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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart
ISSUE
242
May 2015

Pile Up at Melling Station

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
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In December 2012 (Advocate 313; '*Drug Policies Strictly Applied*') we reviewed a then recent Employment Court decision; ***Hayllar v. The Goodtime Food Co Ltd***. That decision re-emphasised the Employment Court's resolve to ensure that drug policies and the application of those policies must be lawful and reasonable. The Employment Court also emphasised that these policies would be interpreted and applied strictly by the Court.

In that case the Court found that an employee who failed a second drug test while participating in a rehabilitation programme was unjustifiably dismissed. It was the Court's view that the test, while positive, did not indicate that the employee was under the influence of drugs. The Court also maintained that a test during rehabilitation should be used for comparative rather than disciplinary purposes. In short, the dismissal was found to be unjustified because of the company's failure to follow their own policy, which was very narrowly interpreted by the Court. The decision hinged significantly on the distinction between '*being under the influence*' and recording a positive test for THC. It emphasised in a positive way the difference between the more commonly used urine test which records the latter and the swab test which is indicative of more recent imbibing and therefore of being under the influence.

A recent Employment Court decision indicates a more flexible approach towards the interpretation of company drug policies and their application. In ***Thorne v. KiwiRail Ltd*** (April 2015) the employee was dismissed after an incident in May 2014 when a passenger unit that Thorne was driving overshot the end of the line at Melling Station and crashed into a solid concrete stop, slightly injuring two of the twelve passengers.

Thorne tested positive for cannabis with a level of 60ng/ml; the cut-off level for cannabis is 50 ng/ml. There was no evidence to suggest that Mr Thorne in any way caused or contributed to the accident.

KiwiRail had recently, with the unions, developed a new drugs policy, replacing an old '*three strikes*' process with one providing for random testing and a disciplinary process commencing on the confirmation of a positive test. The process required the employer and union to discuss the merits of rehabilitation but acknowledged that it "*may not be appropriate in all cases*".

During the disciplinary process Mr Thorne admitted his error in smoking cannabis some two weeks before the incident and sought rehabilitation. He was dismissed for serious misconduct. The dismissal was challenged as a claim for an unjustified dismissal.

In considering this last issue the Court emphasised its role under s.103 to determine the actions of a fair and reasonable employer:

"[32] The test of justification contemplates that there may be more than one response or other outcome that might justifiably be applied by a fair and reasonable employer in all the circumstances of a particular case. It is well established that in undertaking its analysis, the Court may not substitute its view for that of the employer. Its role is to inquire into, and assess on an objective basis whether the decision to dismiss (or any other action taken) fell within the range of conduct open to a fair and reasonable employer in all the circumstances at the time. If it did, then it must be found to be justified."

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The issues raised by the employee, when arguing that the dismissal was unjustified, included the following:

1. Serious Misconduct

The KiwiRail Behaviour Policy listed acts of serious misconduct. The list was described as being inclusive, i.e. it was not limited to these behaviours listed. It did not include failing a drugs test.

The Court noted that serious misconduct was defined by KiwiRail as:

" … an act that destroys or deeply impairs a fundamental aspect of the employment relationship. It usually involves the employer's ability to trust and place confidence in the person. Serious misconduct may include, but is not limited to the following examples of behaviour … "

and that Mr Thorne '*could have been under no illusion that from the outset KiwiRail regarded his actions as anything other than serious misconduct*'. It therefore held that returning a positive test amounted to serious misconduct.

2. Rehabilitation

The Court distinguished between the act of considering rehabilitation, as required by the policy, and granting rehabilitation. It determined that the issue of rehabilitation had been before the parties and had therefore been considered. The Court went on to accept that because the granting of rehabilitation was within the employer's discretion and because the Court could not substitute its views for those of the employer, if the Court determined that a fair and reasonable employer could have reached the decision not to offer rehabilitation, that was sufficient. In all the circumstances the Court found the decision not to grant rehabilitation to be justified. The circumstances this considered included a policy framework intended to try to prevent the risks associated with impairment in the new policy. It also included the fact that KiwiRail had lost trust in Mr Thorne.

3. Impairment

It was argued for Mr Thorne that the decision to dismiss must involve a '*contextual analysis*' including the fact that there was an '*absence of any impairment or poor performance*':

"The points raised under this head of the challenge were that:

- *even though he had tested positive for cannabis, there was no evidence of impairment or poor performance by Mr Thorne;*
- *that he acted in the "honest belief" that there was no impairment, and*
- *the "low level" of 60 ng/ml where the cut-off level was 50 ng/ml."*

The employee argued, referring to ***De Bruin v. Canterbury District Health Board*** (Advocate 235) that a serious incident should not automatically lead to a dismissal. In what seems to be a move away from the very strict line taken in ***Hayllar*** (above) the Court found that the points above had all been considered by the employer in its decision-making and that the decision made was therefore one that a reasonable employer could have made, and was therefore justified.

Other arguments in the employee's defence, including disparity of treatment and an improper delegation of the decision-making, were also considered and rejected with the overall determination being that the dismissal was justified.

The decision, although resting on its own facts, seems to be of variance to that of the ***Hayllar*** decision which really turned on the flow-on consequences of rehabilitation and more importantly the effect of '*impairment*' as opposed to a positive test. ***Hayllar*** emphasised the need for impairment beyond the simple requirement of a positive test. By contrast this case indicates firstly that a mere positive test may amount to serious misconduct justifying dismissal. Secondly, the decision emphasises the requirement that the Court should not involve itself in the decision-making of the employer when the decision-making is that of a fair and reasonable employer.