Judge Colgan in *Parker v Silver Fern Farms Ltd (No 1)*:10

... 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 strictly. A fair and reasonable employer in all the particular circumstances of a case is unlikely to have insisted justifiably on compliance with an unlawful and/or unreasonable direction to an employee.

[66] The intrusive nature of urine testing was explored by the Full Bench of Fair Work Australia in the recent decision of *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*.11 In that case Endeavour Energy, a state-owned energy company, challenged unsuccessfully on appeal a decision12 of Senior Deputy

President Hamberger which had compared the two established methods of drug testing in the workplace: AS/NZS 4308:2008 (urine testing) and AS 4760:2006 (saliva testing) and had concluded that the proposed introduction of urine testing by Endeavour Energy would be unjust and unreasonable.

[67] The comparison between the two methods of drug testing was not an issue in the case before me but the conclusions in *Endeavour Energy* perhaps demonstrate the scientific advances in testing procedures since the decisions of this Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*13 and *Maritime Union of New Zealand Inc v TLNZ Ltd*.14

[68] Although one needs to approach judgments from other jurisdictions with some degree of caution, given the way in which urine testing for drugs in Australia and New Zealand is conducted under a common standard, the decision no doubt has

more relevance than might otherwise be the case. To that extent, the following

10 [2009] ERNZ 301 at [26].

11 [2012] FWAFB 4998.

12 [2012] FWA 1809.

13 [2004] NZEmpC 32; [2004] 1 ERNZ 614.

14 [2007] NZEmpC 168; (2007) 5 NZELR 87.

conclusion of the Senior Deputy President, noted in the Full Bench decision, would in my view have equal application in this country and go some way towards explaining in part the rationale behind the requirement for drug policies to be interpreted and applied strictly:15

... The employer has a legitimate right (and indeed obligation) to try and eliminate the risk that employees might come to work impaired by drugs or alcohol such that they could pose a risk to health or safety. Beyond that the employer has no right to dictate what drugs or alcohol its employees take in their own time. Indeed, it would be unjust and unreasonable to do so.

[69] Another of the conclusions at first instance in the *Endeavour Energy* case noted by the Full Bench has relevance to the undisputed evidence in the present case that the THC-Acid levels do not indicate impairment or when and how much cannabis was used. The passage stated:16

Not only is urine testing potentially less capable of identifying someone who is under the influence of cannabis, but it also has the disadvantage that it may show a positive result even though it is several days since a person has smoked the substance. This means that a person may be found to have breached the policy even though the actions were taken in their own time and in no way affect the capacity to do their job safely. In the circumstances where oral fluid testing - which does not have this disadvantage - is readily available, I find that the introduction of urine testing by the applicant would be unjust and unreasonable. Accordingly I find that the system of drug testing that should be used by the applicant for on-site drug testing should be that involving oral fluids. This should be done on the basis of AS4760-

2006: the Australian Standard governing procedures for specimen collection and the detection and quantitation of drugs in oral fluid.

[70] The scheme of the relevant provisions in Goodtime's drug policy, in conjunction with the rehabilitation contract, can perhaps be summarised by reference to the following clauses:

3.4 Drug/alcohol free workplace

The policy strictly prohibits:

...

b. Reporting to work with risk levels of drugs in the system

...

d. Having a level of drugs in the system that exceeds the Australian/New

Zealand Standard AS/NZS 4308:2001 ...

...

15 [2012] FWA 1809 at [36].

16 At [41].

7.3 Procedure

...

f. ... remove the employee from the employment site on full pay until the test results are available.

...

11.2 Current employees returning a positive test, who want to continue employment, are required to join Goodtime's supported ATCM programme (rehabilitation). Failure to take part or complete the programme may result in disciplinary action including dismissal.

...

11.4 Procedure

a. Employee must sign a contract agreeing to the programme and follow up testing.

b. The manager will arrange an initial appointment for employee to meet

with the substance abuse specialist.

...

d. All communications between the specialist and employee will remain confidential.

e. The substance abuse specialist will arrange for treatment or further

specialist advice as considered necessary.

f. The substance abuse specialist will advise the manager if an alternative employment situation would be advisable to provide for a safe working

environment. This advice may also include whether additional drug

and/or alcohol testing is required during the treatment programme.

g. Rehabilitation will commence and the rehabilitation provider will provide the manager with information on the attendance of the employee.

h. The substance abuse specialist will report to the manager, after the agreed number of sessions, on the necessity or value of further

treatment. ...

...

11.5 Return to Work Decision

On advice from the rehabilitation service provider and drug testing provider

Goodtime will make a return to work decision, based upon:

a. The nature of the employee's work:

...

2. When the employee has returned a drug and/or alcohol test below the

'cut-off' level, a return to normal duties decision can be made.

3. If no such alternative employment exists, the employee is not to return to any form of work until he/she has returned a drug and/or alcohol test

below the 'cut-off' level.

b. Comprehensive drug and/or alcohol assessment report from the rehabilitation service provider. This report will indicate the employee's ability and readiness to change. Note that in some instances, the rehabilitation service provider will recommend that the employee abstain

from drugs and/or alcohol as part of their treatment programme. In such circumstances, a 'zero' result will be expected which is a higher standard than that required for 'return to work.'

...

11.6 Follow-Up Testing

a. On completion of rehabilitation the employee will be subject to up to six unannounced follow-up drugs and/or alcohol tests per year over the next

2 years.

...

c. A second positive test outside the treatment period may result in disciplinary action including dismissal.

The terms of the rehabilitation contract are set out in full in [22] above.

[71] It is clear from the above analysis that Goodtime's drugs policy provided, in essence, that an employee returning a positive result to a drugs test was required to be suspended from work until such time as a return to work decision could be made under cl 11.5 of the drugs policy. That did not happen with Mr Hayllar and Mr Matene. Management required them to carry on their normal duties throughout. In his closing submissions, Mr Cressey described that decision as "completely inexplicable". I agree. The consequences of Goodtime's failure to comply with the terms of its own policy were graphically expressed by Mr Cressey in [56] above. At the time he was required to undergo his second test, Mr Hayllar had had only the one counselling session. At the time Mr Matene was required to undergo his second drugs test, he had had only two counselling sessions.

[72] Clause 11.5 of the drugs policy provided that Mr Hayllar and Mr Matene should not have been permitted to return to normal duties until they had returned a drugs test below the prescribed cut-off level and until Goodtime had received a comprehensive drug assessment report from the rehabilitation specialist. None of those things happened, however, because from the outset management insisted that the two men carry on their normal duties. Goodtime had an obligation under s 4 of the Act to deal with its employees in good faith which included not misleading or deceiving them. By requiring the two plaintiffs to carry on with their normal duties after returning such high drug test results, the company was misleading them into believing that the results did not matter and, provided they continued to undergo the rehabilitation programme, then their employment was not in jeopardy. That was not

the case, however, and in breach of the drugs policy and every notion of fairness, Goodtime demanded a second drugs test for each plaintiff in circumstances which could fairly be described, in the terminology used by Mr Cressey, as an "ambush".

[73] Mr Tayler submitted that the following clause in the rehabilitation contract provided Goodtime with the necessary authority to carry out the second tests on Mr Hayllar and Mr Matene:

I authorise Goodtime to permit the service provider to discuss results of drug and/or alcohol test, undertaken during rehabilitation, with the accredited laboratory and medical adviser (if available). (Emphasis added)

[74] I do not accept that submission. The drugs policy draws a clear distinction between tests undertaken during rehabilitation and tests taken after completion of the rehabilitation programme. Ms Nolan explained in answer to a question from the Court the purpose of drug tests taken during rehabilitation:

A. Whilst they're - we call this comparison testing whilst they're undergoing rehabilitation. The testing when people are in a rehabilitation plan is a different type of test than the testing that is done to decide whether it's above, below the cut-off level. So when a rehabilitation test is done, if it is being done during rehabilitation, we call it comparative testing and that means that when the laboratory is asked to do a comparison test, they also take into consideration the concentration or dilution of that particular urine compared with the concentration or dilution of the first urine that they tested and Your Honour you would realise that depending on how concentrated a urine sample is will depend on whether the level is higher or lower than a normal concentration. So that's called comparison testing.

[75] Tests taken after completion of the rehabilitation programme are provided for in cl 11.6 of the drugs policy. That provision reads in full:

11.6 Follow-up Testing

a. On completion of the programme the employee will be subject to up to six unannounced follow-up drugs and/or alcohol tests per year over the next 2 years.

b. These tests may look for the presence of any amount of the drug (ie it is not restricted to cut-off levels).

c. A second positive test outside the treatment period may result in disciplinary action including dismissal.

[76] In my view it is clear from the evidence that under the drugs policy, drug testing carried out whilst an employee is undergoing rehabilitation is, as Ms Nolan

stated, for comparison purposes only and a resulting positive test result cannot lead to dismissal or other disciplinary action.

[77] For completeness, I also accept Mr Cressey's submissions about the inherent unfairness procedurally of Goodtime's demand for a second drugs test for each plaintiff. Contrary to the provisions in the drugs policy, Mr Hayllar was never informed or given the opportunity to consult a lawyer or representative before undergoing the second test. I am satisfied that he suffered real prejudice in this regard. In addition, the request for the second test was allegedly based on reasonable cause resulting from Mr Hayllar's workplace accident involving the loose floor tile. Whether reasonable cause exists in any given case must be determined on an objective basis. Clause 8.1 of the drugs policy provides that at least two people should have seen the person and both should have reason to believe that he or she may be affected by drugs. Clause 8.2 a. of the drugs policy states that "reasonable grounds" could involve "continual small accidents or inattention". That was not the situation, however, in Mr Hayllar's case.

[78] It is not every workplace accident that will give rise to reasonable grounds for requiring a drugs test. Where there is a clear and rational explanation for an accident, as there was in this case, a fair and reasonable employer does not automatically assume that drugs must have been involved and take the opportunity to conduct what is effectively a random drugs test. I found Mr Pollett's attempts to explain why he suspected that drugs played a role in the loose tile accident totally unconvincing.

[79] In Mr Matene's case, the ground for seeking the second drugs test was because Mr Pollett had allegedly smelt cannabis on Mr Matene at a social function held at a local hotel. Quite apart from the inherent unfairness in failing to confront Mr Matene with such a serious allegation (which Mr Matene strongly denied) until over two weeks later, the definition of

“reasonable cause testing” in the preamble to Goodtime’s drug policy requires the conduct giving rise to the alleged reasonable grounds for the test to suggest that drugs, “may be impacting on their (the employee’s) ability to work effectively and safely”. There was simply no evidence to that effect in relation to Mr Matene. As in the case of Mr Hayllar ([77] above), it was also a prerequisite under cl 8.1 of the drugs policy for a “reasonable cause”

drugs test that at least two people should have seen the person to be tested and both should have concluded that he or she may have been affected by drugs. That proposition was admitted in Goodtime’s statement of defence but there was no evidence that anyone else, apart from Mr Pollett, made the relevant observation in relation to Mr Matene.

[80] In short, I find that there were a myriad of reasons as to why, in terms of the s 103A test for justification, the dismissal of each plaintiff was unjustified. My principal finding, however, is that the defendant acted in breach of its own drugs policy and in an inherently unfair manner in dismissing the plaintiffs for failing a second drugs test taken while they were still undergoing rehabilitation and counselling in respect of their initial drugs test. I turn now to consider the issue of remedies.

Remedies

Mr Hayllar

[81] Mr Hayllar claims the sum of “$32,756” (sic) for gross loss of wages for the period from August 2010 to 27 September 2011, being 55 weeks and two days at

$640 per week. Mr Cressey advised that 27 September 2011 is the date when the matter would have been heard by the Authority. Counsel submitted:

19. It is submitted that he has made reasonable efforts to find alternative employment, but has been unsuccessful. He remains unemployed today. It is submitted that in the circumstances, the Court should exercise its discretion under s.128(3) [of the Act] to award more than

3 months ordinary time remuneration. His claim should be awarded in full.

[82] In response Mr Tayler submitted:

58. He did not complete his rehabilitation and when asked in cross examination why he said “what’s the point” because he had lost his job. This answer indicates that he abandoned his rehab and he continued his drug use. ...

[83] In terms of s 128 of the Act, once I am satisfied that a plaintiff has lost remuneration as a result of a personal grievance, then I am required to order reimbursement in the lesser amount of the lost remuneration or three months’

ordinary time remuneration. Despite this, under subs (3), I may exercise my discretion to award a greater sum. However, as the Court of Appeal stated in *Sam’s Fukuyama Food Services Limited v Zhang*,17 I am also required to make an allowance for all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of Mr Hayllar’s employment.

[84] In this case, there is a very real contingency. At the time of the second drugs test which led to his dismissal, Mr Hayllar was undergoing rehabilitation counselling and, in terms of the defendant’s drug policy, he would not have been able to resume his employment unless he was able to take a drugs test which produced a zero result or, at least, a result below the cut-off point. Mr Hayllar appeared to be making good progress and he may have been able to satisfy that criteria but given his freely admitted regular use of cannabis over a long period of time, there is a real likelihood in my view that he could have relapsed again within a very short time. Given this factor, I am not prepared to award more than the minimum three months’ ordinary time remuneration.

[85] Mr Hayllar also claims compensation for humiliation, loss of dignity and injury to feelings. I accept that he has made out such a claim. In *Hooper v Coca- Cola Amatil (NZ) Ltd*,18 I lessened the amount I otherwise would have awarded for non-economic loss on the grounds that the plaintiff, who was a recreational user of cannabis, would have known that he was taking a risk in the workplace and so the impact on him of the dismissal would not have been as serious as it could have been.

[86] In the present case, Mr Hayllar was aware that the defendant had introduced a drugs policy and armed with that knowledge his decision to carry on as an “habitual smoker” of cannabis still “associating with friends who smoked cannabis” (see [26] above) was a clear indication that he had determined to take the significant risk that he would at some stage fail a legally administered drugs test and be dismissed. An employee who continues his or her heavy recreational use of drugs in the knowledge that the employer has a drugs policy in place can scarcely purport to feign any significant humiliation, loss of dignity or injury to feelings if they are subsequently

dismissed for failing a workplace drugs test. The principle is the same even when, as

17 [2011] NZCA 608 at [37].

18 [2012] NZEmpC 11 at [53].

in this case, the dismissal proves to be unjustified. I fix Mr Hayllar's non-economic loss in the sum of $3,000.

[87] On the issue of contribution pursuant to s 124 of the Act, I am not satisfied that Mr Hayllar contributed in any way to the defendant's breach of policy and inherent unfairness in requiring the second drugs test which was the situation that gave rise to his unjustified dismissal.

Mr Matene

[88] Mr Matene has claimed $22,152 for his gross loss of wages from the date of his dismissal (13 August 2010) through to the date when he found another job (16 May 2011). The claim is for 39 weeks' loss of wages at $568 per week. Mr Matene gave evidence about numerous unsuccessful attempts he had made to obtain other employment after his dismissal. He also told the Court:

58. While I was unemployed, I was enrolled with WINZ and had a work broker actively looking for work for me. I also updated my CV, and attended WINZ seminars to improve my employment prospects.

59. I also continued with my drug rehabilitation and completed it in its entirety.

[89] Mr Matene, thus, invites the Court in the exercise of its discretion under s 128(3) of the Act to award him a significant amount over and above the minimum three months' ordinary time remuneration provided for in s 128(2). I am satisfied that he has made out a stronger case for lost remuneration than Mr Hayllar, who was unable to tell the Court that he had successfully completed his drug rehabilitation programme. At the same time, there is a contingency factor I need to have regard to. While Mr Matene was successful in eventually obtaining new employment, I consider there was a risk that had he remained in his old environment at Goodtime there was a likelihood that at some stage he would have relapsed and resumed his recreational drug use with the attendant consequences. On account of that contingency, I am not prepared to award him the full loss of remuneration he seeks. I am, however, prepared to award him five months' loss of ordinary time remuneration.

[90] Mr Matene also seeks an award of compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act. I do not consider, however, that he has made out a strong case under this head. While Mr Hayllar was able to claim that the drugs policy had laid dormant for three years and he was the first person tested, Mr Matene freely admitted in cross-examination that he was aware that Mr Hayllar had undergone a drugs test on 18 March 2010 and yet he continued his use of cannabis after that time. His eventual dismissal therefore, even though I have found that it was unjustified, would not have come as a surprise to him. The evidence, in fact, was that he had cleaned out his locker at work the day before because he knew what had happened to Mr Hayllar. For his non-economic loss, I award Mr Matene $1,000.

[91] As in Mr Hayllar's case I accept, for the reasons explained in [87] above, that there is no evidence that Mr Matene's actions contributed to the situation giving rise to the grievance.

Costs

[92] The plaintiffs are entitled to costs (one award). If costs cannot be agreed to then Mr Cressey is to file a memorandum within 28 days and Mr Tayler will have like time in which to file a memorandum in response.

A D Ford

Judge

Judgment signed at 10.00 am on 6 September 2012