

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 404
5449927

BETWEEN SHAUN O'CONNOR
Applicant

A N D BALLANCE AGRI-NUTRIENTS
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Mitchell, Counsel for the Applicant
Kylie Dunn, Counsel for the Respondent

Investigation Meeting: 10 September 2014 at Tauranga

Submissions Received: 10 September 2014 from both Applicant and Respondent

Date of Determination: 06 October 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr O'Connor was unjustifiably dismissed by the respondent, Ballance Agri-Nutrients Limited (Ballance).**
- B. Ballance is to pay Mr O'Connor compensation in the sum of \$3000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).**
- C. Ballance is to pay Mr O'Connor the sum of \$10,857.56 net under s.128 of the Act, being three months wages lost by him as a result of his unjustified dismissal.**
- D. All of the above sums are to be paid by Ballance to Mr O'Connor within 21 days of the date of this determination.**

- E. Costs are reserved. Mr O'Connor has 14 days from the date of this determination to file and serve a memorandum as to costs. Ballance has 14 days of receipt in which to reply.**

Employment relationship problem

[1] Mr O'Connor was dismissed from his employment with Ballance on 20 December 2013. The dismissal was confirmed by Ballance in a letter from it which states:

During the course of our meeting the company reached a preliminary view that returning a positive result when reasonable cause tested for cannabis on Friday 13 December 2013 was deemed to be unacceptable behaviour of a serious misconduct nature and was specifically in breach of:

- *Failure to comply with any of the Company's fire prevention, site permit requirements and safety rules or procedures.*
- *Being under the influence of alcohol or illegal drugs to the extent that the individual is unable to perform his/her duties properly/safely.*
- *Failure to comply with the Company Policies and Procedures.*

...

As you are currently on a Final Written Warning for failure to comply with Company Policies and Procedures, this subsequent serious misconduct breach has resulted in a loss of trust and confidence in you as an employee, therefore my decision was to terminate with notice.

[2] The letter was signed by Mr O'Connor's immediate supervisor, Mr Alex Beck, Ballance's Service Centre Manager at Maru Street, Tauranga.

[3] Mr O'Connor claims the dismissal to be unjustified because Ballance was not entitled to request that he undergo a reasonable cause drug test under its drug and alcohol policy, the result of which was the primary reason for his dismissal.

[4] Ballance denies the dismissal is unjustified and says Mr O'Connor failed a drug test which in itself constituted serious misconduct. Ballance says the decision to dismiss Mr O'Connor was open to it as a fair and reasonable employer.

Mr O'Connor's employment at Ballance

[5] Ballance is one of New Zealand's largest fertiliser specialists, with manufacturing plants in Mount Maunganui and Invercargill. Ballance is a national company employing more than 700 employees.¹

[6] Prior to Mr O'Connor's dismissal on 19 December 2013, he was employed by Ballance for about 8 years, as a Service Centre Operator at its Maru Street site in Mount Maunganui. Mr O'Connor's duties included driving heavy machinery and creating fertiliser mixes according to customer requirements.

Previous Warnings

[7] During 2013, Mr O'Connor received two warnings, the first warning was a written warning on 20 February 2013 for "*smoking outside of designated smoking areas*". On 20 May 2013, Mr O'Connor was issued with a final written warning for dumping household rubbish at the Maru Street site. The written warning stated that the conduct was in breach of Company policy and that:

...any further misdemeanours will not be tolerated.

Events of 12 December 2013

[8] On Thursday 12 December 2013, Mr O'Connor and a workmate, Mr Aaron Brown, went to the local shopping centre, Central Parade at lunchtime in Mr O'Connor's car. Mr O'Connor says he went to the Central Parade shopping centre on Thursdays to pay his bills and that his workmates knew this. The Operations Manager, Mr Shaun Piper, confirmed that Ballance pays its employees each Wednesday evening and their pay goes in to their bank accounts each Thursday morning.

[9] Mr O'Connor says he parked his car at the shops as usual, went off to pay his bills and Mr Brown went off to do his business. Mr O'Connor returned to the car before Mr Brown and smoked a cigarette while waiting for Mr Brown.

Meeting on 13 December- Suspension

[10] The next day, at about 9.30am, while he was having his morning tea break, Mr Beck spoke to Mr O'Connor. Mr Beck told Mr O'Connor that there had been a

¹ Ballance website www.ballance.co.nz

phone call from a member of the public reporting that she had seen a car parked at the Central Parade carpark the day before in which two Ballance employees were smoking marijuana. The number plate was that of Mr O'Connor's car. Mr O'Connor told Mr Beck he had been smoking in the car but had not been smoking marijuana.

[11] Mr O'Connor and Mr Brown were asked to meet with both Mr Beck and Mr Piper about the matter. No further details were provided about the complaint received by Ballance.

[12] Mr O'Connor and Mr Brown were told they were required to undertake a urine test at the offices of the New Zealand Drug Detection Agency (NZDDA) in Tauranga. Mr O'Connor says he was told if he refused to take the test that would be serious misconduct. Because of his final written warning, Mr O'Connor felt he had no choice but to undertake the urine test even though he did not believe there was any reason for him to be tested.

[13] Mr O'Connor took the urine test which showed a non-negative result for cannabinoids. Mr Beck, Mr Piper, Mr Brown and Mr O'Connor returned to work. Mr O'Connor was told that because of the non-negative result he was suspended on pay until the test was verified by Canterbury Health Laboratories.

[14] A further disciplinary meeting was held on Thursday, 19 December at which time Mr O'Connor was represented by Mr Selwyn Russell, an organiser from the Maritime Union of New Zealand. There was further discussion about the incident on 12 December. Mr O'Connor acknowledged smoking some cannabis at home but not at work. Mr O'Connor was dismissed for serious misconduct and this was confirmed in a letter from Ballance dated 20 December referred to in paragraph [1] above. Mr Brown was also dismissed and has brought a claim which is yet to be determined by the Authority.

Issues

[15] The issues the Authority is to determine are:

- (a) Was Ballance entitled to request Mr O'Connor to undergo a reasonable cause drug test?

- (b) Did the failure by Mr O'Connor of the reasonable cause drug test constitute serious misconduct for which dismissal from employment was justified in the circumstances?
- (c) Were there other reasons justifying Mr O'Connor's dismissal?

First Issue

Was Ballance entitled to undertake a reasonable cause drug test of Mr O'Connor?

[16] After receiving the non-negative drug test result on 13 December, Mr O'Connor returned to Ballance and was suspended by Mr Beck on pay until the result was verified by the laboratory. Mr O'Connor says he told both Mr Beck and Mr Piper that he had been smoking in his car the day before at the Central Parade shops but that he had not been smoking marijuana. Mr O'Connor acknowledged smoking a small amount of marijuana outside work but not at work.

[17] Mr Piper took handwritten notes of the meeting with Mr O'Connor and Mr Brown which recorded that:

Returned to work, advised both that due to not neg result would suspend them on pay pending lab verification results and if required a investigation/disciplinary process. Advised my view is facts are known and would not require a investigation unless there was something they wanted to add once they had a support person present. Both Aaron Brown and Shaun O'Connor admitted smoking pot outside of work but not at work. All agreed no need for full investigation with representation and would advise AB & SP of any further facts as they saw them.

[18] Both Mr Beck and Mr Piper say that during the meeting of 13 December Mr O'Connor displayed unusual behaviour. They both say Mr O'Connor was agitated and did not keep eye contact and Mr Piper says that Mr O'Connor was fidgeting. At the investigation meeting, Mr Beck said that he and Mr Piper exchanged glances and then nodded at each other. Mr Beck took this to mean they both felt a reasonable cause drug test was warranted given Mr O'Connor's unusual behaviour. Mr Beck and Mr Piper had a brief discussion outside the room and agreed Mr O'Connor should undertake a reasonable cause drug test (the drug test) under the provisions of Ballance's Drug and Alcohol Policy (the Policy).

[19] Mr Piper's notes of the meeting do not mention any "unusual" behaviour by Mr O'Connor. Mr O'Connor was never told that it was his "unusual" behaviour that Mr Beck and Mr Piper considered justified a drug test. The "unusual" behaviour was not raised at the time.

[20] Even if Mr O'Connor was acting unusually at the meeting, it is my view that this would hardly be surprising given the nature of the meeting. It is highly likely Mr O'Connor was anxious and agitated.

[21] An incident investigation report completed after the incident records that Mr Piper's handwritten notes of the discussion were accurate. However, there is no mention in that report of any unusual behaviour by Mr O'Connor. The first mention of unusual behaviour by Mr O'Connor at the meeting on 13 December was in the witness statements filed by Mr Beck and Mr Piper for the purposes of the Authority's investigation meeting.

[22] I do not accept that Mr O'Connor displayed unusual behaviour at the meeting on 13 December which warranted a drug test. As is set out in the incident investigation report, Mr O'Connor agreed that he and Mr Brown were in his car in the carpark on the day the member of the public says she saw two men from Ballance. Mr Beck and Mr Piper decided this was sufficient to request the drug test.

[23] The urine test was subsequently verified by Canterbury Health Laboratories as being positive for cannabinoids. The level was low.

[24] A complaint from a member of the public did not entitle Ballance to require a reasonable cause test. The location of Mr O'Connor's car at Central Parade during lunch time also did not entitle a reasonable cause test. I do not accept the evidence of Mr Beck and Mr Piper that they also observed Mr O'Connor acting in an unusual manner which entitled the reasonable cause test. In my view, Mr Beck and Mr Piper did not have grounds to request that Mr O'Connor undergo a drug test.

Ballance's Policies and Procedures

[25] The parties agree that the collective agreement obliges employees to abide by Ballance's policies, procedures and the code of conduct. There is no dispute that Ballance's Maru Street site is a safety sensitive site.

[26] Ballance has a Group Policy Manual which includes a Drug and Alcohol Policy (the Policy) which applies to Ballance employees throughout the country. The covering letter of the Policy signed by the Chief Executive emphasises the need for a safe workplace free from those individuals adversely affected by alcohol or drugs. The letter also sets out the various levels of assistance provided by Ballance for individuals who test positive for drugs or alcohol. Assistance includes education, training and rehabilitation under Ballance's drug and alcohol rehabilitation programme.

[27] The letter records the types of drug and alcohol testing Ballance may undertake including testing before an offer of employment is made, testing following an incident or an accident, reasonable cause testing if an employee appears to be acting in a manner suggesting alcohol or drugs "*may be impacting on their ability to work effectively and safely*" and random testing for alcohol or drugs to ensure continued compliance by employees with the Policy.

Reasonable Cause Drug Testing

[28] Reasonable cause drug testing is referred to in the letter as follows:

Reasonable cause testing. Employees and contractors may be tested for the presence of drugs and/or alcohol where their actions, appearance, behaviour or conduct suggests drugs or alcohol may be impacting on their ability to work effectively and safely.

[29] The Policy itself reiterates Ballance's commitment to a safe and healthy workforce free from the effects of drugs and alcohol. The Policy emphasises education, training and assistance programmes to eliminate the risks of alcohol and drug related harm to employees as well as testing where required.

[30] Clause 2.0 of the Policy states as its purpose:

... Ballance is committed to a drug and alcohol free work environment where all employees will feel safe from the dangers that people affected by such substances may bring into the workplace.

...

***Reasonable cause testing:** Employees are tested where there is reasonable cause to suspect alcohol or drug use.*

[31] At clause 8.0 of the Policy, there are testing procedures for drug and alcohol use. Clause 8.2 lists the consequences of a non-negative and positive drug or alcohol test. In the case of a non-negative test the employee may be stood down on pay until the result is confirmed. On the first occasion in which a positive test is returned there are a number of possible consequences including suspension from employment without pay, opportunities for counselling or rehabilitation, a written warning, advice of random testing and/ or dismissal.

[32] The second time a positive result is returned may be treated by Ballance under the Policy as serious misconduct for which dismissal is appropriate.

[33] There is reference in the Policy to reasonable cause drug testing when an employee refuses to consent to a drug or alcohol test. The Policy states:

Ballance seeks the cooperation of all employees in agreeing to undergo drug or alcohol testing where there is reasonable cause, following an accident/incident and/or clear evidence of impairment. Where the employee refuses to provide consent to undergo a drug or alcohol test, the company will have no option but to rely on the evidence of the employee's impairment, when making a decision about what action to take.

[34] Schedule 3 sets out the procedure for reasonable cause testing. It states:

***Circumstances.** An employee may be tested for drugs/alcohol where a manager/supervisor determines that the employee's appearance, actions, or behaviour suggests they may be affected by drugs/alcohol. Normally there will be more than one indicator present. The manager/supervisor (where possible) must obtain a second opinion to support their reasonable-cause observation(s).*

***Procedure.** The manager or the employee's supervisor must:*

- (a) Determine whether there is sufficient cause to test for drugs/alcohol (Appendix G);*
- (b) Obtain informed written consent for this testing from the employee (Appendix F).*

If sufficient cause and consent are present the manager or supervisor should follow the same procedures detailed as in Post-accident Post-incident procedures.

***Refusal to consent.** Where an employee refuses to undergo a test the refusal shall be treated under the serious misconduct disciplinary procedures contained in the Ballance Code of Conduct.*

[35] Appendix G sets out reasonable cause indicators which include “*unusual physical symptoms or behaviours*” such as:

- *Excessive lateness;*
- *Absences often on Monday, Friday or in conjunction with holidays;*
- ...
- *Changes in personality;*
- *Changes in alertness – difficulty with attention span;*
- *Changes in appearance – clothing, hair, personal hygiene;*
- ...
- *Going to the bathroom more than normal;*
- ...
- *Dizziness;*
- *Slurred speech;*
- *Hangovers;*
- *Violent behaviour;*
- ...
- *Irritability;*
- *Depression;*
- *Suspected use of drugs/alcohol observed or reported;*
- *Found in possession of drugs or alcohol or drug paraphernalia at the workplace.*

[36] Appendix G includes check lists to be completed by the Supervisor of an employee under observation. Physical symptoms or behaviours observed by the Supervisor are to be provided. A check box for determining reasonable cause is set out as follows:

- *Has some form of impairment been shown in the employee’s appearance, actions or work performance?*
- *Are you satisfied that it is reasonably possible that the risk as a result of the possible use of drugs or alcohol?*
- *Is the impairment current, today, now?*
- *Are you comfortable that the person(s) is likely to be impaired beyond a reasonable doubt?*

[37] It is clearly correct that Ballance has a statutory responsibility to ensure the safety of all its employees. The Policy makes clear that Ballance is committed to a workplace free from drugs and alcohol. That policy is comprehensive and details steps to be followed before reasonable cause testing can be carried out.

[38] There are various references to reasonable cause testing in the Policy. It is my view that a prerequisite for reasonable cause testing by Ballance of one of its employees is an incident/accident, behaviour suggesting drugs or alcohol may be

impacting on his/her ability to work effectively and safely, or impairment as a result of drugs or alcohol.

[39] In this case, if Mr Beck and Mr Piper were concerned that Mr O'Connor may be acting in a manner suggesting his use of drugs or alcohol were impacting on his ability to work effectively or safely or that he was impaired as a result of drug use, there was a clear procedure to be followed before a decision could be made to undertake the reasonable cause testing. The procedure was not followed.

[40] During the course of the week leading up to 13 December, Mr O'Connor had worked as usual without incident and was not spoken to by his immediate supervisor, Mr Beck, or any of his colleagues about his work or his ability to do his work. There was no reason for Mr O'Connor to be tested, he was not acting in a manner which allowed for a request to undertake a reasonable cause drug test under Ballance's Policy.

[41] In the Employment Court case of *Hooper v. Coca Cola Amatil (New Zealand) Ltd*², Judge Ford agreed with counsel's submission that:

It is a "reasonable cause" testing scheme. This means that before a test occurs, the defendant must have reasonable cause to test. There must be some nexus between the reasonable cause and the test, as the test is seen as corroborative of the reasonable cause.

[42] Judge Ford went on to say:

The company's managerial prerogative in relation to drug testing ... was subject to ... the collective agreement. The test results cannot be relied on by the employer to retrospectively validate the testing process if that process was fundamentally flawed through the absence of a prior reasonable cause to test.

[43] Reasonable cause testing in Ballance's collective agreement requires evidence to suspect an individual employee is affected by drugs before deciding to test. There must be an incident/accident, behaviour suggesting drugs or alcohol may be impacting on his/her ability to work effectively and safely, or impairment as a result of drugs or alcohol observed by a supervisor.

² [2012] NZEmpC 11

[44] Having received a positive test in breach of its own Policy, Ballance was not able to retrospectively validate the testing process. The result therefore could not be relied on by Ballance in my view.

[45] I conclude that Ballance breached its own policies and procedures in requiring Mr O'Connor to undertake the reasonable cause test without the requisite reasonable cause. The answer to the first issue is "No".

Second Issue

Did the failure by Mr O'Connor of the reasonable cause drug test constitute serious misconduct for which dismissal from employment was justified in the circumstances?

[46] One of the grounds relied on by Ballance to dismiss Mr O'Connor and which is set out in the letter of dismissal of 20 December, was that he had returned a positive drug test which it "*deemed to be unacceptable behaviour of a serious misconduct nature.*"

[47] As I have found, Ballance was not able, in my view, to rely on the positive drug test invalidly obtained in breach of its own Policy. The answer to the second issue is "No".

[48] Even if I am incorrect in making this finding, Ballance's Code of Conduct (the Code) includes a definition of "*serious misconduct*" which makes no reference to the return of a positive drug test alone as constituting serious misconduct. In relation to drug use, serious misconduct is limited to:

- *The possession or consumption of illegal drugs on Company premises or whilst on Company business.*
- *Being under the influence of alcohol or illegal drugs to the extent that the individual is unable to perform his/her duties properly/safely.*
- *Serious breaches of the Company's Motor Vehicle policy and/or driving under the influence of alcohol or drugs.*

[49] However, the Policy in Clause 8.2 does confer a discretion on Ballance to treat a positive drug test as serious misconduct which may result in termination of employment. I do not accept in Mr O'Connor's case such a finding was open to Ballance as a fair and reasonable employer. The Policy recognises that employees may have consumed alcohol or drugs, but not to the extent that their ability to work

effectively and safely is impacted. Neither Mr Beck nor Mr Piper took this into account during their disciplinary investigation of Mr O'Connor.

[50] At the Authority's investigation meeting, Mr Piper referred to a "zero tolerance" policy to drug and alcohol use as justifying the finding of serious misconduct and consequent dismissal. However, nowhere in the Policy is there a reference to "zero tolerance" to drug and alcohol use. However, there are references to education and where necessary rehabilitation and testing for drug and alcohol use. Such references are incompatible with "zero tolerance". It was not open to Ballance to find serious misconduct on this ground.

[51] Counsel for Mr O'Connor referred me to the Employment Court decision in *Hallyar & Anor v The Good Time Food Company Ltd*³. In that decision the Employment Court recognises that the actions of an employee in their own time, is a matter for them. It is only a matter legitimately for the employer, when it impacts on the employer. Judge Ford cites with approval the Full Bench of Fair Work Australia decision in *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*⁴ and at para [68] states:

*Although one needs to approach judgments from other jurisdictions with some degree of caution, given the way in which urine testing for drugs in Australia and New Zealand is conducted under a common standard, the decision no doubt has more relevance than might otherwise be the case. To that extent, the conclusion of the Senior Deputy President, noted in the Full Bench decision, would in my view have equal application in this country and go some way toward explaining in part the rationale behind the requirement for drug policies to be interpreted and applied strictly:*⁵

...The employer has a legitimate right (and indeed obligation) to try and eliminate the risk that employees might come to work impaired by drugs or alcohol such that they could pose a risk to health or safety. Beyond that the employer has no right to dictate what drugs or alcohol its employees take in their own time. Indeed, it would be unjust and unreasonable to do so.

[52] As I have found, there were no grounds for reasonable cause drug testing of Mr O'Connor. The positive result was at a low level and in all the circumstances did not justify Mr O'Connor's dismissal.

³ [2012] NZEmpC 153)

⁴ [2012] FWAFB 4998

⁵ [2012] FWA 1809 at [36]

Third Issue

Were there other reasons justifying Mr O'Connor's dismissal?

[53] The letter of 20 December terminating Mr O'Connor's employment identifies two other grounds for dismissal namely:

- *Failure to comply with any of the Company's fire prevention, site permit requirements and safety rules or procedures.*
- *Failure to comply with the Company Policies and Procedures.*

[54] Ballance did not produce any Fire Prevention Site Permit requirements at the Authority's investigation meeting. Mr Beck was questioned about this ground for dismissal. He did not know if written policies existed and conceded that he had been given this wording by Ballance's HR representative. Similarly, there was no evidence of a failure by Mr O'Connor to comply with Ballance's Policies and Procedures. The answer to the Third Issue is "No".

[55] Upon receipt of the positive drug test, there was no consideration by Mr Beck or Mr Piper of any of the other provisions available under the Policy. Mr Beck and Mr Piper could have considered offering Mr O'Connor education, training, counselling or to participate in rehabilitation. None of these measures were considered, despite being available to Ballance on the first occasion a positive drug test is returned by an employee.

[56] The Authority must apply the test of justification set out in section 103A of the Employment Relations Act 2000 in determining whether a dismissal is justifiable or not. The test is an objective one as to whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[57] There were a number of reasons as to why, in terms of the s.103A test for justification, the dismissal of Mr O'Connor was unjustified. The principal reason is that Ballance acted in breach of its own drug policy, there was no reasonable cause to test Mr O'Connor. I find Mr O'Connor's dismissal was unjustified.

Remedies

[58] Mr O'Connor claims three months gross loss of wages. Mr O'Connor was earning \$986 net per week which in total amounts to \$11,832. Following the deduction of PAYE Mr O'Connor has earned \$974.44 net since his dismissal. Mr O'Connor seeks the sum of \$10,857.56 net.

[59] In terms of s.128 of the Act, once I am satisfied that Mr O'Connor has lost remuneration as a result of a personal grievance, then I am required to order reimbursement at a lesser amount of the lost remuneration or three months ordinary time remuneration.

[60] I order Ballance to pay Mr O'Connor lost remuneration in the sum of \$10,857.56 net.

[61] Mr O'Connor also claims compensation for humiliation, loss of dignity and injury to feelings. I accept that he has made out such a claim.

[62] In the Employment Court decision in *Hallyar* referred to above, the Court observed that Mr Hallyar was aware the employer company had introduced a drugs policy but he continued to carry on as an "habitual smoker" of cannabis. In that case, Judge Ford observed that

An employee who continues his or her heavy recreational use of drugs in the knowledge that the employer has a drugs policy in place can scarcely purport to feign any significant humiliation, loss of dignity or injury to feelings if they are subsequently dismissed for failing a workplace drugs test. The principle is the same even when, as in this case, the dismissal proves to be unjustified.

[63] Mr Hallyer was awarded the sum of \$3,000.

[64] I also take that approach and award Mr O'Connor the sum of \$3,000 pursuant to s.123(1)(c)(i) of the Act.

[65] On the issue of contribution pursuant to s.124 of the Act, I am not satisfied that Mr O'Connor contributed to his situation. Ballance was not entitled to request that Mr O'Connor undertake a drugs test. Mr O'Connor returned a positive result, albeit at a low level. There was no evidence of any risk by Mr O'Connor in respect of his ability to work effectively and safely.

Costs

[66] Mr O'Connor is entitled to costs.

[67] Mr O'Connor has 14 days from the date of this determination to file a memorandum as to his costs and Ballance has 14 days upon receipt in which to reply.

Anna Fitzgibbon
Member of the Employment Relations Authority