

The Facts

- [3] The company is meat processor, previously known as PPCS.
- [4] Mr Parker worked for the company at its Oringi plant from 4 February 2002 until his dismissal on 7 December 2007. He was a union member. There were no warnings or disciplinary issues in respect of his performance prior to the dismissal.
- [5] By agreement with the union and because of longstanding concerns about drug use by employees at the plant, drug testing was introduced as a term and condition of Mr Parker's employment on 1 January 2007. A key theme in this new policy is to remove the abuse not the abuser, and to offer rehabilitation assistance for those who test positive at work.
- [6] The policy included reasonable cause drug testing, i.e. testing (including urine sampling) when an employee was observed exhibiting behaviour inconsistent with the plant's code of conduct or employment agreement disciplinary provisions.
- [7] Consistent with its longstanding concerns and as part of its drugs and alcohol policy, the company conducted another drug search of employees' vehicles, in the plant car park on 31 October 2007.
- [8] The company found a small quantity of marijuana in Mr Parker's car. The company also observed Mr Parker swallowing an item at the same time his car was being searched and drinking the contents of a container. Mr Parker denied ownership of the drug.
- [9] Mr Parker was asked to remain on site, not to commence any duties and to meet with company management. But, after advising his union delegate he was stressed, Mr Parker left the workplace. He departed despite advice from the union delegate and a company manager that he should stay. Other employees identified by the search remained in the workplace.
- [10] Mr Parker saw his doctor on 8 and 28 November and was diagnosed as "*medically unfit for work*" from 1 November until 5 December 2007. He was paid for that period.
- [11] The parties met on 22 and 28 November. A letter was issued by the company to Mr Parker on 29 November. It set out the respondent's "*thoughts*" (page 166 of the

agreed bundle), that the applicant would be issued a final warning in relation to possession of drugs in the workplace and be required to undergo a reasonable cause drug test (by way of a urine sample).

- [12] The company explained the latter requirement was because it was not confident Mr Parker was free of drugs, that some time had elapsed since marijuana had been found in his car and, unlike other employees found with drugs in their vehicles, Mr Parker had departed the workplace on the day without the company being able to undertake a reasonable cause assessment of him.
- [13] The parties met again on 7 December during which the company confirmed its position, that it intended issuing Mr Parker with a final warning and required him to undertake a drug test as a condition of his returning to work. Mr Parker was unwilling to accept that condition and, as a consequence, he was dismissed.

Mr Parker's Position Summarised

- [14] Amongst other arguments, Mr Parker said the company's process was unfair as it singled him out and treated him differently from other employees in that it required he undergo a drug test. Because he believed himself to have been singled out, Mr Parker said he justifiably refused a drug test.
- [15] He said there was no evidence before the company of him consuming drugs, unlike another employee who admitted he "*spotted cannabis*" at around 3.30 a.m. that morning (page 192) but who was allowed to work that day. Other employees singled out in the drug search on 31 October also admitted to smoking cannabis but they too were allowed to work that day. The company's tolerance of admitted drug users was in breach of its own health and safety requirements.
- [16] It was unfair and disparate of the company to skip a step set out in its drug and alcohol policy, of undertaking a reasonable cause assessment of him as it did for the others identified by the search that day. Instead it required that he undertake an actual drug test.
- [17] The claim he was in possession of marijuana was not fair because it was never established that the cannabis was his, he denied it was his and the cannabis was not tested until August of this year.

- [18] The company's proper requirement should have been the same as what was provided to other employees, a reasonable cause assessment.

The Company's Position

- [19] Because of my findings set out below it is not necessary for me to summarise the company's position.

Findings

- [20] As was acknowledged by the parties at the Authority's investigation, s. 103A of the Act sets out the relevant test in respect of this employment relationship problem: the question of whether an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time.
- [21] At issue is the employer's action of dismissing Mr Parker. Mr Parker was dismissed for refusing to undertake a reasonable cause drug test.
- [22] For the following reasons I am satisfied the decision to dismiss Mr Parker was justified.
- [23] It is common ground that – knowingly or otherwise and as a result of union membership (see page 150) and the application of the Employment Relations Act 2000 – Mr Parker's terms and conditions of employment were those contained in the PPCS Oringi Collective Employment Agreement 2005-2007 (pages 1-99 inclusive) as well as the company's drug and alcohol policy (pages 100-126 inclusive).
- [24] The collective agreement contains numerous references to the employer's and employees' health and safety responsibilities; see for example clause 6, Intent and clause 7 Undertaking of Commitment.
- [25] Similarly, clause 30 of the collective agreement sets out personal conduct rules. They include encouraging, for reasons of health and safety, an alcohol and drug free working environment.
- [26] Sub-clause 30 (a) (v) of the collective agreement provides for the application of the PPCS drug and alcohol policy from 1 January 2007 (page 23).

- [27] Sub-clause 30 (b) examples offences that would normally warrant dismissal, including the possession of illicit drugs on the plant and the deliberate refusal to comply with the employer's safety standards. Offences that would normally incur a warning include leaving the plant during work hours without permission (30 (c) (v) (page 24).
- [28] The company's drug and alcohol policy also provides that refusing to consent to a reasonable cause drug test amounts to serious misconduct (par 7, page 106).
- [29] Mr Parker was bound by the provisions of his collective employment agreement and the related company drug and alcohol policy.
- [30] The company reasonably satisfied itself that, on the worksite, Mr Parker was in possession of an illegal drug. That is because a drug dog under the control of one of its representatives, Mr White, a former police officer, "*indicated*" (reacted to) the applicant's car (par 5 of Mr White's statement). Mr White smelt recently smoked cannabis and also found cannabis material on the floor of Mr Parker's car. Mr White's impression was reinforced by Mr Parker eating one of the items emptied from his pockets, and drinking the contents of a plastic container. I am satisfied from that evidence that the employer, on a balance of probabilities basis, fairly and reasonably arrived at the conclusion set out above.
- [31] Mr Parker then acted in breach of his contracted obligations: unlike other employees who at the same time had been found in possession of illegal drugs, he refused to undergo a reasonable cause drug assessment. I do not accept Mr Parker's reasons for refusing to undergo the assessment: they were that he felt "*victimised*" (para 4 of his witness statement). There is no evidence of Mr Parker being singled out, on 31 October, any more than there is evidence of his co-workers whose vehicles were searched at the same time being victimised. In reality Mr Parker was, for objective reasons, being asked to undergo a process he had agreed to via his union membership and employment agreement.
- [32] As it happens, other workers who were found to have drugs in their vehicles were assessed and permitted – on the ground of them being fit and safe – to commence duties. The company says that, because of their admissions in respect of drug use and fitness to work no testing was required of those workers. Two of those workers received final warnings and a third agreed to undertake drug rehabilitation. Because

of the difficulties in establishing possession, no action was taken in respect of employees who were passengers in vehicles belonging to others in which drugs were found (page 206).

- [33] Because of his unauthorised departure from the workplace on 31 October Mr Parker ensured he could not be reasonable cause assessed at that time.
- [34] Was the company acting fairly and reasonably in making Mr Parker's return to work conditional on an actual drug test? I believe it was. I make that finding because I accept the company's reasoning as set out in its correspondence (pages 166 and 173) and evidence given at the Authority's investigation: it had sufficient evidence of illegal drug possession by Mr Parker. His behaviour on the day was – if not extreme – then unique in that no other worker absented themselves from the workplace, without authorisation, because of the drug search. Mr Parker then went on unexplained, prolonged sick leave. As a result the company had no opportunity to “reasonable cause” assess Mr Parker because of his absence from the workplace.
- [35] Mr Parker later refused to undertake a drug test. I do not accept his reasons for refusing that test. I am satisfied there was no basis to Mr Parker's “serious concerns regarding the fairness of the process...”, or his belief “they were singling (him) out and treating (him) differently from other employees” (par 13 of his witness statement). The only reason for Mr Parker being treated differently was self-selection, i.e. because of his own conduct. Mr Parker's claim any way is not strictly correct as the company required one other employee to undergo a drug test: it was positive and that person agreed to undertake rehabilitation.
- [36] Mr Parker's terms and conditions of employment provided for a finding of serious misconduct for refusing a drug test (page 106). The company had good reasons to require a drug test, including the health and safety of Mr Parker and other employees. Mr Parker did not have good reason to refuse the drug test. The drug and alcohol policy is an important tool in ensuring a healthy and safe working environment. Mr Parker's non-cooperation with the policy would have rendered it a nullity. The applicant was contractually, and in good faith, bound to co-operate with the letter and spirit of the policy. Just as non-cooperation with excess blood alcohol testing results in stronger sanctions, the policy provided that failure to undertake a drug test amounted to serious misconduct. The company's decision in dismissing Mr Parker was one a fair and reasonable employer, objectively measured in all the circumstances, would have arrived at.

Determination

[37] Mr Parker's claim of unjustified dismissal does not succeed.

[38] Costs are reserved at the request of the parties.

Denis Asher

Member of the Employment Relations Authority