New Zealand Employment Relations Authority Decisions

Eaton v Airport Services (Dunedin) Limited (Christchurch) [2017] NZERA 1224; [2017] NZERA Christchurch 224 (22 December 2017)

Last Updated: 15 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 224
3000952

BETWEEN JONATHON EATON Applicant

AND AIRPORT SERVICES (DUNEDIN) LIMITED Respondent

Member of Authority: Christine Hickey

Representatives: Robert Morgan and Kelly Whitten, advocates for the applicant

Diana Hudson, Counsel for the Respondent

Investigation meeting: Submissions received:

5 October 2017

6 October 2017 from both parties
12 October 2017 from the applicant

Determination: 22 December 2017

DETERMINATION OF THE AUTHORITY

A. Airport Services (Dunedin) Limited unjustifiably dismissed

Jonathan Eaton.

B. Airport Services Limited must pay Jonathan Eaton: (i) $4,944.14 gross in lost wages; and

(ii) $6,000.00 compensation; and

(iii) legal costs of $2,321.56.

Employment relationship problem

[1] Jonathan Eaton worked for Airport Services (Dunedin) Limited (ASD) from early 2005 until it dismissed him on 1 July 2016. Mr Eaton had a random drug test on

27 June 2016, which tested positive for a metabolite of THC, the active ingredient in marijuana. He was dismissed because of that result. Mr Eaton claims that ASD dismissed him unjustifiably. He also claims he was selected for testing and dismissed because of his role as a union delegate.

[2] By way of remedy, Mr Eaton claims lost wages, and compensation of $20,000.

[3] ASD says its dismissal of Mr Eaton was justified because his work was safety sensitive, and it has a contract with Air New Zealand that requires zero tolerance and a strict approach to any employees who test positive for drugs or alcohol in the

workplace.

The basic facts

[4] The Drug Detection Agency (TDDA), which undertakes ASD's alcohol and drug testing, assisted ASD in drafting its Drug and Alcohol Policy (the Policy). ASD introduced the Policy in June 2015, after consultation with the E Tu union.

[5] ASD and E Tu have a collective agreement. Mr Eaton was a union delegate. The Policy is not a part of the collective agreement.

[6] ASD has a small workforce. For example, on the day Mr Eaton was tested at work there were only seven employees on the shift. All jobs undertaken by ASD staff are safety sensitive.

[7] Testing under the policy began in early to mid-2016. Before 27 June 2016, Mr Eaton had been subject to two random drug tests, which did not detect the presence of any drugs or alcohol.

[8] Mr Eaton was a baggage handler. On 27 June 2016, he started work driving the tractor that hauls the luggage trailer between the terminal building and the planes. Between 8.30 and 9 am, he was told he had been selected for a random drug test, to screen for specific drugs.

[9] Mr Eaton had not been at work since the previous Friday, 24 June 2016. He had been to a party on the Friday night and had over-indulged in alcohol. However,

he had no concerns that he would test positive for alcohol or any drug and willingly complied with the testing.

[10] Mr Eaton's test came back as non-negative for cannabinoids. When Mr Eaton was told the result he rang Brian Doherty, ASD's sole director, who also works at the airport. Mr Doherty came to speak to Mr Eaton and instructed him to go home. Mr Doherty stood Mr Eaton down at least until the result of a further test, to be undertaken by Canterbury Laboratories, could confirm or negate the screening test result.

[11] Two days later, on 29 June 2016, the result came back that Mr Eaton had

23ug/L of THC-9- carboxylic acid in his urine on 27 June 2017.

[12] Mr Doherty wrote Mr Eaton a letter inviting him to a disciplinary meeting to be held on 1 July 2016. He remained stood down from work until then. Mr Doherty's letter stated:

Under our drug and alcohol policy **we consider any positive result to be serious misconduct** which may lead to termination of your employment.

Before reaching any decisions in this matter we would like to meet with you formally to provide you with the opportunity to put forward

any matters you would like us to take into consideration. ...

You are welcome to bring a representative or support person with you to the meeting.

[13] Mr Eaton decided to get a further urine drug-screening test done at his own cost. He did so in the morning of 1 July 2016. That test was negative, and he brought the result of that test with him to the disciplinary meeting.

[14] Another union delegate accompanied Mr Eaton to the disciplinary meeting with Mr Doherty. Mr Eaton told Mr Doherty that he was not a habitual, regular or even occasional user of cannabis. He said that he had been at a party on Friday,

24 June when he over-indulged in alcohol but that he did not remember partaking of any cannabis and was as shocked as Mr Doherty was when he returned a non-negative and then a positive test. He said that if he had thought he might have had THC in his urine he would have told the tester up-front that he might not pass the test.

[15] Mr Eaton told me that at the meeting he showed Mr Doherty his negative test obtained that day and proposed an outcome short of dismissal. He said that he would

accept a demotion from his part-time loading foreman role and pay for regular drug tests for himself for six months.

[16] Mr Doherty says that he does not remember Mr Eaton's proposal being made. Mr Doherty took notes after the meeting, although they did not record everything said by Mr Eaton or by Mr Doherty.

[17] Mr Doherty's notes record:

J. could not offer any explanation

- v. remorseful

- 2 kids need employment etc. Did produce clear test that am

Told J. –line in sand he crossed it

- me v disappointed – L/F, union rep, trainer should know better

Told me that may have inhaled smoke from joint at party (Second hand smoke!!)

No recollection of having a joint!

[18] Mr Eaton denies ever having said that he must have passively inhaled second- hand smoke and that is how he returned a positive test. Instead, Mr Eaton acknowledged that he must have inhaled from a joint, but that he does not remember doing so.

[19] After the meeting, Mr Doherty consulted John Gallivan, previously of TDDA, by telephone about the level of C-9-carboxylic acid in Mr Eaton's urine and whether that relatively low level of THC could have been ingested by Mr Eaton through passive smoking at the party. He says Mr Gallivan told him that was unlikely.

[20] At some time, before or after the disciplinary meeting Mr Doherty also talked to his contact at Air New Zealand. He was told that if Mr Eaton was an Air New Zealand employee he was likely to be dismissed but that Mr Doherty must make his own decision.

[21] Later on the same day, Mr Doherty visited Mr Eaton at home. He wrote notes after that meeting too:

Verbally told J of my decision to dismiss.

I did not consider his explanation or that he did not know how it got into

Met with J @ his home (in the garden) at 1630.

Told him of my decision to terminate his employment. Very upset concerned about his family/finances etc.

The issues

I said he should have thought about that at the time. Collected ID & Gate Access card.
Would forward phone no to contact to arrange to MT his locker.

[22] I need to decide whether the decision ASD made, and how it made it, were within the range of how a fair and reasonable employer could have acted in all the circumstances.1 In doing so, I need to consider the terms of the policy and how it was applied.

[23] I need to assess the procedural fairness requirements set out in s 103A(3) of the Employment Relations Act 2000 (the Act), specifically:

(i) Did ASD sufficiently investigate the allegation against Mr Eaton? (ii) Did ASD raise its concerns with Mr Eaton before dismissing him?

(iii) Did ASD give Mr Eaton a reasonable opportunity to respond to its concerns before dismissing him?

(iv) Did ASD genuinely consider Mr Eaton's explanation before dismissing him?

[24] I also need to determine whether Mr Eaton's position as a union delegate had any bearing on ASD's decision to dismiss him.

The Policy

[25] Section 1.2 of the Policy prohibits an employee from:

d. using or consuming drugs or alcohol when off-duty if it would result in the Employee ... reporting to work or performing duties under, or at the risk of being under, the influence of drugs or alcohol.

[26] The other relevant parts of the Policy are:

DRUG TESTING PROCEDURE

1.15. ...

• A positive test will only be reported by an AS/NZS 4308 or AS 4760 (or successor Standards) accredited laboratory if

confirmed levels of drug or metabolite exceed designated cut- off levels. Cut-off levels will conform to the relevant Australian Standard/New Zealand Standard, where such a standard has been issued in relation to the drug concerned.

• If the Employee/Contractor disagrees with an initial positive test result then they have the option of having the referee specimen independently retested at another AS/NZS 4308 or AS 4760 (or successor Standard) accredited laboratory.

1 Section 103A(2) of the Employment Relations Act 2000.

• The cost of the second test will be met by the Employee/Contractor but if the result is negative the Company will refund any costs incurred by the Employee/Contractor.

...

Alcohol Testing Procedure

1.16. ...

20 years of age and over

• If the 1st reading is recorded at or **less than 100 micrograms** of alcohol per litre of breath the result is deemed negative and the individual may return to full duties.

...

• If the confirmatory result is recorded at or **less than 100 micrograms** of alcohol per litre of breath the result is deemed negative and the individual may return to full duties.

...

Drug and Alcohol Test Results

1.22. ...

1.24. If an Employee/Contractor tests positive for drugs, and the Company proposes to refer them to an appropriate service for rehabilitation treatment, or pursue disciplinary action/terminate the Contractor's engagement, then the Employee/Contractor is entitled to challenge the results and obtain an independent analysis of the sample (at the Employee/Contractor's own expense).

Stand down if non-negative drug test

1.25. If an Employee returns a non-negative result in relation to his/her drug test, the Company may stand him/her down on ordinary pay until receipt of confirmation of the result. If that result is positive, the Employee agrees that the Company shall be entitled to treat a stand down period as annual leave (and make deductions from the Employee's accrued entitlements accordingly). ... If the Employee's drug test result is negative, the Employee may return to full duties.

Breach of the Drug and Alcohol Policy

1.27. The Company will enforce this policy strictly. This includes if an Employee/Contractor consumes alcohol at a social event in such a way that it raises health and safety issues in the workplace, contributes to unacceptable job performance or the Employee/Contractor exhibits unusual job behaviour.

1.28. If this Policy is breached, the Company may, in relation to

Employees:

• Send the Employee home on leave, which may be unpaid, for such period as may be reasonably necessary. This will be at least as long as required for the Employee to recover from the influence of drugs or alcohol.

...

• Require the Employee, at his/her own expense, to undergo a further drug and alcohol screening test, and return a negative result, before permitting the Employee to return to work.

• Take disciplinary action against the Employee up to and including dismissal. The nature and severity of the violation

will determine the disciplinary action taken.

...

Rehabilitation

1.31. If an Employee returns a positive test, the Company may, in its sole discretion, permit him/her to continue in their employment, such to the **requirement** that they join a Rehabilitation Programme. In such circumstances, failure to take part or complete the programme may result in disciplinary action up to and including dismissal.

…

Discussion

Was the Policy applied fairly and in line with its terms?

[27] The Policy suggests that a number of disciplinary outcomes were possible, including dismissal.

[28] Mr Doherty's evidence was that the Policy states that it would be enforced strictly. He said that ASD's contract with Air New Zealand meant that he was compelled to dismiss any employee who tested positive.

[29] As justification for his view, Mr Doherty presented an Air New Zealand document entitled "Supplier Code of Conduct". Mr Doherty highlighted the portion reading:

It is of particular importance to Air New Zealand to maintain an alcohol-free and drug-free working environment. Suppliers must comply with Air New Zealand's Alcohol and Other Drugs Policy by ensuring their employees, agents or subcontractors are aware of this policy, and maintain a zero blood alcohol level and remain drug-free at all times while providing goods or services to Air New Zealand.

[30] The problem with attempting to rely on that document is that ASD had not been given it by Air New Zealand when Mr Doherty decided to dismiss Mr Eaton. Therefore, it was not something ASD relied on in making its decision to dismiss him.

[31] In addition, Mr Eaton had not been made aware of Air New Zealand's Alcohol and Other Drugs Policy. ASD cannot retrospectively rely on any agreement with Air New Zealand to enhance its argument that the dismissal was justifiable.

[32] Mr Doherty was not able to point to any contractual agreement with Air New Zealand at the time he made his decision that required ASD to dismiss any employee who returned a non-negative test.

[33] In relation to the Policy itself, Mr Doherty's interpretation of the Policy wording must be incorrect. It does state that ASD will enforce the Policy strictly, but it does not say that means any positive drug test will lead to dismissal.

[34] Instead, there is the possibility of rehabilitation for some employees. I accept that is discretionary and that the possibility was mentioned in the disciplinary meeting but Mr Eaton denied that he has a problem with cannabis and did not accept that rehabilitation was an appropriate approach. However, the mere fact that a discretion exists to offer rehabilitation suggests that ASD is not compelled to dismiss every employee who returns a non-negative test.

[35] In addition, in the event of a breach of the Policy, such as by way of a non- negative drug test, the employer may send an employee home on leave for a reasonable period "at least as long as required" for the employee "to recover from the influence of drugs or alcohol." The employer may also require the employee to undergo a further drug-screening test and return a negative result before permitting the employee to return to work. Therefore, the Policy envisages an employee returning to work once s/he is no longer under the influence of drugs or alcohol.

[36] In this case, Mr Eaton took the initiative of retaking a screening test four days after his non-negative result and returned a negative result. That meant that he was fully recovered from the "influence" of drugs and under the Policy ASD may have decided that he could return to work.

[37] I accept that those approaches are discretionary and ASD was not compelled to allow either approach. However, Mr Doherty did not consider the possibility of Mr Eaton returning to work once he achieved a negative test.

[38] Under the Policy, ASD was empowered to take disciplinary action "up to and including dismissal", with the "nature and severity of the violation" determining the disciplinary action that would be taken.

[39] I asked Mr Doherty what it was about Mr Eaton's situation in relation to its "nature" and "severity" that meant the strongest disciplinary action of dismissal was justified. He said that in relation to both the severity and nature of the violation, Mr Eaton worked in a safety sensitive role. That is correct, but all the roles at ASD are safety sensitive so the Policy must mean that there are also other relevant considerations.

[40] Mr Doherty told me that he likened Mr Eaton's situation to someone being tested and found to be a little over the limit for alcohol when they were driving. He said the amount of THC in Mr Eaton's urine may have been low but he was over the cut-off limit. That meant, just like with drink driving, that he was guilty. Coming back a few days later with a negative test did not affect the fact that he had tested positive at the time.

[41] That line of reasoning is not in line with the Policy which says that in considering the appropriate disciplinary action ASD will take into account the nature and severity of the violation. In considering the nature of the violation, ASD may

consider whether the test was a random one or one done for cause, such as when undertaken on suspicion an employee was showing signs of being under the influence, or after an accident or near-miss incident. That was not the case with Mr Eaton. He had been at work since 6 am and was not tested until about 8-8.30 am. There were no signs of impairment and there was no accident or near-miss.

[42] The severity of the violation must include the amount of prohibited substance in an employee's body that could indicate whether they were or were not under the influence of drugs or alcohol. The amount of time between ingesting or inhaling the substance and when the employee next came to work must also be relevant to the severity of the violation. For example, having a joint either the night before or immediately before starting a 6 am shift would be a more severe violation than having a joint on the Friday night before a Monday morning shift.

[43] In addition, ASD had no evidence before it that Mr Eaton was actually under the influence of cannabis when he was tested. Instead, Mr Doherty seems to have assumed he was.

[44] I consider that ASD did not apply its Policy fairly.

Was the process used by ASD culminating in Mr Eaton's dismissal fair?

Did ASD carry out a sufficient investigation?

[45] At first glance, very little investigation was necessary. Mr Eaton had tested positive for cannabis and he did not seek to deny that. However, he did give an explanation. Mr Doherty did not seek to verify Mr Eaton's story about being at the party and drinking too much. For example, he could have undertaken further investigation such as asking Mr Eaton's wife and/or other partygoers to check Mr Eaton's explanation. That is, he could have enquired as to whether Mr Eaton was really so intoxicated that night that he may have no recall of that night, and whether anyone saw him smoke cannabis.

[46] He could have investigated whether Mr Eaton was actually under the influence of or impaired by the THC in his system when he was working on the Monday morning, and whether his explanation of the inhalation of cannabis being a one-off was likely or whether it was more likely he was a regular user.

Did ASD adequately put its allegations and concerns to Mr Eaton?

[47] The disciplinary letter contained the allegation that Mr Eaton had committed serious misconduct by returning a positive test result. It said that could result in the termination of his employment and asked him to meet to put forward any matters he would like ASD to take into consideration when making its decision.

[48] It appears from the letter inviting Mr Eaton to the meeting that ASD had already determined he had committed serious misconduct. In other words, it treated the return of a positive test result as a matter of strict liability, which would inevitably lead to a disciplinary result. We also know that Mr Doherty's view was that result would need to be dismissal.

[49] As part of his investigation, Mr Doherty spoke to Mr Gallivan about the possibility of passive smoking, or secondhand smoke. He says he did so before the disciplinary meeting. He did not tell Mr Eaton that he had had that discussion and that he considered it implausible that Mr Eaton's test result was from passive smoking, or second-hand smoke. That concern was not put to Mr Eaton for his response.

Was Mr Eaton given a reasonable opportunity to respond to ASD's concerns?

[50] Mr Eaton said he had no explanation and was very remorseful. He admitted he may have inhaled smoke from a joint but did not recall it.

[51] Mr Eaton was able to share his recent negative test results with Mr Doherty.

[52] However, Mr Eaton was unable to respond to Mr Doherty's view of the likelihood of passive smoking, as Mr Doherty did not tell him he had spoken to Mr Gallivan.

[53] That was more than a minor defect in the process. It contributed to Mr Eaton being treated unfairly.

Did ASD genuinely consider Mr Eaton's explanation before deciding to dismiss him?

[54] Mr Doherty's notes appear to say that he did not consider Mr Eaton's explanation of how he came to have THC in his system. After questioning Mr Doherty at the investigation meeting, I am satisfied that he did listen to Mr Eaton's explanation but either did not believe it or did not consider it a sufficient explanation.

[55] Mr Doherty was entitled not to believe Mr Eaton, but not in the light of having undertaken an insufficient investigation.

[56] In addition, Mr Doherty did not give all the relevant information proper weight. He did not appropriately consider Mr Eaton's long record of service of 11 years, two previous negative drug and alcohol tests and the further negative test on

1 July.

Was there pre-determination?

[57] The letter inviting Mr Eaton to the disciplinary meeting shows that ASD had decided Mr Eaton had committed serious misconduct. I consider that Mr Doherty considered before that meeting that dismissal was the most appropriate outcome.

[58] Mr Doherty did not consider any result other than termination because he thought that ASD's contract with Air New Zealand meant he had to dismiss anyone with a non-negative test. If that was the case the Policy needed to say so, but it did not.

[59] I do not mean to suggest that Mr Doherty made the decision lightly. He sought advice and considered his options. However, he wrongly, in my view, considered that dismissal was the only option.

Did Mr Eaton's role as a union delegate lead to ASD targeting him for testing, or make him more likely to be dismissed?

[60] If Mr Eaton's role as a union delegate led to him being treated differently, particularly if more harshly, than other employees that would be a factor pointing towards ASD not acting as a fair and reasonable employer.

[61] Mr Eaton has a suspicion that his role led to him being chosen for testing again in June 2016. However, I am satisfied by Mr Doherty and Greg Ronald of the TDDA that the selection truly was a random one. I consider it was the small number of employees, rather than any targeting of Mr Eaton, that meant that selection led to Mr Eaton's third random test in 8 months.

[62] Mr Eaton also has a suspicion that his role as union delegate led to

Mr Doherty's determination to treat him very strictly, and to dismiss him.

[63] Mr Doherty denies taking into account Mr Eaton's union role in making his decision to dismiss and says he would have dismissed anyone in the same circumstances. However, after hearing from both Mr Eaton and Mr Doherty, and taking into account Mr Doherty's notes, which record that among the reasons Mr Eaton should have known better was that he was a "union rep", I consider that was a factor Mr Doherty took into account in making his decision to dismiss. That is, he

considered Mr Eaton's status as a union representative meant he should have demonstrated a higher standard of behaviour.

[64] That was an irrelevant consideration, and one that should not have been considered by Mr Doherty. Union representatives should not be held to any higher standard of behaviour than any other employee. I consider that Mr Eaton was dismissed at least partly because of his involvement in union activities. 2

Conclusion on unjustified dismissal

[65] ASD did not act in a way that a fair and reasonable employer could have acted in all the circumstances at the time, and in the way it made its decision to dismiss Mr Eaton. The procedural failings are sufficiently serious, particularly when considered overall, to make the decision to dismiss unsound. Therefore, Mr Eaton has proved that he was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

[66] In the statement of problem, the remedies claimed are lost wages, and compensation for distress of $20,000, as well as legal costs. In the final submissions Mr Morgan claims holiday pay and KiwiSaver employer contributions on any lost wages awarded. It is too late to claim holiday pay and KiwiSaver contributions in closing submissions. These should have been claimed in the statement of problem instead.

Lost wages

[67] Section 128(2) of the Act provides that I must order ASD to pay Mr Eaton the lesser of a sum equal to his lost remuneration, arising from the dismissal, or three months' ordinary time remuneration. Three months = 13 weeks.

[68] Under s 128(2) the lesser amount is Mr Eaton's lost remuneration. Mr Eaton claims

$6,180.18 gross in lost wages for three months. Mr Eaton obtained part-time and temporary work very quickly and gained other ongoing work within a few weeks. I am satisfied that he adequately mitigated his loss. However, his income in the new roles was

less than he earned with ASD.

2 *Go Bus Transport Ltd v Hellyer* [2016] NZEmpC 177 and *Nathan v C3 Limited* [2015] NZCA 350; [2015] ERNZ 61

[69] I accept that what Mr Eaton claims is justified as his lost remuneration over the 13 weeks for which he has claimed.

Compensation

[70] Mr Eaton claims $20,000 for his humiliation, loss of dignity and injury to his feelings in losing his job in the way he did.

[71] Mr Eaton's evidence is that he was hurt his loyal service of 11 years ended in the way that it did. He said that he was upset because he did not feel that he could provide for his family, his relationship with his partner nearly broke down because he could not provide for her and their children. He said that he did not get depressed but he did feel 'very down' and that he started yelling at his children, which he felt bad about.

[72] In considering how much compensation Mr Eaton should receive I have been aided by considering Chief Judge Inglis observations in the Employment Court case of *Archibald v Waikato District Health Board3*:

Assessing compensation is an inexact science. This can cause difficulties in terms of ensuring a degree of consistency across like cases, while reflecting the individual circumstances of the particular case before the Court. In arriving at an appropriate figure I have considered the extent of the injury suffered ... and where it sits in the spectrum of cases routinely coming before the Court. In this regard, I have found it helpful in this particular case to consider the challenging task of assessing compensation in terms of a broad analytical framework of three bands:

• band 1 involving low level loss/damage;

• band 2 involving mid-range loss/damage; and

• band 3 involving high level loss/damage.4

[73] Based on the evidence I have heard, I assess the injury suffered by Mr Eaton as a result of ASD's unjustified dismissal to sit about the middle of band 1. ASD must pay Mr Eaton $7,500 in compensation.

3 [2017] NZEmpC 132.

4 Archibald, paragraph [62].

Contribution

[74] Section 124 of the Act requires me to consider what contribution Mr Eaton made to the circumstances leading to his personal grievance. If I consider that his behaviour was blameworthy enough, the section requires me to reduce the amount of remedies for which he is eligible.

[75] Although Mr Eaton did not remember deliberately taking part in smoking a joint, he accepts that he must have done so. He made a decision to do so, although his decision-making was apparently affected by the amount of alcohol he had consumed. He also decided to drink such an amount of alcohol that it would affect his decision- making and his memory. Mr Eaton was aware that the Policy required him to refrain from being at work at risk of being under the influence of drugs. Deciding to partake in smoking a joint led to the positive drug test, and contributed to the situation leading to his personal grievance. That decision was a blameworthy one, to the extent that his remedies should be reduced by 20%.

Costs

[76] Mr Morgan has claimed costs for Mr Eaton's representation. Ms Hudson opposes costs because she says there is no evidence that legal costs have been incurred. I disagree.

[77] Mr Eaton was the successful party. As costs follow the event, I consider he is entitled to costs on his successful case. The investigation meeting took slightly less than half a day. ASD must pay Mr Eaton legal costs of $2,250 as a contribution to his legal costs and the filing fee of $71.56.

Christine Hickey

Member of the Employment Relations Authority

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