

Refusal to Undergo a Drug Test

Riley v Acrow Ltd AA180/10

Mr Riley brought a claim of unjustified dismissal after he was dismissed for refusing to undergo a workplace drug test.

The Authority found that the dismissal was unjustified. Evidence of injury to feelings was found to be at the lower end of the scale and further reduction in remedies due to contributory conduct resulted in an award of \$3,000.00 compensatory payment.

Riley was employed as a scaffolder. By way of background Mr Riley and Mr Wright, a co worker, took 45 minutes to arrive at a work site destination, in a company vehicle. Concern was raised that the trip had taken much longer than would be expected. After investigation it appeared that approximately 35 minutes could not be unaccounted for. When initially spoken to about the matter Mr Riley could not give an explanation and discussions became heated. Performance issues were also raised during this discussion.

A routine inspection of the vehicle used by Mr Riley and his co worker revealed the smell of marijuana which was confirmed also by the Auckland branch manager, Mr Lambourne. Mr Lambourne then asked the two employees to take a drug test. Shortly afterwards a vehicle arrived at the workplace with the necessary equipment and personnel to undergo the test.

Mr Wright agreed to be tested and the result was negative. Mr Riley refused testing until he could get advice from his union delegate, who he had unsuccessfully attempted to reach. The drug testing vehicle had remained on site for about 45 minutes, after which Mr Lambourne requested a decision. Mr Riley had still no luck contacting the union delegate and refused to take the test. He was suspended on pay pending further investigation.

A letter dated 2nd July requested a disciplinary meeting and referred to the events that had taken place, with reference to the company's zero tolerance policy on drugs and alcohol, and with reference also to the company's drug and alcohol policy contained in the health and safety manual.



The policy states:

- that employees may be required to undergo drug and alcohol testing where “*reasonable cause*” exists that an individual may harm or have harmed themselves or others in the course of their duties, including but not limited to the presence of physical symptoms;
- that all employees are required to sign to indicate that they have read and understood the drug and alcohol procedures;
- that a refusal to consent to a test, or a positive test will be subject to disciplinary action which may include dismissal or termination of contract;
- 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.

The company had introduced its drug and alcohol policy around April 2009. Workshops were held regarding this but Mr Riley said he did not attend and his name did not appear on the list of attending employees. A copy of the policy was displayed in the lunchroom although Mr Riley denied having seen it.

During the disciplinary meeting held on Friday 3rd July discussion took place about the events that had taken place, Mr Riley's alleged lack of knowledge of the drug and alcohol policy and also that Mr Riley said that part of the reason for his refusing the test was that he was angry for being sworn at.

When the parties met on Monday 6th July Mr Lambourne advised of his decision to summarily dismiss Mr Riley, based on his conclusion that the refusal to undergo a drug test was unacceptable and amounted to serious misconduct.

While the Authority accepted that in principal a refusal to undergo a drug test may amount to serious misconduct under the company policy, *"there is more to the present circumstances"* than *"a simple act of refusal"*. Mr Riley's initial refusal was significantly connected with his attempt to obtain advice from his union delegate, who through no fault of Mr Riley, was unavailable for a period of time. Mr Riley's representative had informed the company the day after the suspension that he was willing to undergo a drug test. But Mr Lambourne relied on the zero tolerance policy and the refusal of 2nd July in reaching his decision.

The Authority found that:

"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 the advice – was the action a fair and reasonable employer would have taken in the circumstances."

This case and others surrounding drug testing highlight the need to exercise caution in both correctly applying policy and any disciplinary consequences. It also reinforces the need to have adequate Drug and Alcohol Policies to cover such situations. If in doubt, call us for advice.



Welcome Back to Work !

We hope you all had a relaxing festive season after the unforgettable events of 2010.

We wish you all the best for 2011 and look forward to providing you with assistance throughout the year.

Change in Team Dynamics at MGZ

In January 2010 we welcomed Amanda Munting-Kilworth to the team. Amanda and her family have made the decision to move to Nelson and so we unfortunately farwelled Amanda in November 2010.

In January 2011 the team at MGZ will be joined by Matthew Dearing. We look forward to introducing Matthew to clients during the early part of next year.



This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact Neil McPhail, Raewyn Gibson or Peter Zwart.

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