IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 71
5307302

	BETWEEN	URSULA ELIZABETH TE HUIA Applicant
	A N D	SOUTH PACIFIC MEATS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranney and Anthea Connor, Counsel for the Applicant Graeme Malone, Counsel for the Respondent
Investigation Meeting:	30 November 2010 at Invercargill
Submissions Received:	23 December 2010 from the Applicant 14 January 2011 from the Respondent
Date of Determination:	18 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Ursula Te Huia, claims she was unjustifiably dismissed from her employment with the respondent, South Pacific Meats Limited (SPM), on 28 April 2010.

[2] SPM accepts that it dismissed Ms Te Huia but considers justified in doing so given a positive drug test.

Acknowledgement

[3] Unfortunately a considerable period of time has passed since the investigation meeting. The situation has arisen as a result the file being inaccessible for a considerable period due to Christchurch's earthquakes and, once returned, there was

difficulty in addressing it given workload issues. I appreciate the parties patience and regret any inconvenience.

Background

[4] Ms Te Huia was engaged by SPM as a Meat Worker when it commenced operating the Awarua Plant near Invercargill in April 2005. While the employment was seasonal, Ms Te Huia maintained the relationship with SPM until her dismissal in April 2010.

[5] Ms Te Huia has, throughout her employment, been active in Union affairs and rose to the position of Sub Branch Secretary. This led to a number of interactions with SPM over what Ms Te Huia describes as health and safety concerns. Some of these were escalated to the Department of Labour but, according to the Union's Branch Secretary, Mr Gary Davis, no action resulted. Mr Davis goes on to observe that notwithstanding the lack of action, and perhaps because of unfavourable publicity that was being generated around the issues, SPM implemented a drug testing regime.

[6] SPM disagrees. Mr Malcolm Hampton, its Awarua Manager states:

> *Meat Plants are intrinsically dangerous places due to the types of machinery used and the use of knives. Drug use imposes an unacceptable danger not only to staff under the influence but also other employees.*

[7] He goes on to say this has meant that SPM has always required that staff acknowledge and accept its ability to test for drugs. He states that it is not, as alleged by the Union, a new situation and his assertion is supported by at least five documents signed by Ms Te Huia between 27 April 2005 and the commencement of the 2009/2010 season. Each contains a provision that reads:

> *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 termination of this contract.*

[8] In addition to the health and safety issues, there were a number of discussions between SPM and Ms Te Huia over her attendance. Indeed, it would appear that her record was such that it she received warnings, an alteration of duties (read demotion) and that it almost brought about her dismissal during 2009. In a letter dated 11 November 2009 Mr Hampton, refers to Ms Te Huia's previous record and what he alleges was her failure to comply with various undertakings about improving her

attendance, before advising that he was willing to offer *further reemployment* but it was *only on the very clear understanding that where there is further absence that I decide is part of a repetitive pattern or is otherwise not acceptable (whether by way of notification or certification) that it WILL result in your dismissal.*

[9] The above ultimatum was revisited in a meeting that occurred on 10 December 2009 and its outcome was recorded in a letter the following day. That letter, again signed by Mr Hampton, advises:

> *Further to the discussion with yourself and separate discussions with your representative Daryl Curran, I have considered all of your reasons and associated employment conflicts with Blue Sky* [Ms Te Huia's secondary employer] *as being the impediments to your regular attendance at SPM.*
>
> *As a final endeavour to assist with your rehabilitation and return to a consistent work pattern.*
>
> *You can commence employment on Monday 14th December 2009 in the Boning room on Dayshift. Treat from this point forward you are commencing with "no absenteeism history", and therefore any future unauthorised absences will go through the normal disciplinary process. (first written warning, final warning, dismissal)*
>
> …
>
> *Ursula, this is your* ***absolute last chance*** *for you prove you can deliver, and the company has moved extensively beyond the normal terms of employment in order to assist you. I hope that you do not let us down, and more importantly that you do not let yourself down.*

[10] While it would appear SPM was of the view the problem remained, no formal action was taken and any concerns SPM may have had were not raised with her.

[11] Returning to the issue of drug testing. Ms Te Huia says *On Friday 19 March 2010 a drug testing van appeared at work* [and] *the company drug tested all the weekend sawmen. Out of 11 tests there were 9 positive results*.

[12] SPM disagrees with this evidence. It contends that the failure rate amidst sawmen was only 65% and that other employees were tested.

[13] Ms Te Huia also states

> *The company used a cut off level of 50 nanograms per millilitre. If the result was less than 50 then the company let you go straight back to work. If the result was 50 or more then you had to see the company doctor to see if he deemed you to be impaired and unable to work.*

[14] She adds that all of those who tested positive were offered an opportunity to participate in a rehabilitation programme and remain employed. She says this approach was applied to four employees whose readings were 200 or more. Ms Te Huia also comments on a fifth employee, with a reading of 69 nanograms, who she says was immediately seen by the company doctor and returned to work on the grounds he was unimpaired.

[15] Again, SPM has a divergent view. Mr Hampton states that all staff who returned a 'non-negative' result were stood down pending a laboratory result. He claims that if the laboratory confirmed a positive result, a disciplinary investigation would occur. SPM also says that a rehabilitation programme was only agreed *in some cases* but, irrespective, staff would be stood down without pay until they could provide a negative result which might, in some cases, result in reemployment and this approach was applied to the staff member that Ms Te Huia claims returned to work immediately.

[16] Ms Te Huia also comments on SPM's practice of suspending those with positive results without pay. She says that her position with the Union meant a number of these people approached her for assistance and that this could occur at home by day or night. She states that she found the situation very stressful and was, as a result, under a lot of pressure.

[17] Ms Te Huia goes on to say:

> *The sawmen were very angry about the drug tests. They felt they were being victimised and that the union was not doing enough to help them. I took the force of their anger.*
>
> *On* [Monday] *19 April 2010 I asked Natalie Jung, the company's health and safety administrator why the company was only testing the sawmen and not everybody at the plant, as it did not seem fair.*
>
> *Three sawmen were standing with me when I spoke to Natalie. They were very angry and said that they wanted a delegate tested every time a sawman was tested. I said to Natalie that she could test me.*
>
> *Natalie told me that she would never test me as she would never think I was impaired by drugs. The saw men got angry and said "why is she exempt?"*
>
> *Because of the reaction this created amongst the saw men and other Union members I felt under pressure to show them my support. I volunteered to have a drug test.*

[18] Ms Te Huia then underwent the test, which was conducted by staff of the New Zealand Drug Detection Agency (NZDDA). She recorded a non-negative result. This led to the NZDDA representative telling her to go home, which she did. The non-negative result was for cannabinoids (in other words, cannabis use). As it transpires Ms Te Huia had smoked cannabis over the just completed weekend though there is conflicting evidence about the circumstances. This shall be discussed later (see 35 to 37 below).

[19] Formal notification of the result was conveyed to SPM in a letter from NZDDA dated 22 April 2010. Under the heading *Results* the letter noted –

> *The sample returned a **positive** result for cannabis use. The sample was analysed for cannabis constituents and THC-Acid. Both were present at levels higher than the cut-off levels stated in AS/NZS4308:2001.*
>
> *The level of THC-Acid was 48 nanograms per millilitre. Urine THC-Acid levels cannot be used to compare individuals or samples from the same person. In addition, THC-Acid levels do not indicate impairment or when and how much cannabis was used.*

[20] A footnote records that the cut-off level for THC-Acid is 15 nanograms per millilitre and this is behind one of the disagreements aired during the investigation meeting – what was the cut-off: 15 or 50. It is not, however, one that impinges upon the outcome and will not be discussed further.

[21] According to Mr Hampton, the result gave him cause to ask Mr Norris Tait (the Production Supervisor) to meet with Ms Te Huia and her representative (another Union delegate – Ms Katrina Murray). Mr Tait was to advise them of the result and that he (Hampton) was considering Ms Te Huia's dismissal, though he would first confer with his 2IC, Mr Kevin Hamilton.

[22] There is some debate as to when the meeting between Ms Te Huia, Ms Murray and Mr Tait occurred. Ms Te Huia says 23 April but Mr Tait's notes suggest the 24th.

[23] About the meeting, Ms Te Huia says:

> *I told Norris that my test result shows how unfair the whole process is. I said that the test result does not show if you are impaired only if there is some level of cannabis in your system. I was okay to be working.*

> *I said that my test was voluntary because it was unfair that only sawmen were being tested for drugs and no-one else at the plant. I said I wanted to support the saw men.*

[24] Ms Te Huia goes on to say that Mr Tait then advised that SPM would not be offering her a rehabilitation programme and that they were considering dismissal, but that would be discussed in a subsequent meeting with Messrs Hampton and Hamilton. She claims that Mr Tait hinted that Mr Hampton was also looking at her work history and that he (Tait) was preparing a report for Mr Hampton. Ms Te Huia states she then said she wished to talk to Mr Hampton before a decision was made, but that Mr Tait responded by advising that while he would pass the request, no guarantee could be made.

[25] Whilst there are some minor disagreements, Mr Tait's notes largely support Ms Te Huia's the evidence.

[26] Mr Tait's comment that a meeting with Mr Hampton could not be guaranteed led to Ms Te Huia preparing a four page letter of explanation. It was sent to Mr Hampton on 26 April and Ms Te Huia summarises its content by saying:

> *…I set out everything that had been happening at the plant as I have said above and also that:*
>
> *1. The whole situation had been very unfair to me personally and put a great strain on me.*
>
> *2. My only crime is that I am too diligent in my secretary role and that I was trying to inform Malcolm* [Hampton] *of how unfair the tests were and that they do not prove people are impaired only that they have cannabis at some stage.*
>
> *3. I asked Malcolm to treat me like everyone else and be given a chance like everyone else. I told him I can easily do rehab as I have no cannabis use to worry about.*
>
> *4. That I have never disobeyed an instruction or done anything wrong on purpose; never lied in the past and never given the company any reason to disbelieve my word.*
>
> *5. The work pressure of extra hours and lack of support I have received.*
>
> *6. My level was very low and that the results showed cannabis can stay in your system for a long time even when you feel no effect from it.*
>
> *7. I was prepared to be re-tested and could guarantee a negative result.*

[27] As events transpired, Mr Hampton agreed to meet with Ms Te Huia. The meeting occurred on 28 April and Ms Te Huia's husband, Ms Murray and Mr Hamilton were also present.

[28] About the meeting, Ms Te Huia says:

> *Throughout the meeting Kevin took some handwritten notes. When I tried to explain or talk at the meeting he would snigger or make a smart comment. He was disrespectful and I felt he was mocking me. It was horrible.*
>
> *At the start of the meeting Malcolm talked about my past issues with attendance.*
>
> *…I said that since then my attendance at work had greatly improved, that I had been promised a clean slate in December 2009 and that if I had too much time off I was going to be put through the warning system. I said that had not happened and so my attendance history should not come into it. I said that we are only talking about the positive drug test.*
>
> *Malcolm did not accept this and said that he wanted everything to be taken into consideration including my previous absences from work.*

[29] Ms Te Huia goes on to say they then discussed a copy of her attendance record before Ms Murray spoke about the hours she had been working before:

> *… I explained to Malcolm why I had volunteered to take a urine test. I said my level was under 50, being 48. I said I was not impaired. Malcolm then had a very short break.*
>
> *When he came back to the meeting he kept referring to my absenteeism and said it would be at 15% now and if he looked at it for the whole year it would be higher.*
>
> *I said that was not accurate. I again explained that most of the days I had off were for good reason and that other days which had been recorded as being absent were due to my Union duties, attending Union conferences and collective negotiation talks. The company had added this to my absenteeism record making it incorrect.*
>
> *I again said it was not about my absenteeism but about my test result.*
>
> *He then dismissed me saying that the reason for this was for a positive drug test result.*

[30] Mr Hampton notes:

> *… that both Kevin and Union took notes at the meeting and that they have been produced. While each is slightly different I believe that is normal in that neither has got down everything that was said but they are generally accurate.*

[31] He goes on to say:

> *At the meeting Ursula repeated comments along the lines raised in her letter, to the effect that she felt her absenteeism was not unacceptable and questioned some of the days I had marked as absent when she was on union business. Even with those days removed further in her favour the result was unacceptable and I gave Ursula a copy of the absentee calculations. She further commented that the drug test results were low and didn't prove impairment, that the testing was unfair, that she had been under pressure from lack of union support and had only taken the test as a protest, and that the test didn't work.*
>
> *She also said that she was the only person that was dismissed and I replied that* [Y] *had been dismissed for drugs…*
>
> *After she made such comments she wanted me to consider I adjourned to reconsider what had been said and reviewed the letter again.*

[32] Mr Hampton then says that:

> *I concluded that in my view dismissal was the only option. Despite the evidence of some others being offered rehabilitation it was not an issue for consideration. Ursula maintained that she was not in fact a drug user but in effect had taken cannabis and the test to prove that the tests were unfair.*
>
> *As I saw it, knowing the company's policy that drug use was unacceptable in that a positive result was a dismissible offence she had intentionally breached that policy and was liable for dismissal. She had deliberately consumed cannabis knowing it was not accepted at work, and then thwarted any testing until she had been voluntarily tested herself. Furthermore the initial test was dilute indicating a possible intention to try and cheat the test.*

[33] Mr Hampton continues to assert that Ms Te Huia's absenteeism was not a major factor in the decision but accepts that it was one that was taken into account

… in the sense that in the past, largely through representations made by her organiser, Darryl, she had been given more chances than others to clean up her act.

[34] Mr Hampton says that despite those chances her absenteeism remained unacceptably high and that while this was not a factor justifying dismissal, it was one that mitigated against offering yet another chance by not dismissing. He concludes:

> *I remain of the view that my decision was correct. She intentionally and wilfully took drugs and gave a positive test. She was aware that a positive test was seen as a dismissible offence and so knew the consequences. It was deliberate and undermining.*

[35] The evidence is that Mr Hampton's belief that Ms Te Huia was not a regular user of cannabis but had deliberately taken the drugs in an attempt to challenge and undermine the testing regime was a key consideration. He appears to have reached

this view given comments in the letter of 26 April. Whilst not express admissions, examples include a note that Ms Te Huia had sought, but been refused, a test at a private clinic in order *to know for myself if what's being said to me about cannabis was correct* along with references to the fact some staff were bragging that they could circumvent the tests and an observation on that Ms Te Huia was *trying to be informed, not defiant.*

[36] Indeed the only evidence of something that could be considered close to an express admission that Ms Te Huia's action was deliberately aimed at the testing process was her comment that *I done the test under protest to make a point Malcolm that you are not impaired at work when you have smoked in the weekend or the night before and that the urine test is unfair as it brings up what people may have done 3 months before doing the test.* This would appear to indicate that she took the test knowing she could provide a positive result but it should be noted that the comment was made after the adjournment during the meeting of 28 April and after Mr Hampton had decided to dismiss.

[37] Her evidence when responding to oral questions during the investigation meeting differed in that she maintained that she was not regular user but felt inclined to try cannabis given the current situation at work. An opportunity arose and she took it but the timing had nothing to do with an attempt to undermine the resting regime as she had no idea testing would occur on the Monday. She puts the situation which developed down to a case of *wrong place – wrong time.*

[38] The dismissal was challenged soon thereafter, but an inability to resolve the dispute led to this investigation meeting.

Determination

[39] As has already been said, SPM accepts that it dismissed Ms Te Huia. In doing so, it also accepts that it is required to justify the dismissal.

[40] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least used to state, that the question of whether a dismissal is justifiable

> *… must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal … occurred.*

[41] The above test is used as the cause of action arose prior to the present version coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless they specifically provide otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[42] It is submitted, on Ms Te Huia's behalf, that SPM will be unable to justify the dismissal due to:

a. An alleged disparity of treatment. This is a reference to the issue of whether or not Ms Te Huia should have been retained while undergoing a rehabilitation program; and

b. SPM took account of Ms Te Huia's attendance record when ti should not have.

[43] I have some sympathy with both arguments. In paragraph 15 I commented on Mr Hampton's evidence about SPM's approach to those who deliver a positive test result. In response to oral questioning he expanded on this. He spoke about what he characterised as a zero tolerance policy in respect to drugs, though the fact some are retained after a positive test suggests the approach was not one of zero tolerance but it was certainly a tougher regime than had previously applied. He advised that those who were given a further chance were good employees with good records, attendance and punctuality who exhibited a *genuine willingness to recognise their drug problem and make a change [normally through participation in a rehabilitation programme]*.

[44] Unfortunately Ms Te Huia claims, and Mr Tait's notes confirm, that he advised that management had already decided that she would not be considered for a rehabilitation programme. This, when combined with Mr Hampton's evidence suggests that the door to retention had already been closed and that this occurred before Ms Te Huia had had an opportunity to put her views and/or explanations. In my view an employer does not make such a decision, which, given the evidence, effectively preordained the outcome so early in the process. It is not the act of an employer behaving fair and reasonably.

[45] There is then the issue of absenteeism. Whilst Mr Hampton denies it was a key factor in the decision to dismiss, he accepts that it influenced the outcome. First I

doubt the issue was as insignificant as claimed. Indeed, both the notes and the evidence of those present suggest it was a prime focus and occupied a majority of the meetings time. In any event it is hard to conclude that it should have been a consideration at all. The letter of 11 December 2009 states Ms Te Huia had a clean record in respect to attendance. If there were further problems they had to be addressed and recorded in accordance with SPM disciplinary process. This never occurred so I must conclude that Ms Te Huia still had a clean record – therefore, and as a result of SPM's decision to waive the past, there was no impropriety SPM could take into account and which could be relied upon as an argument mitigating against Ms Te Huia's retention. To then do so, having waived the right, is not the act of fair and reasonable employer.

[46] There is then the fact that Mr Hampton concluded that Ms Te Huia had deliberately taken the cannabis in order to undermine the testing process and this, he states, was a key consideration in his decision to dismiss. The problem with this is that the notes do not suggest that he put this view to Ms Te Huia for comment, and nor did he suggest he did so when giving oral evidence. Today that would render the dismissal unjustified as a failure to comply with the provisions of s.103A(3)(b) and (d). Then, and given the current section succinctly codifies the case law as it previously existed, that would still have been a breach of natural justice rendering the dismissal unjustified.

[47] There was also a significant debate about which drug policy applied to staff at SPM. The issue was whether or not the policies of SPM's parent company, AFFCO, applied or not. The AFFCO policy is referred to in some of SPM's consent forms but not the ones signed by Ms Te Huia. The issue here is that the AFFCO policy requires cause before testing occurs. The argument would be that there was no cause here thus rendering the test, and any subsequent action, inappropriate though this may be countered by the fact that for whatever reason, Ms Te Huia actively sought the test. Whilst not a decisive factor, the fact the issue arose does, however, suggest a further deficiency in that the rules were not sufficiently clear.

[48] When I consider the above in totality, I conclude that the decision to dismiss was not one a fair and reasonable employer would have reached in the circumstances. The dismissal is unjustified.

[49] The conclusion Ms Te Huia's dismissal was unjustified means a consideration of remedies is required. The Statement of Problem advised that she sought reinstatement, lost wages and an unspecified amount as compensation for humiliation pursuant to s.123(1)(c)(i) of the Act.

[50] At the time the cause of action arose, and at the time the application was filed, reinstatement was a prime remedy. It no longer is, with the change occurring as a result of amendments to the Act effective 1 April 2011 (see s.125 of the Act).

[51] There is some debate as to whether or not reinstatement remains a prime remedy in such circumstances (see Barlett, Hodge, Muir, Toogood and Wilson *Employment Law* (looseleaf ed, Brookers) at ER125.17)) but I do not think that an issue in this instance.

[52] Under either regime, the remedy must be practical and I do not, in this instance, consider it to be so. I reach that conclusion due to the following:

i. First, and despite the fact that SPM waived the past via the letter of 11 December 2009, the fact remains that Ms Te Huia had a poor attendance record. The fact it was improperly taken into account is evidence of the extent to which the issue has undermined the level of trust and confidence SPM has in her;

ii. Second, and notwithstanding the debate about whether or not her taking of cannabis was a deliberate attempt to undermine the testing regime, the employer believes that to have been the case and has some foundation for that belief. Again this must undermine trust and confidence.

iii. There is then the fact that Ms Te Huia was active in trying to have testing discontinued. Such an approach, which compromises the employer's attempts to provide a safe workplace in what is a dangerous industry, also creates a doubt about her ability to be contribute positively to the business and this doubt was expressed by Mr Hampton.

iv. The doubt that Ms Te Huia is reluctant to contribute to the business would also have been compounded by some derogatory and

negative comments she made during the investigation meeting (though it would be fair to say the union received its share of criticism as well).

[53] When I consider the factors above, I conclude that element of trust and confidence essential in the creation and maintenance of a viable and ongoing relationship is absent here. I therefore conclude that reinstatement is impractical.

[54] The finding that Ms Te Huia's dismissal was unjustified means that she is entitled to recompense for wages lost as result of the dismissal.

[55] The evidence, summarised by Mr Malone in his submission is that the season would have come to an end on 30 June and that the resulting loss is $5,100. He suggests that this be reduced given a lack of evidence that Ms Te Huia was actively seeking work but this I decline given the fact she obtained an alternate job in a reasonably short time is, in itself, evidence of a reasonable quest.

[56] Now to compensation. Ms Te Huia gave considerable evidence about the hurt she felt and it is clear there was considerable angst. That said, and given my earlier comment in 52 above, I consider there to be some merit in Mr Malone's counter argument that some of this was attributable to what Ms Te Huia considered a lack of support from the union. In the circumstances, and given the evidence, I consider an award of $5000 appropriate.

[57] Finally the conclusion that remedies accrue means that I must, in accordance with the provisions of s.124, address whether not Ms Te Huia contributed to her demise in any significant way. On one hand I have the fact that she admitted conduct which was both illegal and contravened her employer's policies. Putting aside the fact there is a debate about which policy applied, the underlying principle that drug use is unacceptable was, I conclude clear, and Mr Te Huia was well aware of that.

[58] On the other hand I have evidence that the breach would not necessarily have brought about Ms Te Huia's dismissal. There were other possibilities but it was deficiencies in the way the employer approached the matter which meant that these were not considered (see 44 above). Ms Te Huia did not contribute to those deficiencies and nor was she responsible for the fact improper considerations influenced the decision to dismiss. In the circumstances, I do not consider it appropriate to apply a reduction to the remedies.

Orders

[59] For the reasons given the following orders are made:

(i) The respondent, South Pacific Meats Limited, is to pay to the applicant, Ms Ursula Te Huia, the sum of $5,100.00 (five thousand, one hundred dollars) as reimbursement of wages lost as a result of the unjustified dismissal; and

(ii) SPM is to pay Ms Te Huia a further $5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[60] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Ms Te Huia wishes to seek a contribution toward her costs, she is required to file an application within 28 days of this determination. A copy shall be served on SPM which should file any response it may wish to make within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority