

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 89/07
5032219

BETWEEN MARK STEWART LE GROS
 Applicant

AND PPCS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Simon Mitchell, Counsel for Applicant
 Victoria Donaghy, Counsel for Respondent

Investigation Meeting: 17 May 2007 at Christchurch

Submissions Received: 18 May 2007 from Applicant
 21 May 2007 from Respondent

Determination: 1 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mark Stewart Le Gros, is employed at the fellmongery department at the PPCS Canterbury site on the outskirts of Christchurch.

[2] The respondent, PPCS Limited (PPCS) is a meat export company with 23 processing sites nationally in New Zealand.

[3] Mr Le Gros was required to undergo a drug test as a condition of his appointment to a permanent seasonal position with PPCS in or about February 2006. Mr Le Gros says that the request to undergo a drug test was an unjustified action which has affected his terms and conditions of employment. Mr Le Gros accordingly seeks remedies.

[4] The respondent, PPCS, does not accept that Mr Le Gros has suffered any unjustified disadvantage during his employment. It says that the position was in a high risk safety-sensitive area and that it is the policy of PPCS to require all interested applicants to undergo a drug screening test. Further, PPCS say the offer to Mr Le Gros of the position was conditional and that he refused to accept the condition. PPCS says it had offered Mr Le Gros the opportunity to take up the role whether or not the blood test was positive on the proviso that if he was tested positive for drugs, then he would be required to undergo rehabilitation.

[5] The Authority undertook an informative site visit to the fellmongery with the parties and representatives on the day of the investigation meeting.

Issues

[6] There is no challenge in this case to the legality of the alcohol and drug policy.

[7] Mr Le Gros says that he has a personal grievance under s.103(1)(b) of the Employment Relations Act 2000 that he has been unjustifiably disadvantaged in his employment by an unjustified action of PPCS. The action complained of is the request of him for a drug test before he could be appointed to a permanent packer position at PPCS. The issues for determination in respect of the personal grievance claims are:

- What did the alcohol and drug policy provide in terms of testing for an internal transfer?
- Was Mr Le Gros's employment or a condition of his employment affected to his disadvantage when, as a condition of his appointment to a permanent packer position, he was required to undergo a drug test under the alcohol and drug policy?
- Was the action of PPCS in requesting the drug test of Mr Le Gros unjustifiable?

[8] For completeness, although this was not raised by counsel in submissions, I do not find that the unjustified action complained of by Mr Le Gros derives solely from the interpretation or disputed interpretation, application or operation of the drug and alcohol policy – s.103(3) of the Employment Relations Act 2000.

The collective employment agreement

[9] Mr Le Gros is a member of the New Zealand Meatworkers' Union (the Union). His work is covered by the 2006-2008 Meat Processors' Collective Agreement.

What did the alcohol and drug policy provide for testing for an internal transfer?

[10] The PPCS alcohol and drug policy came into operation in 2005. I accept for present purposes that to the extent there are differences between the alcohol and drug policies provided with the statement of problem and the version supplied by Ms Donaghy with her final submissions, they are not material differences.

[11] The alcohol and drug policy provides for voluntary rehabilitation, pre-employment testing, internal transfer testing, post-accident or post-incident testing, reasonable cause testing, serious misconduct with respect to taking or selling or being in possession of drugs and compulsory rehabilitation.

[12] Ms Donaghy submits, relying in part on the overview of the policy on p.2, that there is a discretion for internal transfer testing and that PPCS is not restricted to the criteria, which I shall set out shortly, on p.11 of the policy under *When to use internal transfer testing*. The overview provision relied on by Ms Donaghy is set out below:

Employees may be tested on application of internal transfer to positions deemed high risk.

[13] Ms Donaghy's submission that PPCS can test in the event of an internal transfer in circumstances other than those set out on p.11 if it is felt justified is not accepted by Mr Mitchell.

[14] Page 11 of the alcohol and drug policy is dedicated to internal transfer testing and provides, with respect to policy and when to use internal transfer testing, as follows:

Policy:

In accordance with the company's general recruitment procedure, an employee offered a new position with the company must return a negative drug or alcohol test before any new position is confirmed.

Refer Schedule IV.

This policy shall apply to both salaried and waged employees.

When to use Internal Transfer testing:

Internal transfer drug and alcohol testing must be undertaken on company employees provided the following criteria are met:

- *The employee has applied and been selected for a new appointment.*
- *The offer of appointment constitutes an entirely new role for the employee.*
- *The position is assessed to be high risk.*

[15] The procedure to be followed when the company undertakes internal transfer testing is then set out and it includes providing the employee with a copy of the internal transfer clause and informing them that their consideration for the offer of appointment is subject to a negative drug or alcohol test.

Conclusions with respect to testing for an internal transfer

[16] It is necessary to consider the policy as a whole. The policy has several initiatives to achieve a healthier and safer workplace and workforce and sets out what is required for testing in the different scenarios. There is a clear distinction between them.

[17] Ms Donaghy submits that if the three criteria set out on p.11 have to be met for any request for a drug test to be justifiable, then the clause would not have been drafted to read testing *must be undertaken* but rather testing *may only be undertaken*. I am not persuaded by that submission. Page 11 is headed up and refers to internal transfer testing. The policy at the top of the page is that an employee offered a new position with the company must return a negative drug or alcohol test before any new position is confirmed. The next heading is *When to use Internal Transfer testing*. There is nothing else on that page to suggest that even if the criteria are not met then internal transfer testing may still be carried out. If that was the case then in my view it would have been set out clearly on p.11. Ms Donaghy refers in her submissions to a flow chart in the policy which relates to both recruitment and internal transfer testing and does not refer to the need for a position on an internal transfer to be high risk or an entirely new role. That does not support that the criteria on p.11 need not be met and a submission that there is no need for a position to even be high risk would be inconsistent with the earlier submission about the policy's overview. A discretion for PPCS to test an employee on an internal transfer regardless of whether the three

criteria on p.11 were met, could potentially blur the distinction between the initiatives and lead to testing of a more random nature.

[18] Ms Donaghy submits that if PPCS could only ask employees to submit to a drug test in the circumstances outlined on p.11, then it would arguably be unable to meet the objectives of the policy. That submission, in my view, overlooks that the objectives in the policy are met by a number of initiatives which include recruitment testing and reasonable cause testing.

[19] I agree with Mr Mitchell's submission that to find PPCS has a discretion to test in circumstances when there is an internal transfer other than those clearly set out on p.11 is inconsistent with the tenure of the policy and cannot have been intended.

[20] Internal transfer testing under the policy is to be undertaken when the three criteria on p.11 of the drug and alcohol policy are met.

The background to the employment relationship problem

[21] Mr Le Gros commenced employment in the Fellmongery Department at the Canterbury plant on 5 November 1980. He resigned in late September 1994 and was then re-employed on 17 November 1997.

[22] At the material time in 2005, Mr Le Gros occupied a position known as the spare man position at the fellmongery. As the spare man, Mr Le Gros covered for other employees at the fellmongery who were absent through illness. Mr Le Gros had become an experienced worker within the entire fellmongery.

[23] In February 2006, the packer in the fellmongery resigned and took sick leave for most of his notice period. Mr Le Gros covered for the packer during this period. The packer's job involves use of the press which bales or presses the wool. The wool is put into a wool bale inside a metal press. A hydraulic ram compresses the wool into the press. The hydraulic ram is attached to a large flat sheet of metal which is pushed down onto the wool. The hydraulic ram can exert a force of up to 13 tonnes.

[24] In February 2006, Mr Le Gros was asked by his foreman if he would be interested in transferring into the packer role on a permanent seasonal basis. Mr Le Gros was advised that he would be offered the position subject to him undergoing a drug test.

[25] Mr Le Gros objected to undergoing a drug test. He did not accept that the position was high risk/safety sensitive. Mr Le Gros does not accept that the internal transfer provisions of the PPCS drug and alcohol policy applied to him because the role of packer was not an entirely new role for him.

[26] Mr Le Gros was advised that he could still keep the packer's position even if he did not pass the test but he would be required to undergo rehabilitation. Mr Le Gros did not see that he should be subject to a test that he felt was unjustified and unreasonable.

Determination

[27] A fair and reasonable employer would follow its drug and alcohol policy in terms of internal transfer testing and consider the criteria as to when such testing should be carried out. *Li v. Vice Chancellor of Auckland University of Technology* [2006] 3 NZELR 66 is a case where a dismissal was held to be unjustified where there was a serious failure to comply with the University's internal procedures and HR delegation.

[28] I have considered whether the criteria set out on p.11 were met. The first criteria for internal transfer testing is met because Mr Le Gros had been offered a new position.

[29] Evidence was given by Mr McKenzie that there had been various discussions with Union representatives about the application and interpretation of the drug and alcohol policy. Mr McKenzie produced two memoranda with his evidence that were prepared some months after Mr Le Gros was asked to undergo internal transfer testing. Mr McKenzie said in his evidence that the agreement was that anybody going to a new seniority group on plant would require a pre-transfer drug test if the seniority group contained positions that were considered high risk. That was so, Mr McKenzie said, even if the job was not an entirely new role. Mr McKenzie said there was agreement with the Union that the packer/presser role was high risk.

[30] I did not hear evidence about this matter from Union officials. Mr Mitchell's submission is to the effect that the aims of the policy are not consistent with PPCS at plant level reaching decisions outside the policies that either vary it or interpret it. Mr Mitchell submits the policy must be applied consistently. In this case, though, I do not need to make findings about the two memoranda because the documents were

prepared some time after Mr Le Gros says that his personal grievance arose. It is Mr Le Gros's personal grievance that I am required to determine.

[31] In terms of the second criteria, I have considered whether the offer of appointment constituted an entirely new role for Mr Le Gros. The New Zealand Oxford Dictionary defines *entirely* as wholly or completely. Mr Le Gros had in his role of spare man been performing work on the press and was skilled in its operation. It was not a completely or wholly new role for Mr Le Gros. In conclusion, therefore, in relation to that criteria, I find the role of packer/press did not constitute an entirely new role for Mr Le Gros and the second criteria for internal transfer testing was not met when Mr Le Gros was requested to undergo testing.

[32] The three criteria have to be met before there can be a request for drug testing for internal transfer. The second criteria was not met in this case.

[33] In terms of the third criteria, there is no definition within the policy of *high risk*.

[34] There was a conflict in the evidence about whether the packer position is a high risk position. Mr Le Gros did not accept that the packer position was a high risk one.

[35] Mr McKenzie outlined the circumstances in which the wool press was deemed to be a high risk position. He said that it was assessed in terms of the Department of Labour definition of *serious harm* outlined in the 1995 discussion document. Serious harm was an injury which could result in an employee taking seven days or more off work to recover. Mr McKenzie gave evidence of his knowledge of decapitation and death resulting from wool presses together with knowledge of amputation.

[36] Mr McKenzie did say in his evidence that there was a relatively low chance of serious harm if the safety mechanisms did not malfunction and were not tampered with. There had been no serious harm accidents reported on the wool press at PPCS Canterbury. The safety mechanism had been tampered with on a previous occasion by an employee in 1994 who disabled the safety mechanism to speed up the press operation. The safety mechanism has since been welded.

[37] In this case, I am not required to determine whether the packer position is a high risk one. All the criteria had to be met if the drug test was to be requested as a

condition of Mr Le Gros's internal transfer. The second criteria was not. Whether or not a position is high risk is best left in the first instance for the employer to define and assess in consultation with the Union and/or employees.

[38] There is assistance in the Employment Court judgment in *NZAEPMU v Air New Zealand* (2004) 7 NZELC 97.367 in paragraph 252:

We have already agreed that a balancing exercise is called for and that it involves a judgement on matters of fact and degree. In our judgment, the balance is to be struck in this case at the point at which the testing can objectively be said to have a sufficiently proximate connection between the impairment of employees by means of the consumption of alcohol or specified drugs or both, and operational safety.

[39] Mr Le Gros was entitled to have the drug and alcohol policy applied to him in the event of an internal transfer in a fair and proper manner and not in an unexpected or arbitrary way. I find that Mr Le Gros was requested to undergo a drug test as a condition for an internal transfer when one of the three criteria which had to be met was not met because he was not being offered appointment to an entirely new role. The request in those circumstances was unjustified under the alcohol and drug policy. The refusal by Mr Le Gros to undergo the test resulted in him being disadvantaged in terms of not being appointed to the new position and, in the belief, as a long standing employee, that his work had been *put down* by the request and that he had suffered a loss of trust that he thought the company had in him.

[40] I do not find that a fair and reasonable employer would have requested Mr Le Gros to undertake a drug test as a condition of appointing him to the position of packer in all the circumstances. Mr Le Gros's ability to perform the role was not in question.

[41] Mr Le Gros has a personal grievance that an unjustified action of PPCS disadvantaged him and he is entitled to remedies.

Remedies

[42] It was clarified during the investigation meeting that Mr Le Gros sought reimbursement of lost wages and compensation under s.123(c)(i) of the Employment Relations Act 2000.

[43] In terms of a lost wages claim, the evidence is clear that Mr Le Gros did not suffer any lost wages as a result of being appointed to the position. He was in fact

some \$15,000 better off remaining in his existing role. I accept that was not the expectation of Mr Le Gros at the time the position was offered to him, but was the result of subsequent market forces. There can, however, be no award for lost wages.

[44] I accept that Mr Le Gros did suffer upset and stress in not being able to take up what he thought was a better position. He gave evidence about the fact that his stress impacted on him in terms of his relationship with his partner and children because of the friction it caused in the household. Mr Le Gros described feeling used by PPCS and humiliated.

[45] In all the circumstances of this case, including the fact that financially Mr Le Gros was better off in his existing employment, I am of the view that an appropriate award under s.123(c)(i) of the Employment Relations Act 2000 is \$6,000.

[46] I order PPCS to pay to Mark Le Gros under s.123(c)(i) of the Employment Relations Act 2000 the sum of \$6,000 without deduction.

Costs

[47] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority