



**Issues**

[4] The Authority is required to objectively assess the actions of South Pacific up to and including the dismissal of Mr Slade and Mr Pikia-Gillies against the test of what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred – s. 103A of the Employment Relations Act 2000.

[5] The first issue for the Authority to determine is whether the conclusion that the applicants had been smoking marijuana during a work break was what a fair and reasonable employer would have decided in all the circumstances at the time.

[6] The second issue is whether the decision of South Pacific to dismiss Mr Slade and Mr Pikia-Gillies was what a fair and reasonable employer would have done in all the circumstances at the time.

[7] If the Authority concludes that the dismissals were unjustified, then remedies must be considered together with the question of contribution and mitigation.

**Policy of South Pacific on drugs in the workplace**

[8] Mr Slade and Mr Pikia-Gillies were covered by the South Pacific Meats Collective Employment Agreement 2007-2009 between South Pacific and New Zealand Meat Workers' and Related Trades Union Incorporated at the material time.

[9] There was confusion about whether a declaration at the back of the collective employment agreement was part of the collective employment agreement or not. Both applicants referred to not having signed the collective employment agreement. The declaration towards the end of the collective employment agreement was required to be signed by the employee and employer.

[10] I do not find that the evidence supports that the declaration was at that time part of the collective employment agreement. I find the declaration was something that all seasonal employees were required to sign at the start of the season and it covered off matters such as confirming independent advice had been given about the agreement, that the collective employment agreement would apply for the first 30 days of employment and confirming that the employee did not have any disability or medical condition.

[11] Materially to this case, the declaration provided:

*I understand that, at the Company's request, I may be required to undertake a drug test at any time. A positive result may result in the termination of this contract.*

[12] Although Mr Pikia-Gillies' declarations for 2007-2008 and 2008-2009 could be found, the situation was different with Mr Slade. Malcolm Hampton, the Manager of South Pacific's Awarua plant, said that Mr Slade's personal file could not be found from shortly after his dismissal. He said that such a declaration would have been signed by Mr Slade because he could not have started work without having signed one. Importantly Mr Hampton said that the declaration was used for medical purposes so that the employee would not be required to undertake a meat handler's medical.

[13] I heard from the then Plant Union Secretary, Ursula Te Huia, who said that when Mr Slade and Mr Pikia-Gillies were inducted at the start of the season, employees could still be employed without signing the declaration although that has since changed.

[14] Having considered the evidence, I prefer the evidence of Mr Hampton that it is more likely that Mr Slade signed the declaration for the material 2008-2009 season as Mr Pikia-Gillies had done. I find it more likely that he simply forgot that he had done so as Mr Pikia-Gillies did.

[15] As well as the declaration, Mr Hampton said that he made it very clear during the induction process to seasonal workers that drug use was not acceptable in the workplace and that a positive drug test may result in dismissal.

[16] Mr Hampton, who commenced his management role at South Pacific in 2008, said that he had also started arranging for dog searching to be carried out by a firm called Elite Dog Services. Elite Dog Services is a private company which owns and operates drug and explosive detector dogs for private industry. Mr Hampton said that initially employees were told when dog searches were to be carried out but after a time that advice was no longer given to employees. Relevant to this matter Elite Dog Services carried out a random and unannounced search from 8.30pm on Monday, 16 February 2009.

[17] Mr Slade and Mr Pikia-Gillies knew that they should not attend work under the influence of drugs. I find they both knew that if caught by a positive drug test that they could be dismissed. They did not accept that this extended to their out of work

use. Both Mr Slade and Mr Pikia-Gillies said they smoked marijuana outside of work with Mr Pikia-Gillies saying that occurred almost every day.

[18] I find that Mr Slade and Mr Pikia-Gillies knew that it was not acceptable to come to work under the influence of drugs or to use drugs at work. The area which the union and the applicants said was unclear was whether cannabis could still be smoked recreationally outside of work. The circumstances of this case and the drug tests that were undertaken, arise from circumstances other than a suspicion of recreational use.

### **The dog handler incident and the meetings held as part of the disciplinary process**

#### **16 February 2009**

[19] On 16 February 2009 at about 8pm Mr Pikia-Gillies, the nephew of Mr Slade, and Mr Slade were both working the night shift and they left the South Pacific site to get a meal during the usual work break. Upon returning to the site, they parked the van. Mr Pikia-Gillies was driving and Mr Slade was the passenger. They were approached by dog handler Peter White and his dog. Mr White said that he noticed the dog was showing an interest towards the van or its occupants and he spoke to them.

[20] After that discussion Mr White said that he was concerned about the men returning to work because he said they had admitted smoking marijuana during their work break. He followed them into their workplace and spoke to their supervisor.

[21] Mr White also telephoned Mr Hampton and advised him that he had intercepted two people coming back from a break who admitted smoking cannabis during the break. Mr White told Mr Hampton he was concerned about both of them returning to work to continue with their shift in the circumstances.

[22] Mr Hampton telephoned the supervisor of Mr Slade and Mr Pikia-Gillies, Regan Gillies, who is also Mr Slade's nephew, and arranged for Regan Gillies to have them both suspended on full pay. Mr Hampton also advised Regan Gillies that they would be offered a taxi home. Both men declined. I find it likely that there was mention of a meeting that would be held with them the following day and in all probability the need to undergo a drug test was also referred to by Regan Gillies.

**17 February 2009**

[23] On 17 February 2009 Mr Slade and Mr Pikia-Gillies attended separate meetings with the Production Manager of the Awarua Plant, Kevin Hamilton, and the Health and Safety Manager, Kirsten Newton.

[24] Ms Thomas was critical of several aspects of these meetings. The first was the fact that Mr Slade and Mr Pikia-Gillies were unaware of the allegations they were required to discuss at the meetings. Mr Slade and Mr Pikia-Gillies went over the events of the previous night. I do not find that criticism can be properly assessed in isolation from the events of the previous evening on 16 February 2009.

[25] Mr Slade, in his evidence, said that Regan Gillies had told him on the evening of 16 February that the reason he was suspended was for *apparently getting pulled over for smoking* and Mr Pikia-Gillies said that Regan Gillies used the word *busted* because the dog handler thought they were *smoking up*.

[26] I find that both Mr Slade and Mr Pikia-Gillies were sufficiently aware that the meeting was being held because of concerns that they had been *smoking up*. I find no significant unfairness in terms of that matter.

[27] There was also a criticism that Mr Slade and Mr Pikia-Gillies had no opportunity to have a support person at the meeting. The notes that were typed from handwritten notes Ms Newton took provided that Mr Hamilton asked each man at the start of the meeting if he wanted support. Both are recorded as declining. In circumstances where neither Mr Slade nor Mr Pikia-Gillies had a good recollection of that meeting and were quite candid about that, I find the notes to be the more reliable record.

[28] Although there was no evidence to support there being an earlier offer of a support person before the meeting started, this has to be balanced against the fact that this was a preliminary meeting and that it was not attended by the decision-maker, Mr Hamilton. The purpose of this meeting was to obtain a preliminary version of events from Mr Slade and Mr Pikia-Gillies.

[29] Their explanations were that they did not admit to Mr White that they had been smoking during the work break. They were completely consistent in their

explanation throughout the process. I am not satisfied, when considered overall, that it could have been said that there was unfairness.

[30] One of the other purposes of the meeting was to arrange a drug test and Mr Slade and Mr Pikia-Gillies were provided with consent forms to be signed. Both men signed a consent form at the meeting and agreed to provide a urine sample for testing.

[31] There was no evidence to satisfy me that Mr Slade or Mr Pikia-Gillies felt forced to sign the form and I do not find, as suggested by Ms Thomas, that the circumstances of the meeting call into question the signing of those forms. There was no evidence to support that the forms were signed other than freely and both men understood what was entailed.

[32] Both Mr Slade and Mr Pikia-Gillies were advised that when the test results were returned a further meeting would be held and they continued to be suspended in the interim.

[33] A further meeting was held on 23 February 2009. Before that date, Mr Hampton was aware that both drug tests returned positive results and he also had a written report dated 17 February 2009 from the dog handler.

[34] The report provided that Mr White approached the vehicle and while talking to Mr Slade and Mr Pikia-Gillies noticed the dog was showing interest towards the interior and its occupants. There was a pipe in the van although that was not material in terms of the disciplinary meetings and outcome. Mr White recorded that he spoke to Mr Slade and Mr Pikia-Gillies and it was revealed that they had been off-site to smoke cannabis at one of their addresses. The report provided that Mr White explained to Mr Slade and Mr Pikia-Gillies that they were a risk to themselves as well as their co-workers and they advised him that they had both smoked cannabis for years and it did not affect their work.

### **23 February 2009**

[35] On 23 February further separate meetings were held with Mr Slade and Mr Pikia-Gillies on this date. Both were represented at this meeting by Ms Te Huia and Allan Murdoch, the Boning Room Union delegate. Mr Slade and Mr Pikia-

Gillies were advised that their respective drug tests had been returned with positive results.

[36] I am not satisfied that they were advised of their actual levels. I find that they were advised that the THC acid confirmation was greater than 15 nanograms per millilitre of urine. I find it was only after Mr Slade and Mr Pikia-Gillies had been dismissed that the levels were requested and made available – see email requesting such information sent 24 February 2009 after dismissal. Both Mr Pikia-Gillies' and Mr Slade's levels were greater than 300 nanograms THC-acid per millilitre of urine. I shall return to this matter because I consider it somewhat unfortunate that the levels were not provided. It is clear from submissions made during the disciplinary meetings that there was discussion about levels of impairment and the fact that cannabis stays in the system for a considerable period. Those matters are valid but less persuasive with such high levels. It did seem objectively assessed however that for all the union representative knew the levels could have been just over 15 nanograms which as defined by AS/NZS 4308:2001 is a positive result.

[37] By way of explanation, both men denied that they had admitted smoking cannabis during their work break to Mr White, the dog handler. They said they never smoked marijuana at work but said that they did outside of work. Mr Pikia-Gillies said he was a heavy user and Mr Slade said he had been to the Rahanna Clinic to get an appointment to help with his problem. During this meeting both men discussed the possibility of rehabilitation.

[38] There was one discrepancy between the two accounts given by Mr Pikia-Gillies and Mr Slade in that Mr Slade said that he had not gone home for lunch but to the Mobil station which was shut. Although that discrepancy was relied on by Mr Hampton, it was not put to Mr Slade or Mr Pikia-Gillies for them to comment further on.

[39] There is a dispute given that Mr Slade and Mr Pikia-Gillies did not accept they had told Mr White they were smoking during their break whether Mr Hampton carried out further inquiries with Mr White. Mr White could only recall one discussion with Mr Hampton on the night of the incident, but Mr Hampton said he was sure he had spoken to Mr White not only that night but also after his report.

[40] A considerable passage of time has elapsed since the disciplinary meeting on 23 February 2009. There is a possibility that Mr White may have forgotten that there was a further call or indeed that Mr Hampton may be incorrect in his evidence. I can not, however, be satisfied from the evidence to the required degree of certainty that there was a further call made to Mr White by Mr Hampton.

[41] I am strengthened in fact in my view that such a further call was unlikely to have been made because of the matters that Mr Hampton relied on in concluding that there was smoking during the work break. These did not include matters in Mr White's evidence to the Authority about signs of recent drug use.

[42] Mr Malone submits that even if Mr Hampton had not checked with Mr White, it could have made no difference. He makes that submission because Mr White confirmed in his evidence to the Authority on which he was quite firm and did not resile under strong questioning from Ms Thomas that he was not mistaken that Mr Slade and Mr Pikia-Gillies told him that they had been smoking marijuana at one of their addresses during the work break.

[43] Further, Mr White said in his evidence to the Authority that they exhibited signs of recent smoking; a lack of concentration on the discussion, treating the issue light heartedly, having bloodshot eyes and being unwilling to follow instruction. Mr White also said that he became aware of the odour of recently smoked cannabis. These signs did not appear in Mr White's summary although that is quite unremarkable because he was not to know at that stage that there would be an issue about what he had written in that report.

[44] Importantly I am assessing justification not at the time of the Authority's investigation but at the time that Mr Hampton made the decision that Mr Slade and Mr Pikia-Gillies were smoking marijuana during a work break and then returning to work under the influence of the drug.

[45] I accept that a fair and reasonable employer would not have concluded that Mr White lied. He did not get any additional benefit out of intercepting individuals and he did not know Mr Slade and Mr Pikia-Gillies. He had no reason to make the evidence up.

[46] I find however that a fair and reasonable employer faced with a denial such as that given by Mr Slade and Mr Pikia-Gillies would have returned to Mr White to see

whether there could have been a mistake as to what was said. Had this been undertaken at the time, then I imagine Mr White would have talked about other matters to Mr Hampton that he thought also were consistent with recent drug use as he has done in his evidence. I do not find that any of those matters were put to Mr Slade and Mr Pikia-Gillies.

[47] The inconsistency about where the two men went during their break was not sufficiently put although may well have ceased to be of such importance if there had been further follow-up with Mr White.

### **Meeting 24 February 2009**

[48] Mr Hampton attended on this date the two separate meetings with Mr Hamilton and Mr Slade and Mr Pikia-Gillies attended with Ms Te Huia and Union organiser, Gary Davis. Mr Slade's wife Terri Slade, also attended his meeting.

[49] The notes record that this meeting opened with recapping the events to date and a decision to dismiss was delivered early on in the meeting. There was then some discussion that took place in terms of the decision.

[50] Ms Thomas is critical of the fact that there was seemingly no reference to alternatives to dismissal. I find that Mr Hampton had considered but rejected the rehabilitation as an option for Mr Slade and Mr Pikia-Gillies. He provided reasons for this in that he felt they had refused to tell the truth in circumstances where he concluded they had been smoking during their break and he could not trust them to truly try to rehabilitate themselves. He was also concerned that neither man nor their representatives considered smoking marijuana was wrong or posed any danger at the workplace and that he was concerned about that attitude. It was, however, provided for in the dismissal letters that if they provided a clean test they could reapply for their position.

[51] I am not satisfied that as an alternative to the dismissal rehabilitation was not considered. It was mentioned by both Mr Slade and Mr Pikia-Gillies or on their behalf during the meeting on 23 February 2009.

[52] I find a fair and reasonable employer would have considered the matters that Mr Hampton did in terms of rehabilitation and I am not satisfied that a failure to agree to that outcome in itself was fatal to the justification of the decision to dismiss.

**Conclusion**

[53] The process adopted was fair in many respects. Mr Slade and Mr Pikia-Gillies had an opportunity to provide an explanation. They were represented during the two main meetings and were given the opportunity to have a support person at the preliminary meeting.

[54] There are some matters that I find were procedurally unfair. I find that Mr Hampton did not go back and check with Mr White whether he could have been mistaken about whether there was an admission by the applicants. Information relevant to that such as demeanour and physical appearance and odour of smoke when intercepted by Mr White was not put to Mr Slade and Mr Pikia-Gillies. Instead Mr Hampton relied on less persuasive matters to justify his findings that there had been smoking by the applicants during their work break such as an inconsistency about where the applicants went during their break. There was as earlier indicated unfairness in terms of that matter.

[55] The high levels of THC in the applicants' urine should have been put to Mr Slade and Mr Pikia-Gillies even if there had to be a delay for the applicants to comment.

[56] I find that the dismissal was procedurally unfair because the actions of South Pacific particularly in not returning to Mr White and questioning him further in light of the denial about the admission were not in accordance of those of a fair and reasonable employer. In terms of substantive justification, I accept that smoking marijuana during a work break and then coming to work under the influence is conduct that is capable of amounting to serious misconduct. I will have to make findings about any contributory conduct with respect to remedies.

[57] For completeness although I do not need to go on to consider whether there was disparity of treatment particularly in terms of rehabilitation for those caught smoking at the workplace Mr Hampton did I find satisfactorily explain the reason for the difference in treatment.

**Determination**

[58] I find that Mr Slade and Mr Pikia-Gillies were unjustifiably dismissed from their employment. They each have a personal grievance. I shall now go on to consider remedies and contribution.

**Remedies****Contribution**

[59] The Authority is required to consider whether the actions of Mr Slade and Mr Pikia-Gillies contributed to the personal grievance I have found of unjustified dismissal and if so reduce remedies accordingly.

[60] Mr White was clear and straightforward in his evidence that he was not mistaken that Mr Slade and Mr Pikia-Gillies had admitted to smoking marijuana during a work break off the work site. Mr Slade and Mr Pikia-Gillies responded to the matters put by Mr White about their physical appearance and demeanour when stopped by him with alternative explanations. I accept that there could be other explanations however there was more than one sign of drug use and then high positive results from the drug tests. This was a case to put it plainly where the information ascertained after the dismissal if anything strengthened its substantive justification.

[61] I find that on the balance of probabilities Mr Slade and Mr Pikia-Gillies smoked marijuana during their work break and when they returned they were under the influence of the drug and had they not been suspended would have worked in that state.

[62] I find that Mr Slade and Mr Pikia-Gillies knew that that sort of conduct was conduct that would be unacceptable to their employer and in the dangerous environment of a meat processing plant it amounts to serious misconduct.

[63] I consider this to be an appropriate case for a 100% reduction in remedies and there will therefore be no order as to remedies.

**Costs**

[64] I reserve the issue of costs.

Helen Doyle  
Member of the Employment Relations Authority