

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 399/09
5164780

BETWEEN	STEIG FERGUSON First Applicant
AND	TROY SUTCLIFFE Second Applicant
AND	VEHICLE MAINTENANCE LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Simon Scott for Applicants Mark Flyger for Respondent
Investigation Meeting:	17 September 2009
Submissions Received:	18 September 2009 from Applicant 21 September 2009 from Respondent
Determination:	11 November 2009

DETERMINATION OF THE AUTHORITY

[1] The Statement of Problem lodged in the Authority on 8 June 2009 cited the respondent as being Equipment and Transport Leasing Limited. The name of the respondent was raised as a preliminary matter at the investigation meeting. After discussions it was agreed to change the respondent to Vehicle Maintenance Limited (“VML”).

[2] Mr Steig Ferguson and Mr Troy Sutcliffe were employed by Vehicle Maintenance Limited (“VML”) as maintenance diesel mechanics (unqualified) to work on a range of earthmoving, contracting machinery and heavy transport trailers.

[3] Mr Ferguson was employed from 2005 until his dismissal on 3 April 2009. At the time of his dismissal Mr Ferguson was acting as a Foreman. Mr Sutcliffe had

been employed for about five months at the time of his dismissal on 3 April 2009. Both men were dismissed for refusing to take a drug test. They claim that dismissal was unjustified and seek remedies including lost wages and compensation. VML denies the claims.

[4] Pursuant to section 103A the Authority must scrutinise the respondents actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[5] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer¹.

[6] Although the Authority does not have unbridled licence to substitute its decision for that of the employer² it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred³.

[7] The issues for determination are whether the instruction to undertake a drug test was a lawful and reasonable instruction, and if not, whether a fair and reasonable employer would have acted as VML did in dismissing Mr Ferguson and Mr Sutcliffe without notice.

VML Drug Testing Policy

[8] Neither Mr Ferguson nor Mr Sutcliffe have been provided with a written employment agreement and had not one either before or during their employment. However, a standard terms and conditions document dated 1 April 2009 was provided to the Authority and was relied on by VML to support its contention that it could seek employees to undergo drug testing as the agreement provides for Random Drug Testing to be undertaken.

¹ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

² *X v Auckland District Health Board* [2007] 1 ERNZ 66.

³ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

[9] The full bench of the Employment Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*⁴ established some principles with regard to drug testing in the workplace. Those principles included:

- Where drug and alcohol testing is not addressed expressly in employment agreements, it may be the subject of a fair and reasonable employer policy.
- Statutory and any relevant contractual consultation principles will apply to the formulation and promulgation of a workplace drug and alcohol policy.
- A direction to an employee pursuant to a drug and alcohol policy must be both lawful and reasonable.

[10] The Court has recognised that drug and alcohol testing during employment is now widespread, and may be even standard in many sectors or enterprises.⁵ The Court has recognized also that it is the employer who is taken to task in a prosecution for a breach of the Health and Safety in Employment Act 1993 and so it must be responsible for doing what it can to ensure statutory compliance.⁶

[11] Determining whether an instruction to an employee to undergo a drug test is lawful and reasonable requires a consideration of the policy, and whether it was implemented in accordance with the good faith obligations of the Act.

The dismissals

[12] VML says that to meet its legal responsibilities it considered random drug testing was necessary to ensure the ongoing safety of all employees working at its Te Rapa workshop. Prior to April 2009 an employee had a serious accident while working for VML. A heavy transport trailer fell on him when he failed to ensure that it was adequately fastened. He sustained serious leg and hip injuries requiring him to have many months off work. There was no evidence, and it was not contended by the Respondent, that this accident was as the result of the employee being under the influence of drugs while at work.

[13] On 3 April Messers Ferguson and Sutcliffe were, along with all other staff requested to attend a staff meeting. At this meeting those present were advised that a drug test would be undertaken in 10 minutes. They were advised that a positive result would not result in the termination of their employment, however, refusal to undergo

⁴ [2004] 1 ERNZ 614.

⁵ *Maritime Union of New Zealand Inc v TLNZ Ltd* (2008) 8 NZELC 99 [73].

⁶ *Ibid* [74].

the test was considered to be a matter of serious misconduct and would result in dismissal.

[14] Mr Ferguson and Mr Sutcliffe refused to undergo the test and challenged the right of VML to force them to undergo a drug testing regime. They were provided with a copy of the individual employment agreement dated 1 April 2009 and were referred to clause 5. This was the first time either man had seen a copy of this document. They had not signed the document previously and were not parties to the document.

[15] The request to take a drug test was the first time either Mr Ferguson or Mr Sutcliffe knew that the respondent was intending to implement a policy requiring random drug testing. Later that day both Mr Ferguson and Mr Sutcliffe received letters advising them that their refusal to undergo a drug test was deemed serious misconduct the penalty for which was dismissal. They were advised that unless they undertook the test before the end of the day they would be dismissed.

[16] At the investigation meeting Mr Phillip Carson, VML's general manager, advised that, following the accident with the heavy trailer, and after a discussion with Mr Robin Ratcliffe a Director of VML, it was decided that VML would implement random drug testing.

[17] Mr Carson says that it is normal when changes are made to the employment agreement, that they update the standard employment agreement and advise staff that revised copies are available. By way of example Mr Carson told me this was the course of action taken to incorporate the changes made to holiday provisions when the Holiday Act 2003 was enacted.

[18] In answer to questions at the investigation meeting Mr Carson produced a Drug Testing policy which had been drafted subsequent to the dismissals of Messers Ferguson and Sutcliffe. At the time of the dismissals, there was no written policy and no written procedures in place.

Determination

[19] The Respondent relies on the *Maritime Union* case⁷ to support its contention that having advised the staff of the new policy and the consequences it did not have to have all staff “buy into” it and that therefore, because the majority of staff underwent the required drug test, VML did not require universal “buy in”.

[20] The *Maritime Union* case can be distinguished on its facts from the matter I am now determining. Firstly, the Court found that TLNZ had consulted with the union over an extended period of time and had made changes to its policy as a result of that consultation.

[21] Secondly, there were comprehensive clauses in the collective employment agreement between the union and TLNZ dealing with health and safety issues in the workplace. This went a long way to demonstrate TLNZ’s commitment to the health and safety of its employees.

[22] In the *Maritime Union* case the Court reiterated a previous decision of the Employment Court which held that:

[C]onsultation had to be genuine and more than a perfunctory meeting with discussions but really just going through the motions. Consultation should include advice of what is proposed including sufficiently precise information to allow a proper response. The periods of time for each step must be reasonable having regard to the nature of the proposal, the complexity of the information and similar relevant considerations. The party proposing the change must maintain an open mind and consider genuinely and properly suggestions made before deciding what is to be done. While consultation is not negotiation and the assent of persons consulted is not necessary, nor is consultation to be advice of a *fait accompli* dressed up as a proposal.⁸

[23] In this matter I am satisfied VML has failed to consult. Rather, it implemented a brand new policy the subject matter of which is fraught with difficulties. There was no discussion or dialogue with its employees prior to implementing the policy rather, what was advised to Mr Fergusson and Mr Sutcliffe on 3 April 2009 was a *fait accompli*. This is evidenced by the letter signed by Mr Carson which states that the drug test was mandatory. The only options available for Messers Fergusson and Sutcliffe on 3 April was to take the drug test or be dismissed.

⁷ *Supra* n 5.

⁸ *Cammish v Parliamentary Services* [1996] 1 ERNZ 404.

This is not the action of an employer consulting over a proposed policy with an open mind.

[24] Standing back and considering this case objectively I find the actions by VML and how it acted in dismissing Mr Ferguson and Mr Sutcliffe were not what a fair and reasonable employer would have done in all the circumstances. I find a fair and reasonable employer, even a small employer such as VML, would have put a properly documented proposal to its employees which would include the circumstances and when drug testing would be applied; information as to what drugs would be tested for; how the testing would be carried out; the protocols about how the information gathered would be stored and used; and the consequences of a positive test or refusal to consent to a test.

[25] A fair and reasonable employer would then have put the proposal document out to its employees and sought feedback on it as required by the good faith provisions of the Employment Relations Act 2000 before notifying staff that the policy would be implemented.

[26] Mr Ferguson and Mr Sutcliffe were unjustifiably dismissed and are entitled to remedies.

Remedies

Contribution

[27] The Authority must consider the extent to which the actions of Mr Ferguson and Mr Sutcliffe contributed towards the situation that gave rise to the personal grievance (s 124). If those actions so require any remedies that would otherwise have been awarded must be reduced accordingly.

[28] I find neither Mr Ferguson nor Mr Sutcliffe took any actions which contributed to their personal grievance. I find the two men wanted time to consider the legal ramifications of what was being asked of them. This would not be an unusual response in a situation where a controversial unwritten policy is thrust upon employees without any previous discussion or consultation.

Mr Ferguson*Lost wages*

[29] Mr Ferguson has provided evidence to show that he was employed in new employment on 11 May 2009. He was out of work for five weeks. Mr Ferguson is entitled to be reimbursed for the five weeks he was out of work.

[30] Mr Ferguson told me the rate of pay he was receiving in his new employment was less than he had received at VML and sought payment of the difference. However, I have received no evidence to show the extent of the loss incurred by Mr Ferguson. I am therefore not able to make any award for this loss.

Vehicle Maintenance Limited is ordered to reimburse Mr Ferguson five weeks pay pursuant to s 123(1)(b) of the Employment Relations Act. Payment shall be made within 28 days of the date of this determination.

Compensation

[31] Mr Ferguson gave little evidence as to the affect his dismissal had on him. He told the Authority that he was humiliated and embarrassed at having to advise his friends and family that after four years employment he had been dismissed. In coming to my conclusions with regard to the amount of compensation to be awarded, I have had regard to the evidence and Mr Ferguson's four years of employment with the respondent. I conclude the appropriate level of compensation is \$5,000.

Vehicle Maintenance Limited is ordered to pay to Mr Ferguson compensation in the amount of \$5,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act. Payment shall be made within 28 days of the date of this determination.

Mr Sutcliffe*Lost wages*

[32] Mr Sutcliffe was employed in new employment on 10 June 2009. He was out of work for nine weeks. Mr Ferguson is entitled to be reimbursed for the nine weeks he was out of work.

Vehicle Maintenance Limited is ordered to reimburse Mr Sutcliffe nine weeks pay pursuant to s 123(1)(b) of the Employment Relations Act. Payment shall be made within 28 days of the date of this determination.

[33] Mr Sutcliffe gave little evidence as to the affect his dismissal had on him. He told the Authority that he was humiliated and embarrassed at having to advise his

friends and family he had been dismissed. In coming to my conclusions with regard to the amount of compensation to be awarded, I have had regard to the evidence and Mr Sutcliffe's short tenure of employment with the respondent. I conclude the appropriate level of compensation is \$3,000.

Vehicle Maintenance Limited is ordered to pay to Mr Sutcliffe compensation in the amount of \$3,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act. Payment shall be made within 28 days of the date of this determination.

Interest

[34] The applicants seek payment of interest on the remedies awarded to them. Pursuant to clause 11 of schedule 2 to the Employment Relations Act 2000, the Authority has a general power to award interest.

[35] Interest may be awarded on reimbursement pursuant to s 123(1)(b) but not on compensation awarded pursuant to s 123(1)(c)⁹. In this case it is appropriate that interest be awarded on the reimbursement of lost wages VML has been ordered to pay to the applicants.

Vehicle Maintenance Limited is ordered to pay to interest on the total amount of reimbursement awarded, at the rate of 4.8 percent per annum from 4 April 2009 until the date on which payment is completed.

Comment

[36] The parties are to calculate and agree on the quantum of the lost wages that have been ordered for reimbursement. If agreement can not be achieved leave is reserved for the parties to request the Authority to determine the matter which will require fuller particulars to be provided.

⁹ *Salt v Fell* [2006] 1 ERNZ 449.

Costs

[37] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the applicants may file and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority