IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 180/10
5278486

	BETWEEN	DAN RILEY Applicant
	AND	ACROW LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	R Bianchi, advocate for applicant P Tremewan, advocate for respondent
Investigation Meeting:	30 March and 12 April 2010
Determination:	20 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dan Riley says his former employer, Acrow Limited (Acrow) dismissed him unjustifiably by reason of a refusal to undergo a workplace drug test.

[2] Acrow says its decision to dismiss was justified.

Background

[3] Acrow is in the business of providing scaffolding, formwork, and falsework. It employed Mr Riley as a leading hand scaffolder. At the material time Mr Riley was working on a site in Pukekohe, South Auckland.

[4] On 1 July 2009, at about 2.10 pm, a supervisor named Julian Ellery telephoned Mr Riley and instructed him to head urgently to another site in East Tamaki to work

on a job that was to be completed by the end of the same day. Mr Ellery was already at the East Tamaki site, and waited for Mr Riley to arrive.

[5] Another employee, Carl Wright, was to travel with Mr Riley from Pukekohe to the East Tamaki site. Mr Wright drove the two in a company vehicle.

[6] Mr Ellery was concerned because the men took longer to arrive than he had expected. He waited for them, but was obliged to leave for a meeting at or about 3.20. Messrs Riley and Wright arrived at or about 3.30 pm. Mr Riley reported his concern about the late arrival to David Lambourne, the Auckland branch manager, when he was himself late to his meeting.

[7] Mr Lambourne decided to investigate the late arrival of Messrs Riley and Wright, and obtained the GPS record showing the movements of the vehicle in which they had travelled. He concluded from the relevant section of the GPS record that a part of the trip which should have taken 10 minutes took some 45 minutes. Some 35 minutes were unaccounted for.

[8] On the morning of 2 July Mr Lambourne spoke separately to Messrs Riley and Wright about the matter. He asked Mr Riley why the trip had taken so long, to which Mr Riley replied that he did not know as he was not the driver. Mr Lambourne replied that he should know. The discussion became heated, and there was shouting.

[9] The shouting attracted the attention of Steven Price, the general manager in Wellington who was on the premises at the time. He entered the office where the discussion was being held, and during the course of further exchanges about the role of a leading hand passed comment on an aspect of Mr Riley's competence as a scaffolder.

[10] Meanwhile that morning while carrying out a routine vehicle check Acrow's contracts supervisor, Dev Chadwick, found the vehicle Messrs Wright and Riley had used parked outside the normal parking area. He looked inside the vehicle and identified a smell of marijuana. He reported this to Mr Lambourne just as the discussion between Messrs Lambourne, Price and Riley was ending. Mr Lambourne went to check the vehicle for himself, and also identified the smell of marijuana.

[11] Mr Riley and Mr Wright had not yet left the premises to carry out their duties, and remained nearby. Mr Lambourne spoke again to them, this time asking them to take a drug test.

[12] Mr Riley said the heated nature of the discussion, and the concern about performance raised during part of it, were the real reasons why he was asked to undergo a drug test. He also alleged that Mr Price threatened to conduct a drug test during the discussion. Mr Price denied making such a threat. I find the allegation very unlikely and do not accept it. The requirement that Mr Riley undergo a drug test arose afterwards and as a result of Mr Chadwick's and Mr Lambourne's observations that there was a smell of marijuana in the vehicle.

[13] Mr Lambourne made arrangements for tests to be conducted. To that end a vehicle containing the necessary equipment and personnel arrived on the site relatively shortly afterwards.

[14] Mr Wright agreed to be tested, and his test was negative. Mr Riley attempted to obtain advice. He spoke to his union delegate, who attempted without success to contact the union organiser Mike Kyriazopoulos. Mr Riley refused to be tested pending the receipt of advice. Mr Lambourne was aware of the attempts to make contact, but after the drug testing vehicle had been waiting on-site for an answer from Mr Riley for some 45 minutes Mr Lambourne came to the view that a decision was necessary. Mr Riley repeated his refusal to take a test and was suspended on pay pending a further investigation.

[15] A disciplinary meeting was sought in a letter dated 2 July. The letter advised Mr Riley of the concerns about the length of time the drive to East Tamaki had taken, that the smell of drugs had been detected in the vehicle, and the refusal to undergo a drug test. The letter also referred to provisions in the applicable collective employment agreement, namely a zero tolerance policy regarding bringing or consuming drugs or alcohol in the workplace or working under the influence of drugs or alcohol. Finally the letter referred to the company's drug and alcohol policy, as contained in the health and safety manual.

[16] The policy contained the following provision for drug and alcohol testing:

> "Reasonable cause testing
>
> Acrow's employees … may be required to undergo drug and/or alcohol testing where 'reasonable cause' exists that an individual may harm or have harmed themselves or others in the course of their duties.
>
> Circumstances which constitute a basis for determining 'reasonable cause' may include but are not limited to:
>
> . a pattern of abnormal or erratic behaviour …
>
> . direct observation of drug or alcohol use: the first line supervisor or another supervisor directly observes an employee using drugs …
>
> . presence of physical symptoms …
>
> …
>
> Full details of Acrow's Drug and Alcohol procedures are contained in attachment A of this document. All employees… are required to read them and sign to indicate they have read and understood them.
>
> …
>
> Any employee … who refuses to consent to a drug/alcohol test, or returns a positive test result, will be subject to disciplinary action which may include dismissal or termination of contract."

[17] 'Attachment A' included the following:

> "Consent – prior to any drug and alcohol testing a consent form will be completed and signed by the participants. Where an employee refuses consent to undertake testing that employee will be stood down from any 'safety sensitive' work areas immediately. A refusal to consent to testing will be treated as a positive result."

[18] Proposals for a drug and alcohol testing policy had been tabled but not agreed during recent negotiations for the cea. Acrow had introduced its own policy in or about April 2009, and workshops in respect of it were conducted during May. However Mr Riley's name and signature did not appear on the list of employees who had attended the workshops. Since Mr Riley said he did not attend, and the absence of his name and signature from the list of attendees was otherwise unexplained, I accept his evidence on the point.

[19] Acrow said a copy of the policy was displayed in the lunchroom. Mr Riley denied seeing it, although he could not say it was not there. I accept that it was there.

[20] The disciplinary meting went ahead on Friday 3 July at about 3 pm. It was attended by Messrs Lambourne and Chadwick, and Mr Riley and Mr Kyriazopoulos. By then Mr Kyriazopoulos had spoken to Mr Riley and advised him to take the test.

[21] Mr Chadwick took a detailed note of the meeting. According to the note issues covered were the unaccounted for 35 minutes during the drive to East Tamaki on 2 July, the smell of drugs in the vehicle on the morning of 2 July and Mr Riley's reaction to the request that he undergo a drug test.

[22] Regarding the time unaccounted for, there was a discussion about what had happened in the office the previous day as well as an effective repetition of the questions and answers already canvassed. There was considerable discussion about Mr Riley's lack of knowledge of the drug and alcohol policy and his initial refusal to be tested on the ground that he was seeking advice, with Mr Kyriazopoulos advising that Mr Riley was now willing to undergo a test. There was no note of the company's response to that advice, and it did not seek to arrange a test.

[23] It was also said at the time, and Mr Riley effectively acknowledged in his statement of evidence, that part of the reason for Mr Riley's refusal to take the test was that he was angry about being shouted and sworn at. That was not a good reason for refusing the test, although there was something to be said for allowing a cooling off period.

[24] The meeting ended at about 4.30 pm, with Mr Lambourne saying more information would be sought.

[25] Mr Lambourne spoke again with Mr Wright about the unaccounted for time, and why there was a smell of marijuana in the vehicle. Mr Wright was not able to explain either of these matters. Mr Lambourne also asked Mr Ellery about whether he had noticed anything on-site, but he had not.

[26] The meeting reconvened at 3 pm on Monday 6 July. The matters of the unaccounted for time and the smell of marijuana in the vehicle were not taken any further with Mr Riley but Mr Lambourne advised of his conclusion that the refusal to undergo a drug test was unacceptable, and amounted to serious misconduct.

[27] Accordingly Mr Riley was dismissed with immediate effect.

Whether the dismissal was justified

[28] The test of justification for a dismissal is whether dismissal was the action a fair and reasonable employer would have taken in all the circumstances at the time.

[29] In support of the justification for Mr Riley's dismissal Acrow relied on Mr Riley's refusal to undergo a drug test. While I accept in principle that such a refusal may amount to serious misconduct under company policy, there is more to the present circumstances than a simple act of refusal.

[30] First, as Mr Lambourne knew, Mr Riley's initial refusal was associated to a significant degree with his attempt to obtain advice. Mr Riley was entitled to seek advice. It was not his fault that advice was not immediately available, and there was no evidence that the inability to obtain advice promptly was the result of any delaying tactic.

[31] The next day Mr Riley's representative informed Acrow of Mr Riley's preparedness to undergo a test. That was not considered satisfactory. There was some discussion in the evidence about the length of time during which marijuana remains detectable. While I accept the matter is not a precise science it is quite conceivable that any use could still have been detected some 36 – 48 hours after the time when use was suspected to have occurred. In any event Mr Lambourne did not rely on any uncertainty of that kind – rather he relied on the zero tolerance policy and the fact of the refusal on 2 July.

[32] I find Mr Lambourne went too far in relying on the zero tolerance policy in that way. I do not consider that relying on the refusal on 2 July - when the refusal was associated with an attempt to obtain advice and was rescinded the following day after the receipt of advice – was the action a fair and reasonable employer would have taken in all of the circumstances.

[33] For that reason I find the dismissal was unjustified.

Remedies

[34] Mr Riley's request for reinstatement was withdrawn at the investigation meeting.

[35] Mr Riley seeks the reimbursement of remuneration lost as a result of his personal grievance. He obtained alternative employment almost immediately, although at a lower rate of pay. He lost one full day's pay of $201.88 gross.

[36] I must also consider whether Mr Riley has been guilty of contributory conduct. His explanations of the events leading to the requirement that he undergo a drug test were unsatisfactory. I regard this as conduct contributing to the circumstances of the grievance and find that a reduction in the remedies otherwise awarded is appropriate.

[37] I would have made an order which included the reimbursement of one day's pay, plus the difference between the rate of pay at Acrow and the rate at the new job for a period. I reduce the amount I would otherwise have awarded by ordering Acrow to reimburse Mr Riley for lost remuneration in the sum of $201.88 gross.

[38] Mr Riley also seeks compensation for injury to his feelings. However part of the injury described in evidence concerned the way he was spoken to at the initial meeting on the morning of 2 July, as well as Mr Price's criticisms of his work. Neither of these arises directly from his personal grievance, and his own role in the meeting of 2 July was not blameless.

[39] Otherwise Mr Riley said he was aggrieved at not having the opportunity to clear his name. I accept that matter is capable of attracting compensation.

[40] The evidence of injury was at the low end of the scale, and for the reasons I have set out Mr Riley was guilty of contributory fault. Acrow is therefore ordered to compensate Mr Riley for injury to his feelings in the sum of $3,000.

Costs

[41] Costs are reserved.

[42] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority