

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 195/09
5160199

BETWEEN	STUART MCLEOD	
	Applicant	
AND	TRANSFIELD	SERVICES
	(NZ) LIMITED	
	Respondent	

Member of Authority: Philip Cheyne

Representatives: Greg Lloyd, Counsel for the Applicant
Emily Moore, Counsel for Respondents

Investigation Meeting: 29 October 2009 at Christchurch

Determination: 12 November 2009

DETERMINATION OF THE AUTHORITY

[1] Stuart McLeod worked for Transfield Services (NZ) Limited as a vegetation worker from April 2004 until his dismissal on 28 April 2009. In April Mr McLeod cut himself out of a tree, and following its usual protocol, Transfield required him to undergo a drug and alcohol test which was positive for cannabis. Transfield later dismissed Mr McLeod for breaching its alcohol and drug policy.

[2] Mr McLeod says that he was unjustifiably dismissed and by this application seeks compensation and reinstatement. Transfield says that it justifiably dismissed Mr McLeod. There are almost no evidential conflicts about what happened and the principal point made on Mr McLeod's behalf is that Transfield under its own policy should have referred Mr McLeod to a substance abuse professional for an assessment before deciding to dismiss him. I will explain a little more fully what happened before addressing that point in the context of the statutory test for justification of a dismissal.

The incident

[3] Mr McLeod and others were tasked with pruning trees and other vegetation on Friday 3 April 2009. Later in the day, while descending a tree that he had topped, Mr McLeod decided to cut more off the truck. He neglected to move his safety anchor point so when the piece of truck toppled it pulled him to the ground about 5 metres below. He did not suffer a significant injury but he was taken to Timaru hospital.

[4] There is no suggestion that Transfield's health and safety processes are anything other than appropriate. The accident was solely caused by Mr McLeod's carelessness in not moving his anchor point to a position below where he was cutting.

Drug tests

[5] Michael O'Brien is Transfield's Line Maintenance Supervisor. He was notified of the accident and went to the hospital at about 5.00pm on 3 April. He told Mr McLeod that Transfield required a drug and alcohol test. Mr McLeod told him that the test would show marijuana use and it did.

[6] Another test was done on a second sample collected on Monday 6 April. That sample tested positive and this was notified to Transfield in writing on 9 April. A third sample about two weeks later tested negative and Transfield were advised of this on 21 April. The second and third tests were done by ESR. After the third test, Mr McLeod was permitted to return to work.

[7] The tests also recorded positive results for opiates but it is accepted that this was completely explained by medication administered at the hospital.

Policy

[8] It is accepted that Transfield is entitled to have its drug and alcohol policy. It provides for random and post-incident testing and there is no challenge to the legitimacy of the post-incident testing of Mr McLeod.

[9] The applicable policy is dated June 2008 and is apparently the fourth iteration. There are sections headed *PURPOSE*, *SCOPE*, *DEFINITIONS*, *PROCEDURE*, *REHABILITATION* and several appendices. The case for Mr McLeod turns on the *REHABILITATION* section. It reads:

5.1 Professional Referral

Employees who test positive for drugs and / or alcohol will be offered referral to a substance abuse professional for assessment. A decision about the employee's continued employment will be made dependent on the specific circumstances, in conjunction with any decision to refer the employee to the Transfield Services – Employee Assistance Programme, or Transfield Services referred rehabilitation with a substance abuse professional. ...

5.2 Rehabilitation Support

...

Disciplinary Process

[10] At the hospital, Mr McLeod told Mr O'Brien that he used marijuana to assist with pain relief from an earlier accident. There is something of a dispute about what Mr McLeod actually said at this time but I prefer Mr O'Brien's evidence.

[11] Mr O'Brien took Mr McLeod home from the hospital later on when he was discharged. During the ride home, Mr O'Brien said that he would have to report Mr McLeod's statement about marijuana and asked when he had last used it. Mr McLeod said that it was in the weekend two or three weeks earlier.

[12] Hamish Gillespie is Transfield's Transmission Lines Manager – South Island. It was his decision later on to dismiss Mr McLeod. Mr Gillespie organised a first disciplinary meeting that was held on 8 April. It was made clear before the meeting that Mr McLeod faced possible dismissal for breach of the drug policy amounting to serious misconduct. At the meeting Mr McLeod was represented by John Gardner, an experienced union official. At the meeting Mr McLeod acknowledged marijuana use several weeks before the accident and use of it two or three times over the past month. He initially maintained the notion that it was for medicinal purposes, but later in the meeting admitted it was simply recreational. He apologised for his actions, said he would never use marijuana again and that he would agree to any testing and rehabilitation conditions. Mr Gillespie referred to a May 2006 work vehicle accident where Mr McLeod had been a passenger and received injuries that had kept him off work for some considerable time. In evidence there is a dispute about what was intended by this reference. However I accept Mr Gillespie's evidence that he meant no more than to draw a parallel with the earlier incident where the driver was dismissed, having tested positive for excess alcohol. As at the date of the meeting the

second sample had been provided but the test results were not available. Mr Gillespie mentioned his understanding that THC remains in the bloodstream longer for a regular user, hence the interest in the second test. There was mention of several recent *near miss* incidents involving Mr McLeod and Mr Gillespie said they had to ask themselves if Mr McLeod was under the influence of marijuana at the time of the fall. In response to a question Mr McLeod denied using marijuana in the week before the fall. Arrangements were made for a second meeting and there was discussion about Mr McLeod's status meantime.

[13] The second meeting was held on 17 April. Mr McLeod was represented by Kelvin Ellis, another union organiser. The second test results were circulated before the meeting. Mr Gillespie commented that the results indicated use of marijuana two or three times per month but Mr McLeod denied using marijuana that frequently. There was discussion about whether Mr McLeod was impaired at the time of his fall and Mr Gillespie acknowledged that he was not qualified to comment on the level of impairment indicated by the test results. Mr McLeod denied being impaired. Mr Ellis made it clear that any dismissal would be challenged. Mr McLeod was offered access to EAP assistance. Arrangements were made for another meeting.

[14] On 21 April Transfield was advised that Mr McLeod had returned a negative test and he returned to work soon after. He also started attending EAP.

[15] The third meeting was eventually held on 28 April. This time Mr McLeod was represented by Mr Gardner. Mr Gillespie said that the investigation into the accident was complete unless Mr McLeod had anything more to say, but he did not. Mr Gillespie said that he was going to issue a dismissal letter and he gave that letter to Mr McLeod. Mr Gardner said that the dismissal would be challenged; he asked Mr Gillespie to reconsider and said that Mr McLeod was not under the influence of drugs at the time of the incident. There was discussion about impairment versus THC test levels, Mr Gardner's point being that there was no evidence of impairment at the time of the fall. There was also some discussion about the reasons set out in the dismissal letter.

[16] The material parts of the dismissal letter say:

Your use of drugs and being under the influence of drugs while in the workplace led to an unacceptable risk of accidents leading to injury,

putting you, your colleagues and potentially members of the public at risk.

...

Under clause 5.1 of the Drug and Alcohol Policy, when an employee tests positive for drugs as you have, Transfield Services must make a decision about that employee's continued employment ...in conjunction with any decision to refer that employee to rehabilitation with a substance abuse professional.

Due to your actions creating such a serious and unacceptable level of risk to you and your colleagues, your employment ...will be terminated immediately. As your employment will be terminated, you will not be referred to a substance abuse professional by Transfield Services.

[17] Some time after the dismissal the parties attended mediation but did not resolve the problem.

Justification for dismissal

[18] Whether a dismissal was justifiable must be determined objectively by considering whether the employer's actions and how the employer acted at the time were what a fair and reasonable employer would have done in all the circumstances.

[19] I am referred to *Air New Zealand v V* (2009) 9 NZELC 93,209 both as to the application in principle of this test and as an analogous case on the present facts. I will return to the details of *Air New Zealand v V* shortly but for the present note that the statutory test requires consideration of both what the employer did and how it acted.

[20] Mr McLeod was bound by the terms of a collective agreement which obliges employees to comply with company policies, permits the employer to introduce and amend such policies and provides that breach of policies can give rise to disciplinary action including dismissal in the case of serious breach. The agreement also permits summary dismissal for serious misconduct. More is said in *House Rules* about serious misconduct. The following are examples: *...consuming or being in possession of illicit drugs at any Transfield Services workplace and Wilful, irresponsible or negligent acts which result or could result in damage to Company property, product or personnel.* There is no suggestion that Mr McLeod consumed or was in possession of marijuana while at work. Neither the *House Rules* nor the *Drug & Alcohol Policy* expressly say that returning a positive drug test itself amounts to serious misconduct.

[21] The *Drug & Alcohol Policy* at clause 4.3.9 says that *A positive drug and/or alcohol test is a violation of the ...Policy ...* Mr McLeod violated the policy but the issue is whether a fair and reasonable employer would have dismissed him for serious misconduct without first offering him a referral to a substance abuse professional for assessment.

[22] It is clear from mention of the policy in the collective agreement that its purpose is to help Transfield meet its obligation under the Health and Safety in Employment Act 1992 to provide a safe and healthy workplace. There is more about the purpose in the section under that heading. The policy recognises that use of drugs can contribute to an increased risk of accidents and that strategies that can assist in preventing drug problems in the workplace include early detection and intervention. The policy is in place to assist in ensuring that the workplace is free from the adverse effects of drug abuse, that employees do not provide an unacceptable risk through abuse of performance impairing substances, that they report to work in a fit condition to perform their duties safely without putting themselves or others at risk and that unlawful possession or use of drugs by an employee does not occur in the workplace (this being serious misconduct).

[23] Clause 4 of the policy deals with *PROCEDURE*. In bold under a sub-clause dealing with drug testing the policy says *Where an employee tests positive, the employee; - must be stood down from duty immediately until a negative test result can be produced, - be informed about educational and rehabilitative programmes*. I have already referred to clause 4.3.9 which makes a positive drug test a violation of the policy. It goes on to say that a failure to comply with a request for a test *will be just cause for dismissal*.

[24] The foregoing is the relevant context for clause 5.1, the text of which is set out above.

[25] The submission for Transfield is that there is an inconsistency between the opening sentence of clause 5.1 and clause 5.2.2 which says *Employees who test positive ...may be given the opportunity for referred rehabilitation*. I do not accept that there is any inconsistency at all because the first sentence in clause 5.1 and clause 5.2.2 deal with different things. The first sentence concerns assessment. Clause 5.2.2 deals with rehabilitation when Transfield has decided to offer the opportunity for referred rehabilitation. The preceding sub-clause deals with voluntary rehabilitation.

[26] Assessment of the circumstances must precede any decision about rehabilitation. That follows as a matter of logic, from the plain words of clause 5.1 and from consideration of the purpose of the policy. However, clause 5.1 does not only mention rehabilitation. The second sentence refers to the decision about continued employment based on the *specific circumstances*. That requirement fits within the statutory test for justification which refers to *all the circumstances*. Accordingly I find that Transfield is obliged by its policy to offer referral to a substance abuse professional for assessment as part of investigating and deciding on the *specific circumstance* relevant to any decision to dismiss. Armed with that and any other relevant circumstances Transfield may then decide whether or not violation of the policy amounts to serious misconduct for which the employee should be dismissed. If the decision is not to dismiss then Transfield might offer rehabilitation support under clause 5.2.2.

[27] On the meaning given to clause 5.1 above, Transfield did not have an option but had to refer Mr McLeod for professional assessment before it could say it had all the *specific circumstances* on which Mr McLeod's continued employment depended. This is a convenient point to return to *Air New Zealand v V*. In that case the company policy required a medical review following a positive drug test in order to inform managers of medical or other factors relevant to the positive test and the need for and willingness to accept a rehabilitation agreement. That requirement was complied with and there was also a review by an alcohol and drug counsellor which also informed the medical review. That information contributed to the medical opinion that the test results and the stated frequency of marijuana use meant there was potential impairment of the employee's ability to work safely and an increase in accident risk so that the employee was not at the time fit to return to his work in a safety sensitive role. A rehabilitation programme was recommended to treat the employee's chemical dependence issues. In the end the employer did not accept that recommendation and dismissed the employee, a decision which was upheld by the Employment Court as justified.

[28] Where the facts of the present case differ materially from *Air New Zealand v V* is Transfield's failure to offer Mr McLeod a referral for professional assessment. An assessment of Mr McLeod's level of dependence on marijuana and his frequency of its use was central to assessing the level of risk posed by Mr McLeod. Mr Gillespie did not accept Mr McLeod's admission as to frequency of use. In particular he did

not accept that Mr McLeod was an infrequent user who had not used in the two weeks preceding the accident. That is why the dismissal letter says that drug use led to the accident and Mr McLeod being under the influence of drugs while at work led to an unacceptable level of risk. Before reaching conclusions such as these a fair and reasonable employer would have complied with its policy and offered the employee a referral for professional assessment. A fair and reasonable employer would have considered any resulting assessment in reaching conclusions about serious misconduct and dismissal. Transfield did not do these things.

[29] For the foregoing reason Mr McLeod has a personal grievance by reason of unjustifiable dismissal.

Remedies

[30] There is a submission for Mr McLeod that he contributed in a blameworthy way to the situation giving rise to his grievance to the level of 20%. The opposing submission is that his contribution was 100% so as to deny him remedies and particularly reinstatement.

[31] I do not accept that Mr McLeod's contribution was 100%. He was not responsible at all for Transfield's failure to comply with its policy. However nor do I accept that Mr McLeod's contribution was quite as limited as submitted. Transfield had to consider his future employment because Mr McLeod violated the *Drug & Alcohol Policy* on 3 April 2009 when he attended work despite knowing that, if tested, he would show positive for THC. There is no evidence to establish to a level of probability that he did this on any other occasion. Mr McLeod's culpable contribution was significant, in the order of 50%. It follows that I must, in deciding the nature and extent of the remedies, reduce them accordingly.

[32] There is a claim for reinstatement. That is resisted because of Mr McLeod's contribution as above, a resulting breakdown of trust and confidence, his lack of transparency as to the reason for his drug use (an initial assertion of a medicinal purpose), several near miss incidents, the potential for a further breach and the lack of any available positions.

[33] If an employee is found to have a grievance and seeks reinstatement, the Authority must provide for reinstatement wherever practicable whether or not other remedies are provided. I have concluded that reinstatement is practicable. Mr

Gillespie's evidence is that there is no current position for Mr McLeod to be reinstated to. However, even prior to the dismissal, it was made clear that reinstatement would be sought should Mr McLeod be dismissed. If there is no current position that should not count against Mr McLeod's claim. The point about a breakdown in trust is answered principally by the finding that Mr McLeod was unjustifiably dismissed. In addition, it was clear to me during the investigation meeting that the personal relationships between Mr McLeod and his managers are not so harmed as to create a barrier to reinstatement. It is fair to say that the managers were (and are) disappointed in Mr McLeod breaching the *Drug & Alcohol Policy* when they felt that the company had done much to support his recuperation and return to work following the May 2006 accident; but that is a long way short of making reinstatement impracticable. Mr McLeod initially attempted to put a gloss on the reason for his use of marijuana but he did not maintain that position when it was canvassed more closely. In context it was a minor prevarication and does not make reinstatement impracticable. The point about future risk is based on Mr McLeod's previous violation and the suggestion that his undertaking to abstain in future should not be accepted because of this violation. It is at least equally tenable that Mr McLeod will honour his undertaking because the consequences of not doing so have been demonstrated and because of his willingness to be subjected to random testing. The point does not give rise to impracticability. There is no evidence to support a conclusion to the standard of probability that the several earlier near-miss incidents had anything to do with a breach of the *Drug & Alcohol Policy*. A little more must be said about the reduction in remedies point.

[34] I am referred to *Waugh v Commissioner of Police* 4/4/03, Goddard CJ, WC12/03 in support of the principle that an employee who has contributed to their dismissal might not be reinstated. I do not read that case as supporting such a principle. It is an interlocutory judgment dealing with a claim for interim reinstatement. The Court refers at [33] of the judgement to an equitable maxim but that does not bear on the present question. A little more relevant is *Safe Air Limited v Wallker* 10/7/09, Couch J, CC7/09 where the Court, dealing with a stay application, saw as significant an argument that an employment who had contributed 50% to a dismissal should have reinstatement reduced by reason of s.124 of the Act. There was reference also to *PPCS Ltd v Vakapuna* 13/12/07, Couch J, WC28A/07 where the Court described the issue of the effect of s.124 on s.125 as *novel* but that judgment did

not provide the opportunity to resolve the point. I will proceed on the basis that reinstatement, while practicable, may be denied because of contribution.

[35] *X v Auckland DHB* [2007] ERNZ 66 illustrates that the over-riding requirement is to craft remedies that do justice to the situation, including reinstatement despite substantial blameworthy contribution on the part of the employee. Here, Transfield could not fairly reach the conclusion on the information it had that Mr McLeod's positive drug test amounted to serious misconduct. Mr McLeod should not have been dismissed. He seeks reinstatement and it is practicable to order it. The just course is to reduce other remedies and allow reinstatement.

[36] Mr McLeod has lost remuneration as a result of his personal grievance. The evidence is that he did some seasonal work at a lower rate of pay for a period after the dismissal and obtained another lower paid job when that work ended. There was also period of about 7 weeks when he had no income from employment. Transfield must reimburse Mr McLeod at his ordinary time remuneration for the first 3 months following the dismissal, less his gross earnings from alternative employment during that period, with the difference reduced by a further 50% to reflect Mr McLeod's contribution. Because of Mr McLeod's contribution I decline to order reimbursement for lost remuneration following the first 3 months.

[37] There is a claim for \$10,000.00 compensation for distress but there is very little evidence to support the claim. I will further recognise Mr McLeod's contribution to the situation giving rise to his grievance by declining to award any compensation for distress.

Summary

[38] Pursuant to s.123(1)(a) of the Act, Transfield is to reinstate Mr McLeod to his former position commencing on Monday 30 November 2009. I do not accept that reinstatement can be treated as new employment so as to engage the pre-employment testing regime. However, Transfield referred Mr McLeod to EAP counselling so it is entitled under clause 4.3.8 of its *Drug & Alcohol Policy* to require Mr McLeod to undergo a post-treatment drug test before he recommences work and for up to 2 years following the accident when he first tested positive. The delay in reinstatement allows time for a test. It also allows the parties an opportunity to identify any training or other requirements before Mr McLeod resumes work.

[39] Pursuant to s.123(1)(b) and s.128(2) of the Act, Transfield is to reimburse Mr McLeod for 3 months' ordinary time remuneration from the date of dismissal less his alternative earning during that period, the difference reduced by 50%. Leave is reserved in case of any difficulty with calculations.

[40] Costs are reserved. If costs cannot be agreed Mr McLeod may lodge and serve a memorandum within 28 days and Transfield may lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority