



[3] A term of that Agreement is clause 38 which provides for *reasonable suspicion* drug testing.

[4] The evidence for Coca-Cola is that it received information from one of its employees about drug use during work hours and the health and safety consequences of that. A private investigator was hired by Coca-Cola to assist in providing evidence (if any) of the extent of the problem.

[5] Further revelations were made to Coca-Cola by staff in January 2010 and the decision was taken to drug test a total of six employees who Coca-Cola had reasonable cause to suspect may have been using drugs. Coca-Cola asked the New Zealand Drug Detection Agency to conduct drug testing at the workplace. Mr Hooper was one of the six employees tested. He readily consented to the test and amongst other things, made admissions about his drug use as part of the testing protocol.

[6] When the results of the drug test became available, the reading from the laboratory showed that Mr Hooper was twenty times over the limit while at work, having a reading of 300 nanograms when the cut-off limit was 15 nanograms. There was a disciplinary meeting between Mr Hooper and Coca-Cola. At the conclusion of the disciplinary process, Coca-Cola formed the view that Mr Hooper had been guilty of serious misconduct and that the only proper sanction was dismissal. That decision was confirmed to Mr Hooper by letter dated 8 March 2010 and on 12 March 2010 the Union raised a personal grievance on Mr Hooper's behalf.

### **Issues**

[7] The first issues to consider are the various sources of the drug and alcohol policy that applied to the employment relationship problem. In particular, the Authority will need to refer to Coca-Cola's Drug and Alcohol Policy and the relevant provisions in the agreement between Coca-Cola and the Union, which covered Mr Hooper's employment.

[8] Then, the Authority will need to have regard to the mechanics of the process leading up to Coca-Cola's decision to dismiss for serious misconduct.

## **The Drug and Alcohol Policy**

[9] Coca-Cola issued its Drug and Alcohol Policy in September 2009. In a 15 page document, Coca-Cola sets out its requirements in respect to drug and alcohol use as it applies to Coca-Cola employees, including Mr Hooper.

[10] The Policy provides for instance that working or reporting for work or being in the workplace under the influence of an illegal drug *or in an impaired condition* (emphasis mine) constitutes a breach of the Policy and may result in disciplinary action *including immediate termination*.

[11] Drug and alcohol testing is mandated where either there has been “an incident” or there is *reasonable cause* that either consumption has taken place during working hours or a worker is impaired and there is no other likely explanation.

## **The Drug and Alcohol Screening clause in the Agreement**

[12] The Agreement between the Union and Coca-Cola contains at clause 38 a provision entitled *Drug and Alcohol Screening*. That provision provides, amongst other things, access to professional assessment counselling and/or referral for employees and their families who have a drug problem ... *where appropriate and whenever practicable ...* .

[13] Then the clause gives Coca-Cola power if *there is a reasonable suspicion* of an employee being unfit for work because they are under the influence of drugs, to require a drug test. Further, the use of drugs while at work is *absolutely prohibited*.

[14] Finally, the clause gives Coca-Cola the right to take disciplinary action. It is worth setting out this portion of clause in full as it is especially relevant to Mr Hooper’s allegations that he was not treated in accordance with the law:

### *38.4 Disciplinary Action*

*If the steps taken in clause 38.1 have failed (clause 38.1 refers to the provision of professional assessment counselling and/or referral for assistance), continuing evidence of the use of drugs and/or alcohol in the premises is defined under s.38.3 may be treated as serious misconduct and may result in actions up to and including dismissal. Notwithstanding the foregoing, if an incident is considered by the employer to be serious, the employer may elect to ignore the option following the provisions of clause 38.1 and instead proceed with the disciplinary process.*

### **Coca-Cola's process**

[15] In July 2009 Coca-Cola became aware of concerns about drug use in its Christchurch operation. The manufacturing manager for Coca-Cola, Peter Kelly, gave evidence at the Authority's investigation meeting that he was advised of this concern by a member of his staff. In order to assess the quality of that intelligence, Coca-Cola engaged a private investigator who amongst other things covertly observed staff away from the workplace but during their lunch break. Coca-Cola's evidence to the Authority was that Mr Hooper was observed by the private investigator smoking what appeared to be cannabis with a work mate in a lunchbreak at a local park. The advice from the private investigator to Coca-Cola about the observation of Mr Hooper, apparently smoking cannabis in the park, was provided to the company in late September 2009.

[16] Then in December 2009 the Human Resources Consultant responsible for the Christchurch plant Ms Natasha Dumbier was in Christchurch on other business and together with Peter Kelly the Manufacturing Manager attended at the self same park in the lunchbreak and there observed Mr Hooper in a car with another employee smoking something that appeared to be cannabis. Because Ms Dumbier and Mr Kelly are clear that the windows of the car were wound up, they were unable to smell whether the material being smoked was indeed cannabis but both witnesses were satisfied that whatever was being smoked was being passed between the two men. It would be unusual for tobacco cigarettes to be passed between two individuals in that way.

[17] Then in January 2010, two further employees of Coca-Cola at Christchurch also raised concerns about drug impaired colleagues, identifying another five individuals.

[18] Given the accumulation of evidence about possible drug use by employees of Coca-Cola at its Christchurch site, and the developing anxiety of co-workers, Coca-Cola decided it had sufficient background context to engage an independent outside agency to conduct drug testing of the individuals who were under suspicion. Ms Dumbier said in her brief of evidence filed in the Authority that Coca-Cola's grounds *were reasonable suspicion that there was drug use occurring during working hours and that employees were reporting to work having smoked marijuana*. When

Mr Hooper was tested on 22 February 2010, Coca-Cola says that it followed the process set out in the Drug and Alcohol Policy for *reasonable cause* testing. Presumably, this is a reference to the second ground for testing where there is reasonable cause to believe that either a person's behaviour is symptomatic of impairment or there is a reasonable belief that consumption is occurring during working hours. Those alternatives are of course disjunctive. There is no requirement for Coca-Cola to find impairment and identify a reasonable belief that consumption is occurring during working hours; the two propositions are in the alternative. Coca-Cola invoked the leg requiring a reasonable belief that drug consumption was occurring during working hours.

[19] Nor for the sake of completeness is Coca-Cola reliant on the other basis on which drug and alcohol testing may be undertaken, namely after an *incident* or *accident* where it is thought that a person's actions may indicate drug use. It is common ground there was no incident or accident and it is clear to the Authority on the plan evidence for Coca-Cola that there is no suggestion that it is reliant on anything other than a reasonable belief that consumption was occurring during working hours and that grounded its decision to test Mr Hooper.

[20] It seems to me a perfectly reasonable decision for an employer to make in all the circumstances that a drug test was an appropriate mechanism, given the evidence from at least two sources that it appeared that Mr Hooper was consuming cannabis during his lunchbreak. I reject the Union's contention, for Mr Hooper, that the decision to test Mr Hooper was somehow unprincipled and/or outside the terms of the Policy.

[21] The Union's submission on Mr Hooper's behalf makes the contention that there was no reasonable cause because there was no indication of impairment at work. But that misses the point that the reasonable cause was reasonable cause to suspect drug use during working hours. I am satisfied it was reasonable for Coca-Cola to make that conclusion given the evidence of the private investigator, the evidence from Ms Dumbier (and Mr Kelly) and the various statements made to the employer by co-workers. I am satisfied there is no requirement on the employer to identify an incident or to identify impairment if reliance is placed (as in this case) on a reasonable belief that drug consumption has taken place during working hours.

[22] I am not troubled by the fact that the private investigator's reported sighting dated from seven months previous to the decision being taken to test. Coca-Cola made in clear in the evidence before the Authority that there were a number of staff under investigation for potential drug use and the only proper course was to proceed slowly and with caution. It is difficult to be critical of an employer for taking a measured approach in a matter such as this with potentially serious disciplinary consequences. I emphasise again that the relevant provision in the Drug and Alcohol Policy of Coca-Cola is disjunctive. There are three possible bases on which drug testing can be undertaken; the one Coca-Cola relies upon is the reasonable belief that drug consumption has taken place during working hours and that is sufficient.

[23] It cannot be right that an employer subject to the strictures of the Health and Safety in Employment Act and its other statutory duties cannot properly investigate employees about potential drug use on the job when that is drawn to the employer's attention. A good and fair employer must take all practicable steps to protect its employees from harm as a consequence of those employees being subjected to the potential ill effects of other employees impaired or potentially impaired by alcohol or drugs.

[24] Furthermore, I accept Coca-Cola's evidence that Ms Dumbier explained to Mr Hooper why the test was being undertaken, that is that Coca-Cola had reasonable cause to believe that he had been consuming drugs during work hours. The Drug and Alcohol Advisory script which was put into evidence before the Authority sets out over two pages the various matters that need to be covered. Alongside each of the statements in the typed portion of the script there are hand written comments in Ms Dumbier's writing. These handwritten comments along with her evidence on oath, satisfy me that she told Mr Hooper why the test was being undertaken. Further, I am satisfied he was told he could have a support person twice and rejected that offer twice. I am clear he indicated he was happy to take the test and that he was given a copy of the Drug and Alcohol Policy of Coca-Cola. Lastly in the course of responding to the various statements made by Ms Dumbier, Mr Hooper's account of his cannabis use *evolved*, to use Mr Lawlor's rather charitable terminology, from a point where he claimed not to have used cannabis for sometime, through to using cannabis every day and finally to an admission that he previously smoked cannabis at the workplace.

[25] Mr Hooper acknowledges making the majority of those observations; the only statement he denies is telling Ms Dumbier that he had completely given up smoking cannabis which is the first statement that Ms Dumbier attributes to him. For the avoidance of doubt, I prefer Ms Dumbier's evidence to the recollection of Mr Hooper. Mr Hooper's counsel is quite wrong to contend in closing submissions that there is nothing on the Drug and Alcohol Advisory script indicating what the reasonable cause was. The very first comment against the first paragraph of the script says *consuming drugs during work hours*. That is the basis for the drug test. As I have already made clear, it is a proper basis for the drug test within the terms of the Drug and Alcohol Policy of Coca-Cola.

[26] When the drug test was taken and analysed, it produced a result twenty times higher than the 15 nanograms per millilitres which is the Australia and New Zealand standard designed to allow for the situation of somebody passively inhaling cannabis rather than actively using it. The evidence before the Authority was that the testing regime proceeds on the basis that readings over 300 ng are simply recorded as over 300 ng rather than a particular figure. The Authority was told by the professional drug tester, who administered the test, that a reading greater than 300 ng was uncommon and would only be seen once or twice a month, or to put it numerically one in between 120 and 400 tests. On that basis then, with the roughest mathematics, a result of more than 300 ng would be observed in less than 1% of tests.

[27] The tester was also clear that while it was impossible to say whether someone was impaired, there is a risk of impairment. This was particularly so given the statement made by Mr Hooper to the drug tester, recorded in his own hand on the test form indicating that he had been a cannabis user for 20 years or more. While the professional tester quite properly conceded that there was no necessary relationship between the results of a cannabis test indicating heavy usage (as in this case) and impairment in an individual case, it was nonetheless a fact that the independent research available suggested that substance abusers (to use the generic term) were *responsible for 40% (forty percent) of workplace fatalities and ... were three times more likely to be involved in workplace accidents*.

[28] Once the drug test had been done and the results received, Mr Hooper was summoned to a disciplinary meeting to discuss the results. Coca-Cola wrote to him on 2 March 2010 and identified their concerns as being the result of his drug test (and

the actual reading achieved), the fact that the result of the drug test *constitutes a breach of the Drug and Alcohol Policy* and that the health and safety risks that existed to the workplace of having an employee under the influence of illegal drugs.

[29] At the disciplinary meeting which resulted, Mr Kelly the Manufacturing Manager presided, and Mr Hooper was represented by Mr Ian Hodgetts, a very experienced Union official. Mr Hodgetts told the Coca-Cola representatives that Mr Hooper acknowledged he had a problem and he sought the help of Coca-Cola in *ridding himself of his habit*. Mr Hodgetts for Mr Hooper, while acknowledging that Mr Hooper was a heavy user of cannabis, denied that he was impaired in the workplace and pointed to the evidence from the drug test which made it explicit that an individuals particular result, although positive, did not indicate impairment of itself.

[30] Not surprisingly, Coca-Cola responded by emphasising its obligation to provide a safe workplace not just for Mr Hooper but also for his work colleagues and that the test result effectively spoke for itself. Coca-Cola noted the original referral of the whistleblower, their subsequent decision to engage a private investigator and the private investigator's report that Mr Hooper was seen smoking marijuana in the neighbouring park with a work mate. Mr Hooper denied that allegation and claimed that he was smoking regular tobacco and not marijuana.

[31] Mr Kelly's notes of the disciplinary meeting record, in his own handwriting, Mr Kelly making the following statement as a summary of Coca-Cola's conclusion in the matter:

*We have put allegations to you that you were under the influence of illegal drugs during work hours. The drug lab tests were a very high result. You were given an opportunity to respond. I expressed concern about the serious nature of the allegations and the concerns we had regarding H & S (Health and Safety) not only for yourself, but for those around you.*

*We have considered your response. Based on the evidence we believe you have breached the CCA Drug and Alcohol Policy. The evidence being primarily the drug test and to a lesser extent the private investigator's information. I said that this was viewed as serious misconduct and that we view health and safety very seriously.*

*Our decision is that we move to dismissal effectively immediately. All outstanding dollars will be paid in the next scheduled pay run. Keith would also receive a letter confirming the decision soon.*

[32] The letter confirming the dismissal is dated 8 March 2010 and its terms are absolutely consistent with the earlier letter of 2 March 2010 summoning Mr Hooper to the disciplinary meeting and to the script used by Coca-Cola in the disciplinary meeting in respect to the nature and extent of the allegations made against him. Plainly, Coca-Cola's conclusion was that the drug test result spoke for itself, that that result constituted a breach of the Policy by exceeding the cut-off limit of 15 ng per millilitre and that it was reasonable to conclude that Mr Hooper was under the influence of drugs while at the workplace. While this last conclusion is not expressed as explicitly as it might be, it is clearly implied by the continuing references throughout the letter (and indeed the previous disciplinary meeting) to the fact that the drug test took place at work. It followed that a finding about the presence of illegal substances in Mr Hooper's system on a working day carried with it a strong and reasonable implication that Mr Hooper had illegal drugs in his system while at work (emphasis added). For instance the following reference in the letter illustrates the point:

*You denied smoking marijuana during working hours; however your test results show that you were under the influence of an illegal drug during work hours ... .*

[33] The Union maintain that there is no necessary relationship between impairment and a positive drug test in an individual case. While that is true, it cannot be right that the drug test is not persuasive evidence on the matter.

[34] The surrounding circumstances are themselves relevant. Mr Hooper acknowledged smoking marijuana on a daily basis for 20 years. According to the expert evidence, that suggests that Mr Hooper is or was a heavy user of marijuana. It is established that there is a very strong statistical relationship between heavy substance abusers and health and safety accidents in the workplace.

[35] Further, Coca-Cola have the evidence of the private investigator and the subsequent corroborative evidence from Mr Kelly and Ms Dumbier's visit to the same neighbourhood park, to give credence to the view that Mr Hooper was, in truth, using cannabis during the working day.

[36] I conclude that it was available to a fair and reasonable employer to conclude that Mr Hooper was likely to be impaired by heavy and regular cannabis use, that it

was more likely than not that Mr Hooper was actually using drugs while at the workplace and that even without the other supporting evidence, a fair and reasonable employer could properly conclude that the very magnitude of the test result, of itself, was redolent of impairment or evidence of the employee attending at work *under the influence*, or both.

[37] I am supported in that conclusion by the ample evidence before the Authority of the care that Coca Cola have taken in managing their process. They designed and used scripts for each part of the process. Copies of those documents were made available in evidence and broadly accepted as accurate by the Union. In the end I must say that the Union's conviction that Mr Hooper had to either have caused an *incident* or to be seen to be impaired in order to trigger the policy is a mistaken view of the policy.

[38] I am satisfied the employer may test on reasonable cause that drugs are being consumed during the working day and that it is available to the employer to conclude that a positive test result of this magnitude, in the context of the other evidence (particularly the admission from Mr Hooper and the evidence of smoking cannabis in the park) may ground a finding of serious misconduct leading to dismissal.

### **Determination**

[39] Mr Hooper's claim that he has a personal grievance by reason of having been unjustifiably dismissed fails for the reasons enunciated in this determination.

### **Costs**

[40] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority