IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 166/10
5273391

BETWEEN	KATRINA LYNAIRE THOMSON Applicant	
A N D	M J D HAULAGE LTD Respondent	

Member of Authority:	Philip Cheyne
Representatives:	Shonagh Burnhill, Counsel for Applicant Peter Zwart, Representative for Respondent
Investigation Meeting:	22 July 2010 at Christchurch
Further Submissions:	26 July 2010 from the Respondent
Determination:	25 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Katrina Thomson worked as a driver for MJD Haulage Ltd from about March 2007 until 28 January 2009 when she was dismissed, having failed a post incident drug test. Ms Thomson says that she was unjustifiably dismissed because she did not take drugs and could not have returned a positive test. She also is critical of how she was dismissed.

[2] MJD Haulage says that in accordance with its well known and agreed policy, it fairly dismissed Ms Thomson after she returned a positive drug test. In its statement in reply MJD Haulage also says that Ms Thomson did not raise a grievance within time.

[3] The grievance was not resolved despite mediation.

[4] To resolve these issues I will first determine whether Ms Thomson raised her grievance within 90 days. If she did, I must then outline more fully why MJD Haulage dismissed Ms Thomson and how it did so.

[5] After the dismissal Ms Thomson obtained further drug tests, both of which were negative. Later, it became apparent that the reference number on the drug test report that pre-dated the dismissal did not match the number on the sample documentation. I will need to assess the evidence to establish whether the positive drug test report was Ms Thomson's sample and how she could have returned a positive drug test in light of the two subsequent negative reports.

90 day issue

[6] Ms Thomson was dismissed on 28 January 2009.

[7] On 27 March 2009, Ms Thomson's solicitor wrote to MJD Haulage as follows:

> *Dear Directors*
>
> *Katrina Thomson – Unfair Dismissal/Personal Grievance*
>
> *We have taken instructions from Katrina Thomson in respect of her dismissal from your company. We understand she was dismissed as a result of a positive blood test for cannabinoids. We are extremely concerned that she was dismissed in an unfair manner given that there were three tests undertaken immediately after the positive test and all three of those tests came back negative. Our client disputes the positive test that your company relied on in dismissing her.*
>
> *We also have issues surrounding her alleged final pay and holiday pay. We require full disclosure of her employee file, particularly relating to the test relied on for dismissal and the results. We also require her wage records and records for holiday pay.*
>
> *We ask that you supply these within seven days. If we have had no response then our instructions are to pursue the matter further. We look forward to hearing from you as soon as possible.*
>
> *Yours faithfully*
>
> *HORNBY LAW CENTRE*
> *J D Eddy*
> *Solicitor*

[8] The letter was received against a background of exchanges between Ms Thomson and Murray Deuart, MJD Haulage's principal. To summarise the

exchanges, Mr Deuart knew that Ms Thomson disputed the first positive drug test, wanted her job back and had provided several negative tests in support of that claim. Mr Deuart had spoken to Toll, whose contract Ms Thomson worked on, asking if they would permit her back on their sites. They would not, despite the negative tests.

[9] Mr Deuart's evidence is that when he received the 27 March 2009 letter he did not think that Ms Thomson was initiating a grievance but that she was simply seeking documentation to assess whether or not to raise a grievance.

[10] To raise a grievance, no formalities are required and the test is whether to an objective observer the communication was sufficient to elicit a response and for the employer to remedy the alleged grievance or the parties to settle it in discussions.

[11] Objectively, the letter alone was sufficient to raise a personal grievance. The heading is clear and the first paragraph explains the basis for Ms Thomson's views. That was enough to elicit a response. The letter differs from that in *Commissioner of Police v. Creedy* (2007) ERNZ 505 where no details of the alleged grievance were provided. If Mr Deuart genuinely thought that Ms Thomson simply wanted a copy of her file before deciding whether to raise a grievance, he misunderstood what the letter conveyed. The information requests were additional to the raising of Ms Thomson's grievance, not a step on the road to whether or not to raise a grievance.

[12] It is not necessary to analyse the earlier communications between Ms Thomson and Mr Deuart more closely other than to say that they add to rather than detract from the conclusion that the letter properly raised Ms Thomson's grievance.

[13] It is necessary to explain what happened over Ms Thomson's dismissal.

The first drug test

[14] Ms Thomson had an accident at work on 23 January 2009. She slipped on a pallet of plywood and fell over, injuring her shoulder. Her evidence is that the standard practice for work accidents is for employees to provide a urine sample for drug and alcohol testing. Ms Thomson signed a consent form for that purpose and provided a sample at the Tinwald Medical Centre. At the Centre part of the sample was used for a dip-stick test which produced a negative result. The sample was then

sent to ERS for full analysis. All this happened on 23 January. The hand-written documentation that accompanied the sample is under the specimen ID No.486569.

[15] Meantime, Ms Thomson was off work at a result of the accident.

[16] The ESR Report is dated 27 January 2009. It records that the sample tested positive for the presence of THC-acid, the main psychoactive ingredient of cannabis. The report records the sample ID No. as 485569. No one noticed the discrepancy until much later.

The dismissal

[17] The ESR Report was sent to Toll since Ms Thomson was working on MJD Haulage's contract with Toll at the time, Toll obtained the consent form and paid for the test. Toll wrote to Mr Deuart after it received the results. It is accepted that Mr Deuart received Toll's letter on 27 January 2009. It reads:

> *Murray Deuart*
> *Owner-Driver*
> *Ashburton*
>
> ***Re: Post Incident D & A Failed Result***
>
> *Murray,*
>
> *It has come to my attention that one of your employed drivers, namely Katrina Thomson has failed a recent post incident drug test.*
>
> *Our policy relating to this is quite clear.*
>
> *The person named above is no longer permitted to operate any Toll NZ branded equipment, or enter any Toll NZ premises, or any Toll NZ customers' premises under any circumstances. As the above person is not an employee of Toll NZ it is not up to us to forward this information.*
>
> *This is effective immediately from the date of the above test.*
>
> *I thank you for your assistance in this matter.*
>
> *Regards*
>
> *M R Atkin*
> *National Transport Manager*

[18] Mr Deuart rang Ms Thomson on 27 January to arrange a meeting with her. There is some dispute about precisely what was said during the telephone call, at least

based on the statements of evidence provided before the investigation meeting. However, Ms Thomson's evidence during the investigation meeting was that Mr Deuart rang her, told her that the drug test results had come in, that he wanted to meet her and that she could have someone at the meeting for support. That evidence is close to Mr Deuart's evidence in chief and I accept it as substantially accurate.

[19] The meeting convened at Ms Thomson's home on 28 January because the accident restricted her ability to travel to the company offices in Ashburton. Ms Thomson had her mother with her and Mr Deuart had his partner (Cheryl) with him. At the meeting Mr Deuart showed Ms Thomson a copy of the letter from Toll and the drug test report. Mr Deuart told Ms Thomson that it meant that she could no longer work for MJD Haulage. Ms Thomson became upset and started crying. She said that the test could not be right as she did not use Marijuana. It is common ground that Ms Thomson repeatedly denied using Marijuana and disputed the validity of the test result.

[20] Mr Deuart's evidence is that he told Ms Thomson of her dismissal after these repeated denials but I do not accept this evidence. It is likely that Ms Thomson became upset after being told of her dismissal. In light of the repeated denial, it was suggested that Ms Thomson should get a further drug test done and Mr Deuart agreed that he would talk to Toll to get them to change their mind if the test was negative. The meeting ended.

Further tests

[21] After the meeting with Mr Deuart, Ms Thomson went to her local medical centre and provided a urine sample for testing. The CDHB documentation shows the time of collection as 10am on 28 January 2009. A dip-stick test produced a negative result which was confirmed with further analysis. The report specifically records that the drug assay provides unconfirmed results for screening purposes and are not suitable for *medico/legal purposes.* Because of this rider Ms Thomson provided a further sample on 30 January 2009. This sample also produced a negative dip-stick result. It was sent to ESR for full analysis and produced a negative result.

[22] There were discussions between Ms Thomson and Mr Deuart about these negative results. Mr Deuart spoke to Toll to see if they would change their mind. Toll's response was that they would not change their stance since Ms Thomson's

negative tests could be because of the passage of time or the result of attempts to mask the sample. Mr Deuart reported this to Ms Thomson and his own conclusion that he could not therefore reconsider her dismissal.

[23] As noted above, the correspondence raising the grievance was received in March 2009 some while after the discussions over the negative tests.

Justification

[24] Justification for the dismissal must be determined on an objective basis by considering whether MJD Haulage's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[25] The relevant terms of employment are important circumstances. MJD Haulage performs work under contract for Toll and it employed Ms Thomson to do some of that work. There is a written employment agreement between Ms Thomson and MJD Haulage. It states that one of Ms Thomson's obligations is:

> *No taking of illegal substances whilst under the employ of MJ Deuart. Random drug testing can be carried out by Murray Deuart at any stage without warning. Any accidents that occur whilst in employ will mean a drug test performed by a medical practitioner and if found that an illegal substance is in the blood stream your employment will be terminated and any costs arising from such an accident may be directly charged to the employee at fault.*

[26] It also states that the employee must comply with the terms and conditions of Toll's drug and alcohol policy. The employment agreement includes a *Code of Conduct.* That states that *working while influenced by alcohol or non-prescription drugs is not permitted. Breach of this provision will be seen as serious misconduct.* There is a list of actions which amount to serious misconduct which includes *illicit or unlawful possession or use of prescribed drugs.* The list is intended as examples and it is clear from the terms of the employment agreement overall that use of illegal drugs would be regarded as serious misconduct.

[27] The *Code* goes on to say that serious misconduct can result in *immediate dismissal.* Finally, there are principles that must be followed in dealing with disciplinary matters, as follows:

> ***5. Principles***

> *The following principles are to be followed when dealing with disciplinary matters:*
>
> *(i)* *The employee has the right to have representation with them at any stage of the process. They shall be advised of this prior to any formal interview occurring. The interviewer will have a witness present.*
> *(ii)* *The employee must be advised of the specific matter(s) causing concern, the seriousness and possible outcomes and given a reasonable opportunity to prepare a response or explanation.*
> *(iii)* *Before any substantive disciplinary action is taken, an appropriate investigation is to be undertaken by management.*
> *(iv)* *The employee must be advised of the corrective action required to amend their conduct and be given a reasonable opportunity to do so.*
> *(v)* *The process and result of any disciplinary action are to be recorded in writing, a copy provided to the employee and another copy placed on their personnel file.*
> *(vi)* *If the offence is sufficiently serious an employee is to be placed on suspension pending an investigation.*
> *(vii)* *An employee aggrieved by any action taken by an employer must be advised of their right to pursue a grievance in terms of the personal grievance procedure set out on the appropriate contract of employment.*

[28] At the time of the dismissal the only reasons to doubt the validity of the ESR drug test report were the negative dip-stick test and Ms Thomson's denial about taking drugs. A fair and reasonable employer would not have doubted the validity of the ESR Report for either of these reasons, separately or together. It was always understood that the dip-stick test was simply indicative rather than conclusive and a simple denial is not sufficient to doubt the scientific integrity of the testing and analysis processes.

[29] A fair and reasonable employer would have dismissed Ms Thomson given the positive drug test from ESR, the clear provisions in the employment agreement about the consequences of a positive drug test, and Toll's decision to prohibit Ms Thomson doing any of their work, which was the only work for her to do in the employment.

[30] For an example of the effect of a positive drug test against the background of clear provisions in the employment agreement as to the consequences of such a test, see *Air NZ v. V* [2009] ERNZ 195.

[31] In these proceedings, Ms Thomson has made much of the subsequent negative tests and the incorrect sample ID number on the first ESR test report. There is evidence from Sarah Russell, a forensic toxicologist employed by ESR, about their administrative processes to ensure the integrity of their tests and reports. There is no reason to doubt any of her evidence about these processes. Her evidence is that sample ID No. 485569 relates to a sample analysed in October 2008 found to contain THC-acid of 280 nanograms per millilitre, whereas the sample ID No. 486569 provided by Ms Thomson was analysed in January 2009 and contained THC-acid at 78 nanograms per millilitre. These samples when received by ESR were each given a unique WDT reference number which was used at ESR for their processes. Sample storage arrangements are such that the samples could not have been mixed up.

[32] Ms Thomson's drug test report mistakenly referred to sample ID No. 485569, but correctly referred to WDT 0923256. The possibility for the human error on the report arose because the testing form provided by the medical centre did not have the bar code affixed but had the (correct) sample ID number written on it in handwriting. Accordingly, the sample ID number had to be manually entered at ESR rather than scanned off the barcode.

[33] From Ms Russell's evidence I am satisfied that the ESR report dated 27 January 2009 related to Ms Thomson's sample which tested positive for the presence of THC-acid. The typographical mistake on the report could not have affected justification for her dismissal even if it had been noticed at the time.

[34] At the investigation meeting Mr Deuart was asked to comment on how he followed the principles in the employment agreement when he dismissed Ms Thomson. He gave evidence that it was not a disciplinary matter, but I do not accept that evidence. When questioned, Mr Deuart acknowledged that he might not have told Ms Thomson of her right to be represented. Ms Thomson's evidence is that he did not do so. I accept that evidence. It is also clear from the sequence of the meeting explained above that Ms Thomson was not given a reasonable opportunity to prepare her response or her explanation before told of her dismissal. It follows that Mr Deuart has failed to comply with the contractually binding principles for dealing with disciplinary matters.

[35] In *Wellington Road Transport etc IUOW v. Fletcher Construction Co Ltd* [1983] ACJ 653 the Arbitration Court held:

> *The Court is not required to see whether it can discern some element of unfairness in the procedure, but rather whether the procedure was so unfair that the dismissal should be set aside regardless of its substantive merits.*

[36] To similar effect the Labour Court in *NZ (with exceptions) Food Processing etc. IUOW v. Unilever NZ Ltd* [1990] 1 NZILR 35, said as follows:

> *This is not to say that the employers conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations are not to be visited with consequences for the employer wholly out of proportion to the gravity, due in real terms, of the departure from the procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but over-indulgent person.*

[37] Finally, the avoidance of *pedantic scrutiny* is no less important now when applying the statutory test for justification: see *X v. Auckland District Health Board* [2007] ERNZ 66.

[38] The failure to advise Ms Thomson of her right to representation was immaterial. There was nothing that a representative could have done in light of Ms Thomson's explanation that she had not taken any illegal drugs, a position that changed only slightly even by the time of the investigation meeting. Ms Thomson had a support person with her and she knew in a general sense what the meeting was going to be about.

[39] A keen-eyed representative might have noticed the sample ID number discrepancy and also might have noticed that the drug test consent form permitted Ms Thomson to request a second test on the same sample. By the time the discrepancy was noticed the sample had been destroyed. However, that might have delayed the outcome for a day or two but it would have made no difference in the end since I am satisfied about the validity of the test result. In addition, Ms Thomson herself supported her contention about not having taken drugs by obtaining the two subsequent tests. That made no difference to Toll's attitude with the result that MJD Haulage had no work that it could provide to Ms Thomson.

[40] In light of all this I conclude that a finding that the dismissal was unjustified because of Mr Deuart's departure from the principles expressed in the employment agreement would be the sort of *pedantic scrutiny* that should be avoided.

[41] There was an element of pre-determination in Mr Deuart's handling of the situation. That was hard for him to avoid given the contractual provisions, the positive drug test and the letter from Toll. The pre-determination is balanced by Mr Deuart's willingness to ask Toll to reconsider its position in light of Ms Thomson's subsequent negative tests. That indicates that Mr Deuart's mind was not closed to the possibility of continued employment if circumstances would have permitted.

[42] For the above reasons I find that MJD Haulage's actions in dismissing Ms Thomson was what any fair and reasonable employer would have done. The deviations from the principles expressed in the employment agreement as to the handling of disciplinary matters were immaterial.

[43] Ms Thomson does not have a personal grievance.

Post Script

[44] Ms Russell's evidence is that the negative tests five and seven days after the positive test are not inconsistent with the initial positive test. A negative test does not mean that there are no cannabis compounds in the body, just that if present, they fall below the cut off levels defined in the applicable testing standards. The length of time that THC remains in the body depends on frequency of use and factors unique to the individual.

[45] Ms Russell refers me to two studies that support these views. The studies report subjects with positive tests later record negative tests three days later on average for infrequent users (range 1 – 3 days), six days later on average for frequent users (range 1 – 21 days) and five days later on average for chronic users (range 0 – 19 days). In response to this evidence, counsel for Ms Thomson referred me to a published review of the research on the length of time that marijuana remains detectable in urine following smoking. I have now read the paper and considered the submissions on behalf of MJD Haulage received on 26 July 2010. I agree with the respondent's submission that the paper supports the evidence of Ms Russell. I find that there is nothing necessarily inconsistent about Ms Thomson producing negative

tests some days after a positive test. Despite Ms Thomson's denial, she must have ingested marijuana which resulted in the positive test on 23 January 2009.

Summary

[46] Ms Thomson was justifiably dismissed.

[47] Costs are reserved. Any claim for costs must be made within 28 days by lodging and serving a memorandum. The other party may then lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority