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Costley v Waimea Nurseries Limited [2011] NZERA 6; [2011] NZERA Christchurch 1 (10 January 2011)

Last Updated: 20 January 2011

**IN THE EMPLOYMENT CHRISTCHURCH
RELATIONS
AUTHORITY**

[2011] NZERA Christchurch 1 5274345

BETWEEN

ZACHARY PETER COSTLEY Applicant

A N D

WAIMEA NURSERIES
LIMITED
Respondent

Member of Authority: Representatives:

Investigation Meeting: Date of Determination:

Philip Cheyne

Ian Miller, Counsel for Applicant Nicole Ironside, Counsel for Respondent

3 November 2010 at Nelson

10 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Zac Costley worked for Waimea Nurseries from August 2006 until 24 April 2009 when he was dismissed for using illegal drugs during working hours. Mr Costley says that he was unjustifiably dismissed because of various flaws in the manner in which Waimea Nurseries investigated the allegation about drug use during working hours. He also denies such drug use.

[2] To resolve this problem I will explain why Waimea Nurseries thought Mr Costley might be using illegal drugs during working hours and what was done to investigate this concern. I will then apply the law concerning justification for dismissal. First I should mention relevant terms of employment.

Terms of employment

[3] There is a written individual employment agreement dated 30 May 2008. It permits the employer to summarily dismiss the employee for serious misconduct. It records the employee's agreement to observe the employer's health and safety policies, to take all reasonable steps to ensure their own safety and health at work and to avoid causing harm to others. It also says *Any acts or omissions of the Employee which endanger the health and safety of either the employee or any other person or persons may result in summary dismissal without notice.*

[4] There is also an *Employee Policy Manual* and a written *Alcohol & Drug Policy* which Mr Costley accepts applied to him. The *Manual* says *Waimea Nurseries is committed to creating an alcohol and drug free workplace in order to enhance workplace safety and efficiency*. It sets out a policy of *post incident and reasonable cause* drug and alcohol testing and states *Waimea Nurseries employees alleged or suspected of taking ...drugs on company premises or work site or while carrying out company business will be subject to the company's serious misconduct procedures and those employees returning a positive ...drug test may be stood down until an investigation has been held in accordance to Waimea Nurseries serious misconduct procedures*.

[5] There is more detail in the *Alcohol & Drug Policy* the purpose of which is *to address the possibility of our workplace safety and/or efficiency being adversely affected by people who have alcohol or drugs in their system*. In particular it says *Where an employee is seen taking .drugs .this is serious misconduct and may result in summary dismissal. In these circumstances no test is required if the employee acknowledges they were taking ...illicit drugs. If there is uncertainty about the substance being taken, an alcohol or drug test may be required*.

The company's concerns

[6] Paul Jameson is the company's nursery manager. In early March 2009 another manager (Andrew Ketel) told Mr Jameson of a concern that Mr Costley and another employee (Api) were leaving the site at lunch time saying they were going to a local shop but were not seen there. Instead their car had been observed at the Appleby Bridge, a place known locally as somewhere to hide out and take drugs. This and the manager's observations of their work caused the manager to think Mr Costley and Api might be using drugs during their lunch break.

[7] During the following two weeks there was damage after lunch twice to a piece of equipment used by Api and Mr Costley. Api took responsibility for the damage.

[8] On 18 March 2009 Mr Jameson spoke to the team leader for Mr Costley and Api (George Mill). Mr Mill said that their work rate and work quality were poor after lunch but were good before lunch. He suspected them of parking under the Appleby Bridge and getting stoned at lunchtime.

[9] Mr Jameson decided to investigate these suspicions.

The company's investigation

[10] Mr Jameson spoke first to Api. He told him that Mr Mill reported his and Mr Costley's good work before lunch, then leaving the worksite at lunch time and their poor work performance after lunch. Mr Jameson told Api that there was suspicion about him taking drugs at lunch time and working under the influence of drugs during the afternoon. Api initially denied the allegation. When Mr Jameson said that he wanted to have a formal disciplinary meeting with him to investigate this allegation Api told him that he and Mr Costley were smoking marijuana at lunch time. That did not resolve the need for a formal meeting which was held on 18 March 2009.

[11] Next, Mr Jameson spoke to Mr Costley. There is a dispute in the evidence about when and what was said during their first discussion. Mr Costley's evidence is that there was an exchange between Api and another employee (Pip) where she took exception to being accused by Api of informing on him about drug use, whereupon Mr Jameson came out of his office, despatched them back to work and told Mr Costley *You, in my office now!* In the office Mr Jameson told Mr Costley that there had been some allegations about drug use at lunchtime but did not identify who had made the allegation. Mr Costley denied the allegation. Mr Jameson said he would think about what would happen next and that he was not sure what he would do. On Mr Costley's account the second exchange did not occur until three or four days later, followed by a meeting two or three days later.

[12] Mr Jameson's evidence is that he first spoke to Mr Costley in the morning on 19 March 2009 straight after defusing a loud and aggressive confrontation between him and Api on the one hand and Pip on the other. There is then a note dated Thursday 19th March 2009 which records when the second discussion occurred. I prefer Mr Jameson's evidence about the sequence. It is unlikely that he would delay dealing with the matter when Api had admitted the allegation.

[13] Mr Jameson's evidence is that he told Mr Costley in the morning that Mr Mill reported him and Api regularly leaving the worksite at lunchtime following which their work performance was noticeably worse. Mr Jameson said they were suspected of using drugs at lunchtime and then returning to work under the influence of drugs. Mr Jameson said that this was a serious matter because of the health and safety risks and the use of machinery at work. Mr Costley denied the allegation and became angry raising his voice and gesturing. Mr Jameson said that it was potentially serious misconduct and they needed to have a formal meeting where Mr Costley should have a representative. Mr Costley was asked but declined to nominate a time for the meeting so Mr Jameson said they would meet that afternoon. On balance I prefer this evidence from Mr Jameson about what was said during the first exchange with Mr Costley. It is likely that he had similar conversations with both men. The one exception is that I do not accept that Mr Jameson identified Mr Mill as the source of any reports giving rise to the concern. This finding is based on other evidence from Mr Jameson, mentioned below.

[14] The second discussion with Mr Costley occurred during the afternoon on Thursday 19th March 2009. Present for the

company were Mr Jameson and Natasha Crawford, the HR officer. Mr Costley was supported by a work colleague (Amy Hendry). Mr Costley is now critical of Waimea Nurseries for proceeding with the meeting despite the unavailability of his first choice of support person. There is no merit in this criticism since Mr Costley agreed at the time to proceed with Ms Hendry as his support person.

[15] The substantive evidential dispute about this meeting is whether Mr Costley was told that that he had to undergo two drug tests but would only need to produce a negative result for the second of those tests (his evidence); or whether he was told that he had to produce negative results for both tests. In addition to Mr Costley's evidence, there is a letter dated 1 September 2009 from Ms Hendry to the effect that she understood that there would be two tests. Against that, there is evidence from Mr Jameson and Ms Crawford as well as Ms Crawford's note dated Thursday 19th

March 2009 that reads *A drugs test will be scheduled for the 20th of April which needs to be negative and a second test scheduled for the 19th of May. Both tests need to be negative so we know that there are no dependency issues.* I find that it was clearly said to Mr Costley that Waimea Nurseries expected him to return a negative result from both tests. In the meantime, and without any objection from Mr Costley, he was deployed on other work that took him away from where dangerous machinery was being operated.

[16] I accept Mr Jameson's evidence about the discussions during the meeting. He decided not to tell Mr Costley about Api's admission or that Mr Ketel and Mr Mill were the ones who had concerns about him using drugs at lunch time. He did tell Mr Costley that the concern arose because of the difference in his work performance before compared to after lunch and that working under the influence of drugs was contrary to company policy and a serious health and safety risk. Mr Costley denied any drug use but could not explain the difference in his work performance before compared to after lunch. Mr Jameson said that he would be required to undergo a drug test. In response Mr Costley said there would be no point in testing him immediately because he used cannabis every night at home. There was some discussion to the effect that one month was sufficient time after cessation of use to produce a negative test and Mr Costley said there would be a first test in one month's time, which needed to produce a negative result, followed by a second test a month later which also needed to be negative. Mr Jameson told Mr Costley that he needed to get clean and stay clean and both tests would need to be negative if he wanted the employment to continue.

[17] As arranged, on 20 April 2009 Mr Costley provided a urine sample for drug testing. He was told at the medical centre that it was an unconfirmed positive result and that information was also relayed to Mr Jameson. Mr Jameson met with Mr Costley and told him that he was suspended on pay as a result of the unconfirmed positive test pending the confirmed results. There is no complaint by Mr Costley about the suspension.

[18] Next, Mr Jameson received the confirmed positive test result dated 22 April 2009. Arrangements were made for a formal disciplinary meeting.

Dismissal

[19] The meeting was held on 24 April 2009. Present for the company were a representative (Emma Worseldine), Mr Jameson and Ms Crawford while Mr Costley was accompanied by Ms Hendry and Cath Slotemaker, his support person. At the start Mr Costley was told that it was a serious matter that could result in dismissal. Mr Jameson then spoke about the serious health and safety issues that could arise from working under the influence of drugs. He recounted how there had been suspicion that Mr Costley was using drugs at lunchtime, the discussion about an immediate drug test and the arrangement to delay a test for one month for Mr Costley to produce a negative result followed by a second test a month later. Mr Costley said that he was surprised at the positive test result and that he thought he was going to get two drug tests with only the second one needing to be negative. Ms Hendry supported that view. Mr Jameson said that the arrangement was that Mr Costley had to produce a negative result for both tests. Mr Costley was asked if he was aware of the *Alcohol & Drug Policy* and said that he was. He said that he did not use drugs at work and that he was willing to continue his suspension on pay for a month until the second drug test. Mr Jameson declined this suggestion. There was an adjournment for Mr Jameson, Ms Worseldine and Ms Crawford to discuss matters. It was decided that Mr Costley should be dismissed because he could not be trusted to work without being under the influence of drugs giving rise to serious health and safety risks.

[20] When the meeting reconvened Mr Jameson told Mr Costley that they believed he had been consuming drugs during work hours and working under the influence of drugs in breach of the company's policy and amounting to serious misconduct. He said that the only option for such misconduct was dismissal. Mr Costley was asked if he had anything he wanted to be taken into account. He repeated his point about only having to produce a negative test result for the second test. Mr Jameson confirmed the summary dismissal, wished him the best for the future and told him to take whatever time was needed to say goodbye to his work colleagues. Mr Costley left the work place soon after. There is no complaint about how Mr Costley was treated after the dismissal decision was announced.

After the dismissal

[21] In June 2009 Mr Costley requested and received some documents from the company relevant to his dismissal. He then wrote on 26 June 2009 expressing concern about not having been given access to that material before the dismissal and

repeating his view that he only needed to produce a negative test result for the second test. That drew a reply from Mr Jameson and Mr Costley then confirmed on 9 July 2009 that he was taking a personal grievance.

[22] On 29 July 2009 Mr Costley obtained his own drug test which produced an unconfirmed negative result.

Justification

[23] Justification must be assessed objectively by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances.

[24] Part of Mr Costley's grievance is based on his evidence that it was agreed that he could have two months to produce a clear drug test. However, I do not accept that is an accurate account of what happened. On 19 March 2009 Mr Jameson made it clear that Mr Costley had to produce a negative test result in April as well as in May after Mr Costley said he would fail an immediate test because of his use of cannabis after work. As events transpired Mr Costley produced a positive test in April so Mr Jameson decided not to proceed with a second test in May. I accept that these were the actions of a fair and reasonable employer.

[25] A fair and reasonable employer would always comply with [s.4\(1A\)\(c\)](#) of the [Employment Relations Act 2000](#). That provides that the duty of good faith requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of an employee's employment to give them access to relevant information and an opportunity to comment on that information before making that decision.

[26] Mr Jameson's evidence, which I accept, is that he deliberately did not tell Mr Costley on 19 March 2009 that Mr Ketel and Mr Mill were the source of the company's suspicion that he and Api were smoking drugs under the Appleby Bridge at lunchtimes or that Api had admitted this to him. Mr Jameson's evidence is that he did not tell Mr Costley these things because of concern about Mr Costley's temper. The evidence is that Mr Costley was not told these things on 24 April 2009 either. By that stage Mr Costley had been suspended on pay and was not at work so there was no justification for not giving him this information. Api had also been dismissed the day before. It is important to note that Mr Jameson dismissed Mr Costley for consuming drugs during working hours. The notes of the 24 April 2009 meeting, which I accept as a substantially accurate account, record Mr Jameson discounting the significance of Mr Costley's belief that only the second drug test needed to be clear because *the fact remains that Paul believes that Zac and Api were consuming drugs during work hours and this is a breach of the Waimea Nurseries Drug and Alcohol policy ...* Mr Jameson believed that to be the case because of Api's admission which took the matter beyond the suspicions voiced by the two managers. Mr Jameson did not disclose to Mr Costley the piece of information that was most relevant to the dismissal decision. That was a breach of [s.4\(1A\)\(c\)](#) of the Act which must render the dismissal unjustified.

Remedies

[27] I am required to consider the extent to which Mr Costley contributed in a blameworthy way to the situation giving rise to his grievance and reduce any remedies accordingly.

[28] Mr Costley is not entitled to any remedies because of the significant level of his contribution to the situation. Despite the clear contractual requirement that he not work while under the influence of drugs, for a period of time he used cannabis during lunch breaks and returned to work. He exposed himself and others to a significant risk given the work environment.

Summary

[29] While Mr Costley has a personal grievance his blameworthy contribution to the circumstances giving rise to that grievance was such that he is not entitled to any remedies.

[30] Costs are reserved. Any claim for costs should be lodged with the Authority and served on the other party within 28 days who may then lodge and serve a response within a further 14 days.

Philip Cheyne

Member of the Employment Relations Authority